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The right to social security in the Constitution of the Republic of Poland

Prawo do zabezpieczenie społecznego w polskiej Konstytucji

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Summary In the event of the regulation of the right to social security at the constitutional level, one of the most interesting theoretical and practical issues is the question about the possibility of claims on the grounds of the provision of the Constitution that lays down the right to benefits at a determined level. Thus, in the above-cited constitutions, there is either the constitutional right to social security or only reference is made to provisions regulating this right precisely. In the latter case, there is no doubt that the specific contents of the given right are to be developed in the future secondary regulations. On the other hand, in the situation when the right to social security is laid down in a constitution directly, a question is raised about its material (definite) substratum. It usually results in many controversies in literature as well as in judicial decisions. The issue also concerns the right to social security regulated by the Polish Constitution of 1997. The aim of the article is to present the controversies over the above-mentioned issue in the Polish constitutional system.*

Keywords: the right to social security, polish constitution.

Streszczenie W przypadku jurydyzacji prawa do zabezpieczenia społecznego na poziomie konstytucyjnym jednym z bardziej interesujących zagadnień zarówno teoretycznych, jak i praktycznych jest pytanie o możliwość domagania się na podstawie przepisu konstytucji wyrażającego przedmiotowe prawo świadczenia w określonej wysokości. Stąd też w powoływanych w artykule porządkach konstytucyjnych mamy do czynienia albo z konstytucyjnym prawem podmiotowym, albo wyłącznie z odesłaniem do przepisów konkretyzujących to prawo. W tym drugim przypadku nie ulega wątpliwości, że konkretna treść danego prawa ma być dopiero ustalona w aktach prawnych niższego rzędu. Natomiast w sytuacji, gdy prawo do zabezpieczenia społecznego wyrażone jest w konstytucji wprost, pojawia się pytanie o jego materialny (konkretny) substrat. Jest to zazwyczaj źródłem wielu kontrowersji, zarówno w piśmiennictwie jak i orzecznictwie. Problem ten dotyczy również prawa do zabezpieczenia społecznego uregulowanego w polskiej Konstytucji z 1997 r. Celem artykułu jest przedstawienie kontrowersji związanych z powyższym zagadnieniem w polskim porządku konstytucyjnym.

Słowa kluczowe: prawo do zabezpieczenia społecznego, polska Konstytucja.

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Introduction

In the pre-industrial community, the issue of social security for the community was not really known. The basic form of support for the poor was social welfare (which remained dominant until the end of the 19th century). The legislation in that area usually obliged boroughs to ensure elementary care for every resident without means of livelihood. The Scottish social welfare system (Old Scottish Poor Law passed in 1574) and the English one (The Poor Relief Act passed in 1601) are good examples. At the time, the fact that there was a legal regulation aimed at helping the poor was perceived as an essential element of public order policy. At the same time, social welfare was very limited in character and it was used as a last resort. The Industrial Revolution also exerted a substantial influence on the creation of other forms of support (apart from social welfare). The first forms of social security resulted from workers' initiatives to develop friendly societies providing mutual financial help. In fact, these were forms of voluntary insurance organisations of little importance. It was due to the fact that their members were equally prone to particular risks. Apart from that, in the periods of economic crises, the number of members contributing to the fund decreased and the number of those in need increased dramatically. Thus, both social welfare and mutual credit associations were not able to provide workers with adequate protection. Workers' attempts to protect themselves against the above-mentioned risks were not successful

either because of faint possibilities of gathering savings from low pay and a long-term unemployment risk.

Development of political and social thought with respect to social security

The changes in the social structure and work organisation had a major impact on the development of political and social thought. On the other hand, rather tense relations between workers and employers as well as the political dispute typical of that conflict had a significant influence on bringing new legislation on social security. The first regulations on the broadly understood protection of labour were passed in England, where a professional Factory Inspectorate was established. The regulations aimed to protect workers against abuse by employers. At the same time in other countries, there was an idea of a state social policy defined as a state's actions aimed at reducing the hurdles of workers' everyday life and weakening the class struggle by introducing various reforms. The first complex legal regulations aimed at protecting workers against the consequences of an illness, injury, breadwinner's death and old age were passed in the late 19th century in Germany ruled by Otto von Bismarck. These were: Sickness Insurance Law (1883), Old Age and Disability Insurance Law (1889) and Accident Insurance Law (1885). It was a typical model originating from business insurance. Its major characteristic features are: obligatory contribution dependent on the remuneration, benefits dependent on the amount of the lost income resulting from the risk covered by the insurance and a separate (other than budgetary) system of funding benefits. On the other hand, in the English speaking countries, the workers' protection system was based on the idea of social welfare and further developed as a form of social security implementation (Denmark and Scandinavian countries introduced this kind of system, too). Benefits were offered at a minimum level, equal for everyone, and the costs were covered from public finance resources.

Since then, the first forms of social security have undergone numerous changes in many countries. The elements characteristic of both models of social security can also be found today in the legal systems of many European Union member states.

The right to social security in the European culture

In the European Union culture, the right to social security is a human right recognised for years. From the historic point of view, 'social security' appeared in the legal language for the first time in the decree of the Council of People's Commissars of 31 October 1919. The second normative act was passed in the United States (*The social security act*). It resulted from the economic crisis of the 1920s and the recognition of the need to solve social problems. A really stable implementation of the idea of social security took place only after World War II. It was reflected in a series of legal regulations. The first document that must be **mentioned** is the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1949. Article 22 stipulates that everyone, as a member of society, has the right to social security. The term was then repeated in other acts of international law, e.g. Convention 102 1nd 130 of the International Labour Organisation, the European Social Charter of 1961, the European Convention on Social Security of 1972 or the European Code of Social Security revised and adopted in 1990. As far as the expression of the right to social security in the European and international legal acts is concerned, the dominating attitude is the one that lists the social risk under protection. They are, inter alia, a disease, maternity, disability, an accident at workplace or an occupational disease, old age, unemployment or the loss of a breadwinner. Thus, there are risks strictly connected with labour, or in fact no possibility of working, or in more general terms — the loss of income.

The right to social security is also mentioned in the constitutional systems of many European countries. The present examples are the Constitutions of: (1) Bulgaria (Article 51 (1) and (2): "(1) The citizens have the right to social security and social assistance. (2) Individuals who are temporarily unemployed receive social security assistance under the conditions and procedures regulated by law."), (2) Estonia (§ 28 sentence 2: "An Estonian citizen has the right to state assistance in the case of old age, inability to work, loss of a provider, or need. The categories and extent of assistance, and the conditions and procedure for the receipt of assistance shall be provided by law."), (3) Luxemburg (Article 11 (5): "The law regulates as to their principles: social security (...)"), (4) Portugal (Article 63: 1. Everyone shall have the right to social security. 2. The state shall be charged with organising, coordinating and subsidising a unified and decentralised social security system, with the participation of trade unions, other organisations that represent workers and associations that represent any other beneficiaries. 3. The social security system shall protect citizens in illness and old age and when they are disabled, widowed or orphaned, as well as when they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or ability to work. (...)"), (5) Romania (Article 47 (2): "Citizens have the right to pensions, paid maternity leave, medical care in public health centres, unemployment benefits, and other forms of public or private social securities, as stipulated by the law."), (6) Slovenia (Article 50 sentence 1: "Citizens have the right to social security, including the right to pension, under conditions provided by law."), (7) Italy (Article 38: "Every citizen unable to work and without the necessary means of subsistence is entitled to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the case of accidents, illness, disability, old age and involuntary unemployment."), (8) Finland (§ 19: "those who cannot obtain the means necessary for a life of

dignity have the right to receive indispensable subsistence and care. Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider."), (9) Lithuania (Article 52: "The state shall guarantee the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law.").

The analysis of the particular regulations indicates that in general there are two ways of formulating the right to social security. In the first case we deal with constitutional rights, in the other case we deal with reference to other (detailed) acts in which the right to social security will be regulated. The Constitution of Germany is a very interesting example, which lacks the right to social security. However, it is derived from the clause on the social state of law ("sozialer Rechtstaat" — Article 20 of the Basic Law of Germany). On the other hand, social rights were included in the German social codes.

The right to social security in the Polish constitutional system

In case of the Polish constitutional system, there was no clear reference to the concept of 'social security' until 1997. It resulted from historical conditions connected with the more common use of a term 'social insurance' in legal acts. In the Constitution of 1927, Article 102 (2) stipulated that every citizen has the right to the state's protection of work, and in case of unemployment, illness, accident and disability — to social insurance that will be laid down in a separate act. The issue was regulated in a broader and more dynamic way in Article 60 of the Constitution of 1952 (Garlicki, 2007, p. 3). Item 1 expressed the citizens' right to health protection and assistance in case of illness or disability. Item 2 stipulated that the broader and broader implementation of the right is provided by (1) the development of social insurance of blue collar and white collar workers in the event of illness, old age and disability as well as the development of various forms of social support, and (2) the development of the state-owned health service system, the improvement of sanitary facilities and the state of health in towns and villages, constant improvement of the health and safety conditions, a widespread campaign for disease prevention and combating, broader provision of free medical assistance, the development of hospitals, spas, clinics, village health centres and care for the disabled. Article 77 of the Small Constitution of 1992 kept in force Article 60 of the Constitution of 1952. The Constitution of 1997 laid down *expresis verbis* every citizen's right to social security in Article 67. According to item 1, "A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute". Item 2 states that "A citizen who is involuntarily without work and has no other means of support, shall have the right to social security, the scope of which shall be specified by statute".

In accordance with Article 67 of the Constitution, the scope of protection covers the indicated social risks: incapacitation for work by reason of sickness or prolonged ill health, old age as well as being involuntarily out of work and having no means of support. This enumeration means that Article 67 of the Constitution is not applicable to situations that are not laid down[1] . This scope is definitely narrower than that resulting from social security stipulated in international or European legal acts. This especially concerns Convention 10[2] of the ILO defining the minimum standard of social security or the European Social Charter. As both acts have been ratified by Poland and in the light of constitutional sources of law (Article 81 of the Constitution) are binding in the Polish legal system, there is no doubt that a domestic employer is obliged to follow the scope of the right to social security that results from those regulations. Thus, although the right to social security has been laid down in the Constitution of the Republic of Poland in a narrow scope, Poland is obliged to implement a wider scope, which actually takes place.

The constitutional right to social security guarantees that every citizen shall get a social benefit in the event of incapacitation for work by reason of sickness, disability, old age, involuntary unemployment and having no means of support (Garlicki, 2007 p 4 2). On the other hand, the implementation of the obligation imposed on the state consists in developing the system and determining its rules as well as guaranteeing its operation. However, depending on the funding system, the role of the state will differ. It is more important in the repartition system ('pay as you go programme'), less important in the capital system, in which it must only appoint supervisory institutions[3] . It is especially important as repartition systems operate within social insurance systems, in which the pension (as well as the contribution) depends mainly on the formerly obtained remuneration (it also depends on the length of employment). On the other hand, in the capital system, usually operating within the so-called pillar model, pensions financed from the system supplement the basic system run by the state. Thus, pensions depend on the rate of return from investment of the total contribution to the scheme.

In case of the over-regulation of the right to social security at the constitutional level, one of the most interesting theoretical and practical issues is the question about the possibility of claims in accordance with the constitutional provision expressing the right to pension of a specified amount. Thus, in the above-mentioned constitutional systems, we either deal with the constitutional rights or only the reference to other legal regulations defining the rights. In the latter case, there is no doubt that the detailed contents of the given right are to be determined in secondary regulations. On the other hand, in case the right to social security is directly laid down in the constitution, a question about its material (substantial) substratum is raised. It is usually the source

of many controversies in literature as well as court decisions, also in Poland. The issue has been discussed in the doctrine of constitutional (Wojtyczek, 1999, pp. 53–58), administrative (Jakimowicz, 2002, pp. 256–259) and social law (Kolasiński, 1999, p. 10; Pacud, 2002, pp. 138–140; 2006, pp. 259–264; Zieleniecki, 2005, pp. 580–581). In the jurisprudence of constitutional law, it is actually agreed that social rights, including the right to social security, should be classified as the so-called entitlements resulting in the possibility of claiming specified behaviour from the obliged party, i.e. its action (provision of benefits) for the claimant's benefit. According to K. Wojtyczek (1999, pp. 31–32), the possibility of implementing social rights depends on the establishment of specific legal norms, which causes that an individual cannot make use of the right without an adequate legal regulation. In his opinion, the legislator has the basic task of: "(1) developing the system of state institutions appointed to enforce particular regulations and creating mechanisms to raise finance, indicating particular institutions appointed to provide certain benefits and providing them with adequate financial resources to do that, (2) determining the circle of the entitled persons, (3) defining grounds for obtaining given entitlements, (4) determining the contents of the benefit and creating legal measures in the event of law violation" (Wojtyczek, 1999, pp. 31–32). B. Zawadzka (1996, p. 7) expressed a similar opinion, stating that social rights differ from other types of citizens' rights because the provisions regulating their application in detail clearly determine the scope of their application. Thus, the state determines in them the limits to its obligations towards the citizens. Therefore, social rights are in her opinion a special type of rights because they do not protect a citizen against the state but require that the state act in a positive way. According to her, social rights are social entitlements that do not give legal grounds for individual claims (Gronowska, 2000, p. 99). They can only be enforced with the use of detailed legislation. The fact that they lay down active participation of the state or third parties does not make the constitutional regulations insufficient. In the light of that, it can be stated that the constitutional rights determine an individual's legal status only *prima facie* and on the grounds of the constitution they can be determined as only the rights of that kind. In case of some constitutional rights, this means that definite determination of this status depends mainly on the legislator (Tuleja, 2003, p. 167). The thesis might be also applied in case of the right to social security, whose introduction to the constitution results from the adoption of the conception of a broad role of the state. That is why, according to L. Garlicki, the discussed norm expresses the state's constitutional obligation to provide pensions, which is not correlated with any entitlements of an individual that might be subject to individual claims against the state (Garlicki, 2014, pp. 110–111).

In the literature on administrative law, W. Jakimowicz (2002, p. 256) paid special attention to the issue of legal characteristics of social rights. He classified the right to social security as public rights with positive contents. They consist in the possibility of demanding that an adequate institution act in a specified and active manner, and they provide an individual with the right to demand that the state ensure the conditions for making use of the benefits to which an individual is entitled. In this author's opinion, social rights can be directly executed in accordance with the Constitution (or the Constitution and a statute), and they include, inter alia, the right to social security, or they can be claimed exclusively within the scope of statutes (Jakimowicz, 2002, pp. 257–258). According to him, this "dual way of regulating a citizen's freedoms and social rights results from a compromise between the standpoint that the Constitution must guarantee a certain minimum, but this minimum must be fully obtainable with the use of claims determined in the constitution, and a call for a broad and caring role of the state" (Jakimowicz, 2002, p. 259).

On the other hand, in the literature on the social security law, the dominant standpoint is that the contents of the law is determined by the legislator, however, Article 67 (1) of the Constitution does not stipulate that the legislator has absolute freedom to create institutions and mechanisms to guarantee the rights. The legislator's freedom to select legal solutions is limited by the essence of a given law as well as the constitutional axiology connected with respecting the principle of social justice and equality (Antonów, 2003, p. 47). In the literature on social law, there was an attempt to determine the normative contents of Article 67 (1) of the Constitution, looking for the meaning of the concept of 'social security', which as a legal language term has not been introduced to general legislation. It was stated that the constitutional right to social security is determined by the functions it is to play (Ślebzak, 2003, p. 204 and the following). Reference to the function of social security while determining the normative contents of the right to social security also has grounds in the role that the Constitution has to play. Such interpretation of the right to social security goes far beyond the proposed framework established by the European social standards. In this context, the constitutional formulation of the right to social security may raise doubts because, in the discussed provision, the scope of social security was determined in a narrower way than that traditionally adopted in international law and doctrine, and the institution of social support was left outside its scope (Compare Article 67 (2) of the Constitution of the Republic of Poland). This is why, in M. Zieleniecki's (2005, p. 566) opinion, the contents of Article 67 (1) of the Constitution cannot constitute grounds for the definition of social security.

It only formulated a citizen's right to social security and its implementation was left to the ordinary legislator.

Similar standpoints can be found in the judgements of the Constitutional Tribunal. First of all, it is stated that the right to social security expressed in Article 67 of the Constitution is the entitlement and is fully enforceable[4] . However, it does not result in any material entitlements; thus, neither the constitutional right to any specific form of social

security[5] nor the right to a specified method of awarding or valorising it[6] can be derived. Only statutes regulating these issues thoroughly can constitute grounds for claims[7] .

On the other hand, however, the Tribunal states in the established decisions that Article 67 of the Constitution stipulates grounds for differentiating, firstly, the minimum legal scope of the right to social security, adequate to the constitutional essence of the right, and, secondly, the rights guaranteed by statute and going far beyond the constitutional essence of the discussed right[8]. With regard to the former sphere, the recognition of a breach of Article 67 of the Constitution can take place in case the legislator failed to provide the persons specified in Article 67 (1) and (2) of the Constitution with such benefits that will ensure the minimum means to live. However, the event when the legislator has the freedom to lay down the scope of entitlements resulting from the right to social security and may — as a rule — annul the entitlements going beyond the essence of that right must be assessed differently. In such a case, the assessment of constitutionality of the binding law may concern the issue whether the legislator acted with respect to other constitutional principles and norms, especially those that determine the rules of amending the law. However, a violation of the right to social security cannot be pronounced in case of the area that the legislator does not have to regulate following Article 67 of the Constitution. This is due to the fact that the provision does not regulate the scope or the form of benefits that goes beyond the essence of the right to social security[9] . At the same time, it is stated that the statute must ensure the benefits providing the minimum means to live so that basic needs can be met[10] . Thus, the statutory execution of the constitutional social right can never be below the minimum determined by the essence of the given law[11] . Thus, the aspect that refers to the minimum scope of social security and tries to determine it dominates this line of adjudication. Although it is not stated anywhere that the regulation may constitute grounds for an unambiguously determined entitlement, reference to the minimum means to live seems sufficiently definite and calculable.

However, as far as the right to social security above the specified minimum is concerned, the judicial decisions provide that the legislator is in charge of laying down the rights adequate to the political, social and economic objectives and developing such legal solutions that will best serve to meet them. That is why the adjudication on the aptness and purposefulness of the solutions remains beyond the cognition of the Tribunal[12] . Although the duty imposed on the legislator to implement the social guarantees laid down in the Constitution by developing adequate regulations does not constitute the obligation to develop the maximum benefit system, the protection of social rights should manifest itself in such development of legal solutions that would constitute the optimum implementation of the constitutional right[13] . It must be done, however, in the way that "on the one hand, takes into account the existing needs and, on the other hand, possibilities of meeting them"[14] .

Conclusion

In the light of the above-presented discussion, it can be stated that although there are many opinions on the right to social security, its contents may be described as relatively unambiguous. On the one hand (the bottom level), we deal with the duty to guarantee the minimum right (the essence of the right); on the other hand, however, it (the top level) is about the execution of the right to social security in the optimum way. It seems that it would be possible to determine the minimum (definite) contents of social security and let an individual formulate claims in case the legislator fails to develop statutory regulations (Ślebzak, 2009, pp. 262–304), which in fact makes reference to the adjudication of the Constitutional Tribunal, which assumes absolute obligation to safeguard the minimum (essence) right to social security. Such narrow contents of the social right would guarantee respect for human dignity, which shall be inviolable (Article 30 of the Constitution of the Republic of Poland), and would make it possible to execute the right. It would also determine the minimum standard of the protection of an individual at the constitutional level.

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[1] Judgement of the Constitutional Tribunal of 11 July 2013, SK 16/12, OTK-A 2013/6/75.

[2] Judgement of the Constitutional Tribunal of 31 July 2014, SK 28/13, OTK-A 2014/7/81.

[3] Judgement of the Constitutional Tribunal of 7 May 2014, K 43/12, OTK-A 2014/5/50.

[4] Sentence of the Constitutional Tribunal of: 8 May 2000, SK 22/99, OTK ZU 2000/4/107; 7 September 2004, SK 30/03, OTK ZU 2008/8/A/82; 31 July 2014, SK 28/13, OTK-A 2014/7/81.

[5] Sentence of the Constitutional Tribunal of: 6 February 2002, SK 11/01, OTK ZU 2002/1A/2; 17 June 2014, P 6/12, OTK-A 2014/6/62; 13 May 2014, SK 61/13, OTK-A 2014/5/52; 17 December 2013, SK 29/12, OTK-A 2013/9/138; 25 June 2013, P 11/12, OTK-A 2013/5/62; 24 February 2010, K 6/09, OTK-A 2010/2/15; 27 January 2003, SK 27/02, OTK ZU 2003/1/A; 7 September 2004, SK 30/03, OTK ZU 2004/8/A; 19 July 2005, SK 20/03, OTK ZU 2005/7/A; 20 November 2006, SK 66/06, OTK ZU 2006/10/A; 1 April 2008, SK 96/06, OTK-A 2008/3/40.

[6] Sentence of the Constitutional Tribunal of 17 December 2013, SK 29/12, OTK-A 2013/9/138.

[7] Sentence of the Constitutional Tribunal of: 17 December 2013, SK 29/12, OTK-A 2013/9/138; 29 May 2012, SK 17/09, OTK ZU 2012/5/A/53; 13 May 2014, SK 61/13, OTK-A 2014/5/52.

[8] Sentence of the Constitutional Tribunal of :25 February 2014, SK 18/13, OTK-A 2014/2/15; 26 June 2013, P 11/12, OTK-A 2013/5/62; 28 February 2012, K 5/11, OTK-A 2012/2/16; 8 June 2010, SK 37/09, OTK-A 2010/5/48.

[9] Sentence of the Constitutional Tribunal of: 25 February 2014, SK 18/13, OTK-A 2014/2/15.

[10] Sentence of the Constitutional Tribunal of: 7 February 2006, SK 45/04, OTK ZU 2006/2/A/15; 11 July 2013, SK 16/12, OTK-A 2013/6/75.

[11] Sentence of the Constitutional Tribunal of: 8 May 2000, SK 22/99, OTK ZU 2000/4; 27 January 2010, SK 41/07, OTK-A 2010/1/5.

[12] Sentence of the Constitutional Tribunal of: 24 April 2006, P 9/05, OTK-A 2006/46; 11 July 2013, SK 16/12, OTK-A 2013/6/75; 22 June1999, K 5/99, OTK ZU 1999/100/538; 12 September 2000, K 1/00, OTK ZU 2000/185/976.

[13] Sentence of the Constitutional Tribunal of: 24 February 2010, K 6/09, OTK-A 2010/2/15; 27 January 2010, SK 41/07, OTK-A 2010/1/5; 13 December 2007, SK 37/06, OTK-A 2007/11/157; 20 November 2006, SK 66/06, OTK ZU 2006/10/A.

[14] Sentences of the Constitutional Tribunal of: 8 May 2000, SK 22/99, OTK ZU 2000/4; 3 July 2006, SK 56/05, OTK ZU 2006/7/A; 27 January 2010, SK 41/07, OTK-A 2010/1/5.

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