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ON THE UNCONSTITUTIONALITY OF THE REMUNERATION POLICY

FOR ATTORNEYS-AT-LAW WHO PROVIDE EX-OFFICIO LEGAL AID

ABSTRACT

The paper discloses the reasons why the principles of remunerating attorneys-at-law who provide legal aid ex officio do not meet constitutional standards as well as indicates the resulting legal consequences. The author concludes that differentiating the remuneration of attorneys-at-law appointed by a party to the proceedings and attorneys-at-law appointed by the court for the same activities undertaken as part of the legal aid provided is unconstitutional, especially in the light of the conclusions resulting from the analysis of the judgement of the Constitutional Tribunal of 23 April 2020, file ref. SK 66/19. The paper also interprets the possible ways of removing the aforementioned unconstitutionality in the process of judicial application of the law, which may be significant before the compliance with the Constitution of the principles for remuneration of attorneys-at-law providing ex officio legal aid will be ensured by the legislator.

Keywords: fee, unconstitutionality, attorney-at-law, ex officio assistance, litigation

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1. Introduction

Ex officio legal aid is an institution directly provided for in Art. 42 sec. 2 of the Constitution of the Republic of Poland, which guarantees everyone against whom criminal proceedings are conducted the right to defence at all stages of these proceedings, including the right to use a court-assigned defence attorney on the terms indicated in a statute.[2] Such a narrow regulation of legal aid ex officio does not mean that the broader application of this institution is not justified by constitutional norms, rules, and values. As the Constitutional Tribunal defines in its jurisprudence, "the issue of legal aid provided for the poor has a constitutional rank, and a rank resulting from international standards of human rights protection that are binding in Poland. And this does not only apply to criminal disputes but to all cases examined by the courts".[3] This type of legal aid is important from the perspective of everyone's right to a fair hearing by a court (Art. 45 sec. 1 of the Constitution) as well as to prevent the closure of the judicial process of redressing violated freedoms or rights (Art. 77 sec. 2 of the Constitution).[4] Providing each citizen with ex officio legal aid should also be perceived as an element of the state's obligation to guarantee their security (Art. 5 of the Constitution), and more specifically – a sense of legal security in a situation where they do not know the law and are unable to cover the costs of legal assistance from a professional attorney.[5] This thesis is supported by the settled case-law of the Constitutional Tribunal, by which it appears that "Providing legal aid to persons who, due to their financial situation, cannot afford to bear the costs of this assistance, is the responsibility of the public authority. This is one of the guarantees of providing the constitutional right to a fair trial".[6] Legal assistance granted ex officio may also be treated as a form of counteracting social exclusion by law of persons who do not have access to expert knowledge in the area of law, and thus as a form of practical implementation of the prohibition of discrimination (Art. 32 sec. 2 of the Constitution)[7] and the principle of social justice (Art. 2 of the Constitution). As stressed by the Constitutional Tribunal, "The institution of legal aid provided ex officio, as well as exemptions from paying court fees, are *de facto* to mitigate the effects of economic inequality of entities, guaranteeing them equal access to court".[8] In turn, from the perspective of professional

2 For more on this subject, see M. Zubik, *Konstytucyjne aspekty prawa wyboru obrony i obrońcy w sprawach karnych w perspektywie orzecznictwa Trybunału Konstytucyjnego* [*Constitutional aspects of the right to choose a defence and a criminal defence attorney from the perspective of the jurisprudence of the Constitutional Tribunal*], "Europejski Przegląd Sądowy" 2019, No. 1, p. 11 ff.; P. Wiliński, *Konstytucyjne granice prawa do obrony w procesie karnym* [*The constitutional limits of the right to defence in a criminal trial*], "Palestra" ["The Bar"] 2007, No. 5–6, p. 40 ff.

3 The judgment of the Constitutional Tribunal of 29 August 2006, SK 23/05.

4 See: the judgement of the Constitutional Tribunal of 16 June 2008, P 37/07.

5 Legal security, understood as a sense of legal stability, is also closely related to the principle of legal certainty derived from Art. 2 of the Constitution. See: *Argumenty i rozumowania prawnicze w konstytucyjnym państwie prawa. Komentarz* [*Arguments and legal reasoning in the constitutional state of law. A commentary*], ed. M. Florczak-Wątor, A. Grabowski, Kraków 2021, p. 250.

6 Constitutional Tribunal decision of 18 November 2014, SK 263/13.

7 See: the Constitutional Tribunal judgement of 29 August 2006, SK 23/05.

8 Constitutional Tribunal judgement of 16 June 2008, P 37/07.

attorneys, including attorneys-at-law, the issue of legal aid granted ex officio may be analysed in terms of the freedom to pursue their occupation (Art. 65 sec. 1 of the Constitution), including the admissibility of restricting this freedom (Art. 31 sec. 3 of the Constitution), and bearing in mind the specificity of the profession of an attorney-at-law as a profession of public confidence (Art. 17 sec. 1 of the Constitution).

The article aims to analyse only one aspect of the ex officio legal aid institution, namely the issue of remuneration of attorneys-at-law providing such assistance. This issue has been widely commented on for years both in the literature on the subject and in the public discourse. The framework of this study does not allow for a comprehensive approach to the entire range of problems related to low remuneration rates for representatives who are provided ex officio, regulating them by a regulation in a manner that goes beyond the framework of delegation of legislative powers, or shifting the burden of financing legal aid for poor people onto legal corporations. Only one research problem was selected for a more thorough analysis, namely that concerning the permissibility of differentiating the rules for determining the remuneration of attorneys-at-law. Thus, in the first part of the article, an attempt is made to reveal that it is a breach of the constitutional principle of equality to establish rates for attorneys-at-law provided ex officio at a lower level than the corresponding rates for attorneys of choice. In the second part of the paper, attention will be drawn to the possibility of the courts omitting the constitutionally questionable provisions of the regulation on rates for court-assigned attorneys and the legitimacy of determining their remuneration based on an analogous regulation on rates for attorneys of choice.

2. Legal regulation of the rules for determining the rates of attorneys-at-law

As a rule, the State Treasury covers the costs of legal aid provided by a court-appointed attorney-at-law.[9] Detailed rules for incurring these costs are specified in the regulation by the Minister of Justice, after consulting the National Council of Attorneys-at-law, taking into consideration the method of determining these costs, the expenses constituting the basis for their determination, and the maximum amount of fees for the legal aid provided. It follows from the regulation currently in force, namely the regulation of 2016 on the remuneration of court-appointed attorneys-at-law,[10] that the costs of unpaid legal aid incurred by the State Treasury include the fee determined in accordance with the provisions of this regulation as well as the necessary and documented expenses of an attorney-at-law appointed ex officio. At the same time, § 4 sec. 1 of the aforementioned regulation limits the amount of these expenses, indicating that the fee is set in the amount specified in further provisions of the regulation and within the limits set by

9 Art. 22^3 sec. 1 of the Act of 6 July 1982 on attorneys-at-law (Journal of Laws of 2022, item 1166, as amended).

10 Regulation of the Minister of Justice of 3 October 2016 on the State Treasury covering the costs of unpaid legal aid provided by a court-appointed attorney-at-law (Journal of Laws of 2019, item 68, as amended); hereinafter: the regulation of 2016 on the remuneration of court-appointed attorneys-at-law.

the value of the subject matter of the case. Nevertheless, the possibility of determining the fee in the amount increased to 150% of fees is provided for in § 4 sec. 2 of the regulation, leaving this issue to the court to decide, and additionally making the possibility of awarding such an increased fee dependent on the appearance of particularly justified reasons on the part of an attorney-at-law (in the form of extraordinary workload or contribution to the clarification of the case), or the specific nature of the case (in the form of a higher value of its subject matter of the dispute, or a greater degree of its complexity).

On the other hand, the rates of remuneration of an attorney of choice are governed by the regulation of the Minister of Justice issued pursuant to Art. 22^5 sec. 3 of the Act on Attorneys-at-Law,[11] which specifies the minimum rates and the amount of fees for the activities of attorneys-at-law before judicial authorities. A comparison of the rates and fees from this regulation with the fees from the regulation governing the remuneration of attorneys-at-law assigned by the court leads to the conclusion that in the regulation on the remuneration of attorneys-at-law of choice some of the rates are higher. This applies to both rates and fees depending on the value of the subject matter of the dispute as well as rates and fees established for particular activities. For instance, the fee for an attorney-at-law conducting a case for divorce or annulment of marriage ex officio is PLN 360, and the minimum rate in this case for an attorney of choice is twice as high. This leads to the conclusion that already at the stage of determining the amount of remuneration for the same activities, the legislator introduced a differentiation depending on whether the attorney-at-law was appointed ex officio by a court or was chosen by a party to the proceedings. The second conclusion, on the other hand, is that the ex officio fees for attorneys-at-law granted under the 2016 regulation were set below the minimum rates guaranteed to an attorney-at-law of choice in the 2015 regulation.

An additional regulation influencing the differentiation of remuneration of court-appointed attorneys-at-law and attorneys of choice are the provisions providing for the possibility of awarding remuneration in a higher amount than the standard. The aforementioned 2015 regulation provided for a maximum ceiling for such increased remuneration in the form of 150% of the fees set in the provisions of this regulation. On the other hand, in the case of attorneys-at-law of choice, this issue is not determined by the regulation but by a statute, namely by Art. 22^5 sec. 2 of the Act on Attorneys-at-Law, from which it follows that the court may increase the fee due to an attorney-at-law of choice up to six times the minimum rate specified in the regulation of 2015 if it is justified by the type and complexity of the case and the necessary workload of an attorney-at-law.

This type of differentiation in remuneration for legal aid provided by court-appointed attorneys-at-law and attorneys of choice, while setting the rates for the former below the minimum rates – for the latter raises serious constitutional doubts from the point of view of different constitutional standards. Undoubtedly, there is a problem regarding the principle of equality (Art. 32 of the Constitution), as the differentiation concerns entities having the same essential feature, i.e., attorneys-at-law providing legal assistance

11 Regulation of the Minister of Justice of 22 October 2015 on fees for the activities of attorneys-at-law (Journal of Laws of 2018, item 265, as amended); hereinafter: the regulation of 2015 on the remuneration of attorneys-at-law of choice.

and performing the same activities. In addition, these solutions raise doubts due to the far-reaching restrictions on the constitutional rights of attorneys appointed by the court, including restrictions on the right to property (Art. 64 of the Constitution), freedom to practice a profession (Art. 65 sec. 1 of the Constitution), and the right to access public service on the same terms (Art. 60 of the Constitution). My further remarks, as can be seen from the title of the paper and for the reasons explained in the introduction, will, however, concern only the assessment of the compliance of the analysed legal regulation with the constitutional principle of equality.

3. Right to equal treatment

The principle of equality is anchored in many constitutional provisions which directly or indirectly refer to the idea of equal treatment of similar entities.[12] The provision which defines the content of this principle in the most comprehensive way is Art. 32 of the Constitution, which not only stipulates the principle of equality but also contains a supplementary prohibition of discrimination.[13] For the purposes of this analysis, it is also worth mentioning Art. 60 of the Constitution, which guarantees Polish citizens who enjoy full public rights the right of access to the public service "on equal terms". The requirement to treat similar entities equally applies also during states of exception. Art. 233 sec. 2 of the Constitution specifies that during a state of exception, it is unacceptable to limit human and civil freedoms and rights solely on the basis of race, gender, language, religion (or its lack), social origin, birth, and owned property. Thus, this regulation lists the prohibited discriminatory criteria – while the above-mentioned Article 32 of the Constitution does not indicate them, prohibiting instead discrimination "for any reason".

The last provision requires equal treatment of each person by public authorities.[14] As clarified by the Constitutional Tribunal in the judgement of 9 March 1988, file ref. U 7/87, the principle of equality reads as follows: "all subjects of law (addressees of legal norms), characterized by a given significant (relevant) feature, are to be treated equally. Thus, they should be treated according to the same measure, without both discriminating and favouring distinctions". Therefore, this principle implies the requirement to treat similar entities in the same way,[15] and the criterion determining this similarity

12 See more on the development of this idea: J. Zajadło, *Idea równości we współczesnej filozofii prawa i filozofii polityki* [*The idea of equality in contemporary philosophy of law and philosophy of politics*], "Przegląd Sejmowy" ["The Sejm Review"] 2011, No. 6, pp. 11–29; *Arguments and reasoning…*, pp. 1042–1044.

13 The prohibition of discrimination is the prohibition of different and constitutionally unjustified treatment of similar entities. See, e.g., the judgements of the Constitutional Tribunal: of 23 March 2006, K 4/06; 15 July 2010, K 63/07; of 5 July 2011, P 14/10.

14 See: *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [*The Constitution of the Republic of Poland. A Commentary*], ed. P. Tuleja, Warsaw 2019, pp. 120–121; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* [*Polish constitutional law. Outline of the lecture*], Warsaw 2021, pp. 112–113.

15 More disputable is whether the principle of equality also prohibits the equal treatment of different entities that do not have the same significant (relevant) feature from the point of view of a given legal regulation.

is whether the compared entities have a significant (relevant) feature from the point of view of a given legal regulation. In the case of attorneys-at-law, such a significant feature from the point of view of the legal regulation determining the amount of their remuneration is the performance of the same legal aid activities for which the remuneration is granted. Nevertheless, the method of appointing an attorney-at-law is not a significant (relevant) feature from the point of view of the legal regulation determining the amount of remuneration due to attorneys, especially as it does not affect the scope of activities that they can perform under their authority or the manner of performing those activities. This means that attorneys who perform the same activities as part of the legal assistance provided, regardless of whether they are appointed ex officio or chosen by a party to the proceedings, should be entitled to the same remuneration. Meanwhile, the provisions of the 2015 and 2016 regulations on the remuneration of attorneys-at-law appointed ex officio or chosen by the party, respectively, are differentiated by the rates of possible remuneration, setting them at a much lower level in the case of attorneys-at-law appointed ex officio.

The principle of equality is not absolute, and in certain circumstances, it is possible to differentiate the legal situation of similar entities.[16] Yet, the settled jurisprudence of the Constitutional Tribunal shows that any derogations from the requirement of equal treatment of similar entities must be justified, the arguments in favour of introducing such derogations must be relevant and, therefore, should be directly related to the purpose and substance of the relevant provisions. To put it differently, the introduced differentiations must be rationally justified and cannot be made according to an arbitrary criterion.[17] Moreover, the arguments in favour of different treatment of similar entities must be proportional, so the importance of the interest, which is to differentiate the situation of the addressees of the norm, must be in the fair proportion to the weight of the interests that will be violated as a result of unequal treatment of similar entities. And, finally, these arguments must be properly related to other constitutional values, principles, or norms that justify different treatment of similar entities. Differentiating the legal situation of similar entities may be considered constitutionally justified, for example, when it is in line with the principles of social justice or serves the implementation of these principles. In this sense, it can be ascertained that the principle of equality largely corresponds to the principle of social justice.[18]

Transferring these findings to the plane of the considerations outlined above, it should be concluded that the differentiation of remuneration rates for court-appointed

16 See: M. Ziółkowski, *Zasada równości w prawie* [*The principle of equality in law*], "Państwo i Prawo" 2015, No. 5, pp. 108–110; M. Kruk, *Zasada równości w orzecznictwie Trybunału Konstytucyjnego* [*The principle of equality in the jurisprudence of the Constitutional Tribunal*], [in:] *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* [*Book of the 20th anniversary of the jurisprudence of the Constitutional Tribunal*], ed. M. Zubik, Warsaw 2006, pp. 297–298; *Konstytucja Rzeczypospolitej…*, pp. 120–121; L. Garlicki, *Polish law…*, pp. 112–113.

17 Constitutional Tribunal judgement of 12 December 1994, X 3/94. See also: S. Biernat, *Glosa do orzeczenia TK z 12 XII 1994, K 3/94* [*A gloss to the judgement of the Constitutional Tribunal of 12 December 1994, K 3/94*], "Państwo i Prawo" 1995, No. 8, pp. 102–106.

18 See more on the relationship between the principle of equality and the principle of social justice, e.g., the judgements of the Constitutional Tribunal: of 6 May 1998, K 37/97; of 20 October 1998, K 7/98.

attorneys-at-law and attorneys of choice for performing the same activities is in no way related to the purpose and essential content of the provisions regulating the principles of determining these remunerations. In other words, there is no rationale for this differentiation. The requirement of proportionality of the arguments is also not met because the interest served by this differentiation is vague and, therefore, it is difficult to determine both its importance and the relationship to the interests of attorneys-at-law who provide legal aid ex officio in obtaining appropriate remuneration for their work, and those interests will undoubtedly be violated as a result of their unequal treatment in relation to attorneys-at-law providing legal aid of choice. Finally, the differentiation in this case is not justified in the light of constitutional values, principles, and norms, including the aforementioned principle of social justice.

4. Significance of the ruling on the unconstitutionality of the analogous regulation concerning advocates

The issue of the compliance with the Constitution of the provisions regulating the remuneration rates of ex officio attorneys has already been resolved by the Constitutional Tribunal in a case in which the regulations on attorney fees – analogous to those currently under consideration – were reviewed. In the judgement of 23 April 2020, file ref. SK 66/19, the Tribunal stated that § 4 sec. 1 of the regulation of the Minister of Justice of 22 October 2015 on the State Treasury covering the costs of unpaid legal aid provided by a court-appointed advocate (hereinafter referred to as 2015 regulation on the remuneration of an ex officio advocate)[19] is inconsistent with Art. 64 sec. 2 in connection with Art. 31 sec. 3, Art. 32 sec. 1, second sentence, and Art. 92 sec. 1, first sentence, of the Constitution. This judgement concerned a provision which essentially coincided with the content of § 4 sec. 1 of the regulation of 2016 on the remuneration of ex officio attorneys-at-law.

In this case, the Constitutional Tribunal resolved two allegations on the merits, the first of which concerned the unequal treatment of party-appointed and court-appointed advocates with regard to the protection of their property rights in the form of remuneration due to them, and the second – the regulation of the matter going beyond the scope of the statutory authorization, which did not provide for the possibility of differentiating advocates' remuneration by the Minister of Justice. The first of these allegations is particularly important taking into account the subject of this study. The right to equal treatment in this allegation was considered in connection with the right to property because the proceedings in this case were initiated by a constitutional complaint, and the established jurisprudence of the Constitutional Tribunal reveals that Art. 32 of the Constitution cannot be

19 Journal of Laws item 1801. This regulation entered into force on January 1, 2016 and was in force until November 2, 2016, i.e., until it was repealed by § 23 of the Regulation of the Minister of Justice of 3 October 2016 on the covering by the State Treasury of the costs of unpaid legal aid provided by an *ex officio* advocate (Journal of Laws 2019, item 18), which is currently in force.

an independent control pattern in complaint proceedings.[20] The Constitutional Tribunal stated that advocates, regardless of whether they provide assistance ex officio or of choice, constitute a group of entities similar in terms of the objective and content of the analysed regulation and, therefore, should be treated in the same way. The differentiation of similar entities is permissible when it is introduced on the basis of a criterion that is rationally related to the purpose and content of a given regulation as well as to other values, principles, or constitutional norms that justify different treatment of similar entities and also when the weight of the interest, which the differentiation is to serve, remains in an appropriate proportion to the weight of the interests that will be violated as a result of the differentiation introduced. In this case, the Constitutional Tribunal accentuated that "it does not see any constitutional values that the reviewed regulation was to serve. Moreover, in the opinion of the Tribunal, there are no rational arguments (not only constitutional ones) that would justify discriminatory treatment of advocates depending on whether they were appointed by a party to the proceedings or were appointed ex officio".

It is also worth mentioning that a few days after the announcement of this judgement, the Constitutional Tribunal issued a decision of 29 April 2020, file ref. S 1/20, in which it signalled to the Minister of Justice the need to remedy the deficiencies not only in § 4 sec. 2 of the regulation of 2015 on the remuneration of ex officio advocates but also § 4 sec. 2 of the 2016 regulation on the remuneration of ex officio attorneys-at-law, indicating that the deficiencies consist of "unjustified differentiation of the rules for increasing remuneration for attorneys appointed ex officio as compared to attorneys of choice". In the justification of this decision, the Constitutional Tribunal stated that the reasons for which the regulation on the remuneration of ex officio advocates was declared unconstitutional "remain valid, respectively in relation to attorneys-at-law", at the same time drawing attention to the necessity to "eliminate from the legal system the regulations which – in essence – in a discriminatory manner for attorneys appointed ex officio regulate the issue of their increased remuneration". This signalling decision, in spite of the fact that it contained very specific comments and reservations, has not been implemented to this day.

On the other hand, the aforementioned judgement of the Constitutional Tribunal of 23 April 2020, file ref. SK 66/19, resulted in the loss of binding force of the provision which was subject to control in this case; namely § 4 sec. 1 of the regulation of 2015 on the remuneration of ex officio advocates. Although the subject of the control de facto was the norm resulting from this provision, the finding that this norm was unconstitutional did not deprive the same-sounding norms contained in the provisions which were not the subject of the control from their legal validity. Such a conclusion results from the settled jurisprudence of the Constitutional Tribunal, which is of the opinion that the convergence of normative content, or the similarity of legal provisions, does not mean that the legal effects of the unconstitutionality of the reviewed provision may be extended to provisions that have not been controlled by the Constitutional Tribunal.[21] This also

20 See: the Constitutional Tribunal decision of 24 October 2010, SK 10/01.

21 See: the judgement of the Constitutional Tribunal of 18 July 2012, K 14/12. See, however, also a different standpoint presented in the judgements of the Supreme Court: of 25 June 2020, I NO 37/20, of 17 March 2016, V CSK 377/15, of 20 February 2018, V CSK 230/17.

applies to the § 4 sec. 1 of the regulation of 2016 on the remuneration of ex officio attorneys-at-law, which may not be considered deprived of binding force following the entry into force of the judgement of the Constitutional Tribunal, file ref. SK 66/19.

Nonetheless, the consequence of the latter judgement is the loss of the presumption of constitutionality of the norm contained in § 4 sec. 1 of the regulation of 2015 on the remuneration of ex officio advocates, which is also included in § 4 sec. 1 of the regulation of 2016 on remuneration of ex officio attorneys-at-law.[22] This means that the latter provision also lost the presumption of constitutionality following the entry into force of the judgement of the Constitutional Tribunal, file ref. SK 66/19. This circumstance is of key importance for the possibility of its further application in the adjudication process by courts.

5. Removal of unconstitutionality in the course of judicial application of the law

Currently, when the legal order includes a provision containing a norm identical to the norm contained in a provision recognized by the Constitutional Tribunal as unconstitutional, the rank of this provision is highly relevant. Judges are not bound by sub-statutory regulations in the adjudication process (Art. 178 sec. 1 of the Constitution). Hence, it is commonly assumed that the unconstitutional provisions of a regulation may, and even should be omitted by a judge when examining a given case.[23] This position has been presented in the jurisprudence of the Constitutional Tribunal for years. Already in the decision of 19 February 1997, file ref. U 7/96, the Constitutional Tribunal clearly indicated that each court is called upon to independently assess the compliance of sub-statutory legislation with the Constitution and a statute, and in the event of their non-compliance – also to refuse to apply them. In this respect in the judgement of 8 November 2016, file ref. P 126/15, the Constitutional Tribunal stated that a judge in the adjudication process is subject to the Constitution and statutes, and when it comes to regulations, a judge retains the authority to independently assess their constitutionality.[24] Similarly, the Supreme Court takes the view that when examining the constitutionality

22 More on the presumption of constitutionality, see: *Arguments and reasoning…*, pp. 861–877; A. Dębowska, M. Florczak-Wątor, *Domniemanie konstytucyjności ustawy w świetle orzecznictwa Trybunału Konstytucyjnego* [*Presumption of constitutionality of a statute in the light of the jurisprudence of the Constitutional Tribunal*], "Przegląd Konstytucyjny" ["The Constitutional Review"] 2017, No. 2, pp. 5–37; M. Gutowski, P. Kardas, *Domniemanie konstytucyjności a kompetencje sądów* [*Presumption of constitutionality and the competences of courts*], "Palestra" ["The Bar"] 2016, No. 5, pp. 44–62; P. Radziewicz, *Wzruszenie „domniemania konstytucyjności" aktu normatywnego przez Trybunał Konstytucyjny* [*Rebuttal of the "presumption of constitutionality" of a normative act by the Constitutional Tribunal*], "Przegląd Sejmowy" ["The Sejm Review"] 2008, No. 5, pp. 55–86.

23 See: L. Garlicki, *Sądy a Konstytucja Rzeczypospolitej Polskiej* [*Courts and the Constitution of the Republic of Poland*], "Przegląd Sądowy" ["The Judicial Review"] 2016, No. 7–8, p. 15; P. Jabłońska, *Konstytucyjne podstawy rozproszonej kontroli konstytucyjności prawa* [*The constitutional foundations of the dispersed control of the constitutionality of the law*], "Przegląd Sądowy" ["The Judicial Review"] 2020, No. 11–12, p. 26.

24 See also: the decision of the Constitutional Tribunal of 4 February 1998, Ts 1/97.

of a provision of a lower rank than a statute, judges may independently decide on the application of this provision and do not have to apply to the Constitutional Tribunal to resolve doubts in this respect.[25]

The refusal to apply an unconstitutional provision always raises the question of what other provision should be applied in place of the one that cannot be applied. This issue appeared in the jurisprudence of the courts shortly after the announcement of the aforementioned judgement of the Constitutional Tribunal declaring the unconstitutionality of § 4 sec. 1 of the regulation of 2015 on the remuneration of ex officio advocates. In the decision of 2 June 2020, file ref. II CSK 488/19, the Supreme Court determined the costs of an ex officio attorney, taking into account the judgement of the Constitutional Tribunal of 23 April 2020, file ref. SK 66/19, which in practice meant the application of the rate resulting from the 2015 regulation on the remuneration of advocates of choice. This standpoint was also taken by the Supreme Court in subsequent judgements.[26] In the decision of 7 January 2021, file ref. I CSK 598/20, the Supreme Court explained that "The analysis of the status of advocates and attorneys-at-law and their role in the proceedings, in which they act as entities appointed and obliged to provide legal representation, leads to the conclusion that in the matter of differentiation of their remuneration, i.e., the remuneration that they would receive if they had acted as attorneys of choice in the case, there is no constitutional justification".

After this judgement of the Supreme Court, other courts also began to award attorneys appointed ex officio remuneration on the basis of the regulation on the remuneration of attorneys of choice. Although this line of jurisprudence is not yet uniform, established, and disseminated,[27] still, it can be concluded that this position assuming the need to omit constitutionally questionable provisions concerning the principles of remuneration of ex officio attorneys is becoming dominant in the jurisprudence. A good example of a solution illustrating this approach may be found in the judgement of 31 March 2021, file ref. IV Ka 85/21, in which the District Court in Szczecin concluded that the 2016 regulation on remuneration for ex officio attorneys-at-law is unconstitutional for the same reasons which prejudged the CT finding that the 2015 regulation on ex officio advocates' fees was unconstitutional. The District Court emphasized that "it fully shares the suggestion of the Constitutional Tribunal contained in the signalling decision of 29 April 2020, S 1/20, that § 4 sec. 2 of the regulation of the Minister of Justice of 3 October 2016 on the payment by the State Treasury of the costs of unpaid legal aid provided by an ex officio advocate leads to an unjustified differentiation of the rules for increasing remuneration for attorneys appointed ex officio compared to attorneys of choice". At the same time, it stated that every common court, when deciding to review

25 See: Supreme Court judgements: of 26 September 2007, III KK 206/07; of 9 June 2005, V KK 41/05; of 28 May 2009, II KK 334/08. See, however, the motions of the Prime Minister and the Marshal of the Sejm to the Constitutional Tribunal in cases with file ref. K 18/20 and K 21/20.

26 See, to that effect, e.g., the provisions of the Supreme Court: of 30 November 2020, V CNP 15/20; of 15 November 2020, V CSK 71/20, of 15 September 2020, IV CSK 159/20, of 23 July 2020, III CZ 18/20, of 13 July 2020, IV CSK 746/19, of 30 June 2020, V CZ 87/19, of 15 December 2020, I CSK 438/20; of 30 November 2020, IV CSK 375/20.

27 See, e.g., judgement of the District Court in Zielona Góra of 14 July 2020, IV Pa 42/20.

the constitutionality of the law, should follow the rules adopted in the jurisprudence of the Constitutional Tribunal concerning the principles of such review and thus also the rule according to which the determination of the unconstitutionality of a legal norm in one case binds the Constitutional Tribunal in each subsequent case, in which the next provision containing this standard is examined.[28] In this particular case, the court considered the mechanism of setting the minimum rates for defence in proceedings to pass joint judgement at a level lower than the rates for a defence attorney of choice and setting the upper limit of the remuneration to be awarded at 150% of the minimum rate to be unconstitutional, that this type of mechanism violates the constitutional models indicated in the judgement of the Constitutional Tribunal of 23 April 2020, file ref. SK 66/19. The District Court in Szczecin, in this case, applied *per analogiam* inference, i.e., inferring norms from other norms.[29] By means of this inference mechanism, the court came to the conclusion that, due to the unconstitutionality of the regulation to which the remuneration relates, the remuneration for an advocate assigned by the court should be determined by analogy precisely on the basis of the provisions of the regulation governing the remuneration for an advocate of choice.

A similar argumentation can be adopted with regard to the 2016 regulation on the remuneration of attorneys-at-law assigned by the court. Serious doubts as to the constitutionality of its § 4 as well as the rebuttal of the presumption of its constitutionality as a result of the entry into force of the judgement of the Constitutional Tribunal of 23 April 2020, file ref. SK 66/19, should persuade the courts to refuse to apply the provisions of this regulation and to determine remuneration for ex officio attorneys-at-law based on the provisions of the analogous regulation of 2015 on the remuneration of an attorney-at-law of choice.

6. Conclusions

The differentiation of the remuneration of attorneys-at-law chosen by a party to the proceedings and attorneys-at-law appointed by the court for the same activities undertaken as part of the provided legal aid raises not only serious doubts as to the compliance with the Constitution but even – in the light of the above-mentioned judgement of the Constitutional Tribunal of 23 April 2020, file ref. SK 66/19 – certainty that this solution is unconstitutional. The sub-statutory rank of the provisions containing these regulations allows courts to omit them and to set the amount of the remuneration of the ex officio attorney-at-law based on the principles of determining the remuneration of the attorney of choice. The jurisprudence of the courts is already heading in this direction, which, however, does not abrogate the Minister of Justice's obligation to amend constitutionally

28 Constitutional Tribunal judgement of 19 April 2011, K 19/08.

29 More on the issue of an argument by analogy, see *Arguments and legal reasoning…*, pp. 1052–1071; T. Barszcz, *Struktura argumentum a simili* [*The structure of a simili argumentum*], Lublin 2015; K. Szymanek, *Argument z podobieństwa* [*Argument from similarity*], Katowice 2008; J. Nowacki, *Analogia legis*, Warsaw 1966.

defective provisions. The unification of the rules for determining the remuneration of court-appointed attorneys-at-law and attorneys of choice will rectify the problem of violating the requirement of equal treatment, which will not, however, be tantamount to full compliance with the Constitution. Also, the doubts that were not analysed in detail in this paper will still remain valid; namely those concerning the determination by the Minister of Justice of the remuneration of attorneys-at-law at a too low level, which does not take into account the reality of providing legal aid and the costs actually incurred in this regard.

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