Judgment of 4th October 2000, P 8/00

JUDGES' REMUNERATION. THE PROBLEM OF DIRECT APPLICATION OF THE CONSTITUTION BY THE COURTS

Type of proceedings: Question of law referred by a court **Initiators:** Regional Court for Częstochowa Regional Court for Kraków	**Composition of Tribunal:** Plenary session	**Dissenting opinions:** 0

Legal provisions under review	**Basis of review**
Establishment of a uniform basic remuneration rate for judges within the same level of common courts, this rate being a multiplication of the predicted average remuneration within the public sector, and the appropriate multiplier for a given judicial position; the principle of increasing basic remuneration alongside duration of employment or in recompense for fulfilling court administrative functions; authorising the President of the Republic of Poland to indicate the multipliers applicable to particular judicial positions and functions, by means of a regulation issued after seeking the opinion of the National Council of the Judiciary [Organisation of Common Courts Act 1985: Article 71 (in the wording introduced in 1994)]	Principle of separation and balance of powers Guaranteeing judges remuneration consistent with the dignity of their office and scope of their duties [Constitution: Articles 10(1) and 178(2)]
Multipliers for basic remuneration (operative during the period 1997–1999) for the following positions within district courts: trainee judges; assistant judges; and judges [Regulation of the President of the Republic of Poland Concerning Remuneration of Judges of the Common Courts, Assistant Judges and Trainee Judges 1996: § 2]	
Level of the functional supplement (operative during the period 1997–1999) payable in recompense for fulfilling the function of a district court President of Department [*Ibidem*: § 3]	

The currently operative Constitution of the Republic of Poland of 2nd April 1997 contains, for the first time in the history of Polish constitutionalism, a general guarantee concerning judges' remuneration levels: pursuant to Article 178(2), judges' remuneration should be consistent with the "dignity of their office and the scope of their duties".

In the view of many judges of the common courts, especially those of the district courts, their remuneration was too low during the first period in which the new Constitution was operative and, accordingly, failed to conform to the aforementioned constitutional guarantee. This opinion was based, inter alia, on a comparison of their salaries with the higher income earned by those practising the learned legal professions (as advocate, legal advisor or notary), and also with the remuneration levels of those fulfilling functions connected with decision-making within the legislative and executive powers. They argued, for example, that the guarantee expressed in Article 178(2) of the Constitution, read in conjunction with the

constitutional principle of separation and balance of the three powers (Article 10(1)), requires that remuneration of the lowest level of the judiciary be at least equal to the remuneration of those fulfilling the lowest level functions connected with decision-making within the executive power; the reference points for such comparisons were usually taken as the remuneration levels of the Vice-Governor of a Region (Voivodship) and a member of a Local Self-government Appeals Committee (*Samorządowe Kolegium Odwoławcze*; i.e. a second-instance organ adjudicating upon matters falling within the scope of competence of local self-government organs).

According to the provisions reviewed by the Tribunal in the present case (indicated in the table above), the remuneration for judges of the common courts was determined as a multiplication of the "predicted average remuneration within the public sector" (as stipulated by the Budget Act for the given year). The multipliers for particular judicial positions, and for certain court-related administrative functions fulfilled by judges (e.g. the functions of court President or President of Department), were specified in a 1996 Regulation of the President of the Republic of Poland. For example, the multiplier for the basic remuneration of a district court assistant judge amounted to 2, whilst it was 2.7 for the basic remuneration of a district court judge. A supplement was paid in recompense for fulfilling the function of a district court President of Department, determined using a multiplier ranging between 0.35 and 0.5, whereas for fulfilling the function of a district court President the multiplier was between 0.6 and 0.75.

Some district court judges initiated civil proceedings to "equalise" the remuneration they received, in accordance with the provisions indicated in the table above, to a level which, in their opinion, would be appropriate pursuant to Article 178(2) of the Constitution. The courts' jurisprudence in such cases lacked consistency; some courts upheld these claims, adjudicating directly on the basis of the general constitutional guarantee and contrary to the content of statutory provisions and the Regulation, which unambiguously determined judges' remuneration.

In considering such claims of district court judges, involving different periods between the entry into force of the new Constitution and the year 1999, the Częstochowa and Kraków Regional Courts decided to refer a question of law to the Constitutional Tribunal, concerning the conformity of the provisions regulating judges' remuneration (indicated in the table above) with the Constitution. Both questions were examined jointly.

In the reasoning to the judgment, the Tribunal not only provided a comprehensive interpretation of Article 178(2) of the Constitution but also emphatically confirmed its hitherto position on the issue of interpreting the principle that judges of the common and administrative courts are subject "only to the Constitution and statutes" (Article 178(1) of the Constitution), read in conjunction with the principle of direct application of the provisions of the Constitution (Article 8(2)). From this position it follows that, contrary to the opinions sometimes expressed in the courts' jurisprudence, a generally-formulated constitutional provision (such as Article 178(2)) may not constitute the basis for judicial decisions which disregard detailed legal provisions in force; only the Constitutional Tribunal may rule that the latter fail to conform to the Constitution (cf. point 13 below).

RULING

Article 71 of the Organisation of Common Courts Act 1985, in its wording introduced by the Amendment Act 1994, as well as § 2 of the Regulation of the President of the Republic of Poland Concerning the Remuneration of Judges of the Common Courts, Assistant Judges and Trainee Judges 1996, in its part specifying the basic remuneration rates for district court judges and assistant judges, and § 3 of the aforementioned Regulation, in its part specifying the functional supplement rate for the position of a President of Department at a district court – conform to Article 178(2) and are not inconsistent with Article 10(1) of the Constitution.

The Tribunal discontinued proceedings in relation to the remaining challenges, pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act, given that it would be inadmissible to pronounce judgment on these issues.

PRINCIPAL REASONS FOR THE RULING

1. The principal addressees of the legal norm expressed in Article 178(2) of the Constitution are State organs authorised to shape the organisation of judges' remuneration. This norm does not constitute an autonomous basis for judges to bring claims against the State. In particular, an allegation that the aforementioned norm has been infringed could not, pursuant to Article 79 of the Constitution, constitute an autonomous reason for a judge's individual constitutional complaint.

2. Judges of the common and special courts constitute the only professional category whose remuneration is the subject of explicit constitutional regulation. It is from such regulation that the obligation stems for the relevant State organs to take particular care in setting an appropriate level of such remuneration, also in comparison with the remuneration of other public officials.

3. The appropriateness of judges' remuneration, referred to in Article 178(2) of the Constitution, is not merely quantitative in nature, expressed in specific monetary amounts, but also qualitative, expressed in solutions emphasising respect for judicial office, stabilising the exercise of such office and judicial independence.

4. The norm expressed in Article 178(2) of the Constitution lays down a certain necessary standard to be respected by the legislator when shaping the organisation of judges' remuneration. The general and imprecisely defined nature of the criteria contained in this provision indicates the need for them to be clearly defined and, accordingly, concretised within ordinary legislation.

5. In assessing whether or not the legislator exceeded the limits of discretion conferred upon it by the Constitution, whilst regulating judges' remuneration, attention must be paid to certain objective reference points. The first reference point is the average remuneration level within the public sector. Since the profession of a judge is constitutionally distinguished vis-à-vis other professions, it must be assumed that the remuneration level of judges, including those in the district courts, should significantly exceed the average public sector remuneration level. Secondly, judges' remuneration in general, and remuneration for particular categories of judges in courts of an equivalent level (including district court judges and assistant judges), 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.

6. It would be erroneous to assess the adequacy of judges' remuneration by reference to a "basket" of necessary expenditures. There exists no such objective, measurable criterion to assess the material needs of a judge, consistent with the dignity of office they exercise. The "appropriateness" of remuneration levels must be assessed, primarily, with reference to tendencies and proportions in setting public sector remuneration levels and not to the specific needs of those exercising judicial office. General economic growth and an increasing level of societal affluence have a long-term influence on how the "appropriateness" of judges' remuneration should be understood, although this constitutional norm does not require the legislator to establish a strict inter-dependence between these factors.

7. It is arbitrary to compare judges' remuneration with income earned by the operation of market forces. In particular, it is unjustifiable to make such comparisons with the income earned by persons practising the learned legal professions, practice of which is not only related to expectations of financial prosperity but is also burdened with the risk of long-term income losses, or even economic pressure to change profession. Such comparisons also ignore the fact that part of the income earned by persons practising the learned legal professions represents, simultaneously, reimbursement of investments made for the purpose of practising the profession and also the source for financing such investment in the future. Concomitantly, no State guarantees exist to stabilise the material status of those within the learned legal professions, such as the irremovability and right to retirement enjoyed by judges.

8. The principle of separation and balance of powers, as expressed in Article 10(1) of the Constitution, does not signify that they are mutually exclusive and lack inter-dependence. However, there does stem from this principle a prohibition on encroaching into the sphere of each of the powers' exclusive competences. The legislator's shaping of the judicial remuneration system, having its bases in Articles 176(2) and 216(1) of the Constitution, would be irreconcilable with Article 10(1) of the Constitution only where this system established a relationship between remuneration and exercise of the courts' exclusive competences (e.g. conditioning the remuneration level upon the number of convictions handed down or introducing wage supplements proportionate to monetary sums adjudged in favour of the State Treasury).

9. It is also not possible to assess, from the perspective of Article 10(1) of the Constitution, the allegation that an imbalance exists between, on the one hand, remuneration levels for assistant judges and district court judges and, on the other hand, remuneration levels for officials of the legislative and executive powers who, in the applicants' opinion, occupy positions comparable with the given judicial offices. The principle of separation and balance of powers does not determine specific arithmetical proportions between remuneration levels within the particular powers, nor between remuneration levels enjoyed by those occupying comparable positions. It is always controversial to compare positions encountered within the different powers, given the complexity of factors defining a professional position, the frequently very diverse types of work, the character and scope of responsibilities and the irregular degree of stability in exercising such office (in the case of judges – the highest degree), or certain entitlements re-

lated to the function performed. For these reasons, amongst others, it is unfounded to claim that a district court judge should earn no less than the Vice-Governor of a Region (Voivodship). Likewise, it is arbitrary to treat the Vice-Governor of a Region (Voivodship) as the lowest-ranking official of the executive power since it ignores authorising employees of public sector departments to issue decisions, which is a common feature of government administration. It also takes no account of the fulfilment of public administration tasks, including certain instructed (allocated) duties falling within the sphere of government administration, by organs of local self-government administration.

10. The reviewed Article 71 of the Organisation of Common Courts Act 1985, interpreted and applied whilst taking into account the determinants contained in the Budget Act, does not permit the Polish President to act arbitrarily when specifying the multipliers for particular positions and judicial functions.

11. The basic remuneration level earned by the applicants (multiplier 2.0 for an assistant judge, 2.7 for a district court judge), when compared with the average public sector remuneration level, and the level of the functional supplement payable for fulfilling the function of a district court President of Department (multiplier 0.35–0.5), may be viewed as insufficient, from the perspective of the legitimate aspirations of the interested parties. Nevertheless, on the basis of the aforementioned criteria for assessing whether or not the legislator respected the norm expressed in Article 178(2) of the Constitution, the Tribunal has found no grounds to depart from the presumption of constitutionality of these provisions.

12. The conclusion that the provisions reviewed in the present case conform to the Constitution does not signify that the organs authorised to shape public sector remuneration may consider themselves discharged from the constitutional obligation to care for an appropriate level of judges' remuneration. On the contrary, they must take account of the fact that the criteria for assessing such remuneration are subject to modifications reflecting long-term trends and that such assessment will, accordingly, be increasingly demanding the longer the 1997 Constitution remains in force and the more permanent that growth trends in the national economy prove to be.

13. There is no justification within the principle of the direct application of constitutional provisions (Article 8(2)), nor in the provision envisaging that judges shall be subject only to the Constitution and statutes when exercising their office (Article 178(1)), for the view that an adjudicating court is entitled to refuse to apply a statutory norm, on the basis that it contradicts a constitutional norm, and is entitled to base its judgment directly on constitutional provisions. Whilst being subject to the Constitution, a judge is not relieved of his subordination to ordinary statute. The appropriate manner in which to resolve doubts regarding the conformity of a detailed statutory regulation, applicable in a case considered by a court, with a general constitutional norm, is to refer a question of law to the Constitutional Tribunal (Article 193 of the Constitution).

14. According to Article 193 of the Constitution, the admissibility of a question of law regarding the conformity of a specified normative act (or part thereof) with the Constitution is conditional upon joint fulfilment of three prerequisites: the norm indicated by the referring court must be applicable in a concrete case pending before this court; the referring court must be certain, or at least have significant doubts, that this norm fails

to conform to the Constitution and the referred question must convey this to the Constitutional Tribunal by indicating the constitutional basis of review and appropriate reasoning; and the referring court's judicial decision in a given case must depend upon the Tribunal's response to the referred question of law (the content of the Tribunal's judgment), which in practice signifies that the judgment in the case considered by the referring court would vary, depending upon whether or not the Tribunal ruled that the norm conformed to the Constitution (cf. the final part of the ruling, concerning partial discontinuation of proceedings).

15. The modifications introduced by the Constitutional Tribunal Amendment Act 2000 (insertion of a new sentence at the end of Article 39, denoted Article 39(3)) do not affect the view, consolidated within the Tribunal's jurisprudence, that the formal quashing of a normative act does not always automatically result in its loss of binding force, within the meaning of provisions governing the discontinuance of proceedings before the Tribunal (Article 39(1) point 3 of the Constitutional Tribunal Act). A repealed provision retains binding force where it is still applicable to determining the legal consequences of situations taking place in the past, present or future. Accordingly, in the present case, the Tribunal rules on the constitutionality of the provisions having such content as is applicable in the cases pending before the courts referring the question of law.

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

Art. 8. […] 2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

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.

Art. 79. 1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.
2. The provisions of para. 1 above shall not relate to the rights specified in Article 56.

Art. 176. […] 2. The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute.

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.
3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

Art. 193. Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

Art. 216. 1. Financial resources devoted to public purposes shall be collected and disposed of in the manner specified by statute.

CT Act

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:
1) if the pronouncement of a judicial decision is superfluous or inadmissible;
2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

2. If the circumstances referred to in paragraph 1 above shall come to light at the hearing, the Tribunal shall make a decision to discontinue the proceedings.
3. The regulation stated in item 1 point 3 is not applied if issuing a judgment on a normative act which lost its validity before issuing the judgment is necessary for protecting constitutional freedom and rights.