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## **THE RIGHT TO SOCIAL SECURITY IN THE CONSTITUTION OF THE REPUBLIC OF POLAND\***

### **Introduction**

Social security is understood to encompass the following nine branches: adequate health service, disability benefits, old age benefits, unemployment benefits, employment injury insurance, family and child support, maternity benefits, disability protections, and provisions for survivors and orphans.

### **The meaning of social rights**

The Constitution of the Republic of Poland was adopted on 2 April 1997<sup>1</sup>. Decisions concerning its content had been accompanied by numerous discussions, including the issues of what social rights should be guaranteed in the content of provisions of the Constitution. The effect of the discussions was the inclusion of numerous regulations, which stipulate social rights, in the basic law. Nevertheless, for fear of imposing excessive obligations on the state, the regulation of many rights in the realm of social law was overly general, even for the basic law, which may, by principle, only contain some general guidelines for the content of particular rights.

### **Constitutional guarantees of social security rights**

The Polish Constitution of the Republic of Poland has regulated key social rights in a separate chapter, entitled *Freedom and Economic, Social and Cultural Rights* („Wolności i prawa ekonomiczne, socjalne i kulturalne.”). While analyzing this part of the Polish Constitution, special attention should be paid to the guarantees regulated in article 67, section 1, concerning social security in the event of incapacity to work due to illness or disability, as well as after reaching the age of retirement. The same article indicates the right to social security of the unemployed (article 67, section 2). The term of social security was not defined in the provisions of the Constitution. The Legislator was left to

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<sup>1</sup> Dz. U. [Journal of Laws] No. 78, item 483 as amended.

stipulate the content of the guarantees arising from this regulation. It is the obligation of The Constitutional Tribunal, a judicial authority responsible for the verification of provisions of the law with constitutional provisions, to control whether legislative provisions meet the minimal requirements for the right to social security right.

The Constitution also grants every person the right to health care (article 68, section 1).<sup>2</sup> Constitutional provisions also recognise the need to provide health care for groups that are particularly vulnerable to illnesses and require increased health care. As a result, it was indicated in article 68, section 3 of the Constitution that public authorities are obligated to provide special health care for children, pregnant women, the disabled and the elderly.

Another important regulation stipulating the guarantees of social rights at the Constitution level, is the obligation imposed on public authorities in article 69 to help with securing the existence, vocational training and social communication.

The fact that special situation of the disabled was accounted for in the Constitution should be positively appraised. Such persons require increased support from the State. As it was discerned by the Constitutional Tribunal, the obligation of article 69 should be interpreted as “the obligation of public authorities to create a mechanism to conduct the tasks stipulated in it. Such mechanism must ensure the effective accomplishment of the objective.”<sup>3</sup>

The constitutional scope of social law also comprises protection of family rights. In accordance with article 71 “The State considers family welfare in its social and economic policy. Families who find themselves in a difficult financial and social situation, in particular multi-children families and single-parent families, are entitled to special help from public authorities. A mother, both before and after giving birth to a child, is entitled to special help from public authorities, the scope of which is defined by the relevant legal act.” This is another regulation that protects social groups that are most greatly exposed to social exclusion. This, in a way, emphasises the meaning of the family as the basic unit of society<sup>4</sup> and, at the same time, completes the principle stipulated in article 18 of the Constitution, according to which the family, motherhood and parenthood are under the protection and care of the Republic of Poland. It should be noted, however, that in both the doctrine of the Polish constitutional law and in the judicature of the Constitutional Tribunal, these norms are treated only as the determinant of specific actions. Article 71 of the Constitution, similarly to article 18, is considered not to define the rights the citizen is directly entitled to. Article 18 of the Constitution declares the protection of the marriage, family, motherhood and parenthood by the state however, article 71 of the Constitution formulates one of the elements of the welfare state by accounting for “family welfare” in its social and economic policy. These regulations, formulated in the form of the principles of state policy and not the rights of the individual, may not constitute the basis for the

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<sup>2</sup> H. Zięba-Załuca, *Pojęcia prawa do ochrony zdrowia*, [in:] *Zasady równości w prawie* eds. H. Zięba-Załuca, M. Kijowski, Rzeszów 2004, p. 44 at seq.

<sup>3</sup> Verdict of the Constitutional Tribunal of 6 February 2007, Ref. No. P 25/06, OTK Series A 2007 No. 2, item 9.

<sup>4</sup> M. Gołwkin, *Rodzina jako wartość chroniona w konstytucji na tle europejskich standardów ochrony praw człowieka*, [in:] *Polska wobec europejskich*, p.101 at seq.

individual pursuit of claims. It is commonly presumed, not only in the doctrine of the Polish constitutional law, that thus formulated provisions stipulating the objectives of public authorities' functioning constitute the programme norms and may not, as such, constitute the basis for the citizen's pursuit of claims as their addressee is primarily the legislator<sup>5</sup>.

While analysing the scope of social rights guarantees in the Constitution, one may not omit article 75 of that act. It says that "Public authorities pursue a policy that creates favourable conditions for meeting the citizen's housing needs and in particular prevent homelessness, support social housing development and support the citizen's activity to obtain their own flats" (article 75, section 1). In the second section of this article, the necessity to protect the tenant's rights has been emphasized. The limits of that protection have been, however, left to be defined by legislative provisions. As it has been discerned in the judicature, the wording of article 75 of the Constitution makes it impossible to talk about inconsistency with it apart from in extraordinary situations, in particular when: the legislator determines the obligations of public authorities at such a level that it prevents the performance of those obligations and deprives article 75 of the Constitution of its actual content<sup>6</sup>, the legislator will undertake actions that hinder the citizens meeting their housing needs<sup>7</sup> or will impose the burdens of performance of these obligations on private entities and not public authorities.<sup>8</sup>

The scope of the social law guaranteed by the provisions of the Constitution may not be analysed, however, without reference to the general principles regarding the freedom and social rights arising from the provisions of the Polish basic law. Above all, it is necessary to indicate regulations on the inviolability of human dignity (article 30 of the Constitution), statutory limitation upon the exercise of rights and freedom (article 31 of the Constitution), equality before the law and in the law and non-discrimination (article 32 of the Constitution) and the state's protection of citizens abroad (article 36 of the Constitution). It is also advisable to pay attention to the principle of social justice arising from article 2<sup>9</sup>. Although the usefulness of this notion is often questioned<sup>10</sup>, it has, in my opinion, particular significance in decoding the material scope of rights of the social law as guaranteed by the Constitution. It is assumed that directives of social justice are supposed to ensure social balance, thus persons of poor health, those in a difficult economic situation and others are enabled to live in dignity through access to goods of modern

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<sup>5</sup> Cf. Z. Czeszejko-Sochacki, L. Garlicki, J. Trzcziński, *Commentary to the Act on the Constitutional Tribunal*, Warszawa 1999, Wydawnictwo Sejmowe, p. 163

<sup>6</sup> Decision of the Constitutional Tribunal of 15 November 2000, file no. TS 86/00, OTK ZU No. 8/2000, item 308; Verdict of the Constitutional Tribunal of 14 May 2001, file no. SK 1/00, OTK ZU No. 4/2001, item 84

<sup>7</sup> Decision of the Constitutional Tribunal of 12 January 2000, file no. TS 62/99, OTK ZU No. 4/B/2002, item 240

<sup>8</sup> Verdict of the Constitutional Tribunal of 10 October 2000, file no. P 8/99, OTK ZU No. 6/2000, item 190

<sup>9</sup> Article 2 of the Constitution reads: "The Republic of Poland is the democratic rule of law, realising principles of social justice."

<sup>10</sup> See: Rozważania na ten temat J. Oniszuk, [in:] *Zarys systemu prawa pracy* eds. K. W. Baran, Warszawa 2010, pp. 285–294.

civilisation<sup>11</sup>. From the wording of this provision, the Constitutional Tribunal interpreted a number of citizens' rights that shape the content of the social law in Poland. It has presumed, among others, that the principle of social justice requires that the state provide citizens with the minimum subsistence level.<sup>12</sup> The Tribunal has pronounced that the principle of social justice is comprised, inter alia, of values such as creating conditions for sustainable and stable economic development, budget equilibrium, as well as the right of the citizens and their elected representatives to determine the directions and priorities of social and economic policy by means of democratic procedures.<sup>13</sup> The Constitutional Tribunal has also emphasized that the principle of social justice ensures "the balance of burdens and benefits".<sup>14</sup> It cannot be argued that while the social justice is connected with the constitutional principle of equality, it "does not denote the necessity to grant all categories of citizens (groups of entities) identical rights and obligations. Particular categories of citizens should be treated equally, i.e. according to the same standards, without discrimination and favouritism, only when particular legal provisions are based on the same factual situation of those categories of entities"<sup>15</sup>. The principle of social justice provides the source for shaping many institutions of labour law and social security.<sup>16</sup> Finally, it consists of numerous, detailed legal rules, addressed to public authorities, including, for instance, the minimum of social security, protecting the very foundations of human existence for people who remain without work not of their own will, as well as the principle of equality. Thus, one cannot fail to observe that in view of the Polish Constitution, the principle of social justice should be treated as the foundation of rights within social law.

It must also be emphasised that in the doctrine of the Polish concept of constitutional law, rights arising from the Constitution such as freedom of labour, the right to remuneration, the obligation to implement the policy of full employment, the obligation to ensure the health and safety of employees, the employees' right to free days and paid leave, the guarantee of appropriate standards of working time are often included in the social rights. Due to the conception of the social security assumed for this study, they are, as a matter of principle, not contained in the notion and the aforementioned guarantees will not be discussed. They should be classified as the constitutional rules of labour law. One exception should be made for the obligation to implement the policy of full employment. This rule may, in my opinion, be also numbered among the guarantees within social law wherein this norm orders positive actions aiming at decreasing unemployment.<sup>17</sup>

<sup>11</sup> J. Karp, Zasada sprawiedliwości społecznej, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, eds. W. Skrzydło, S. Grabowska, R. Grabowski, Warszawa 2009, p. 725.

<sup>12</sup> Judicature of the Constitutional Tribunal of 13.7.1993, P 7/92, OTK 1993, No. 2, item 27, p. 266

<sup>13</sup> Verdict of the Constitutional Tribunal of 25.2.1997, K 21/95, OTK 1997, No. 2, item 23

<sup>14</sup> Judicature of the Constitutional Tribunal of 26.10.1993, U 15/92, OTK 1993, No. 2, item 36, pp. 343–344

<sup>15</sup> Judicature of the Constitutional Tribunal of 11.12.1996, K 11/96, OTK 1996, No. 6, item 54, p. 411

<sup>16</sup> L. Florek, Konstytucyjne podstawy indywidualnego prawa pracy, [in:] *Konstytucyjne podstawy systemu prawa* eds. M. Wyrzykowski, Warszawa 2001, p. 70.

<sup>17</sup> E. Polak, Ewolucja państwa wobec problemu bezrobocia, *Polityka Społeczna* 2003, No. 8, pp. 8–13, J. Jończyk, *Prawo zabezpieczenia społecznego, ubezpieczenia społecznego i zdrowotne bezrobocie i pomoc społeczna*, Zakamycze 2001, p. 345 at seq.

## The scope of the material and personal social security rights guaranteed by the Constitution

### *Material scope*

The material scope of guarantees within social security rights should start with defining the content of the right to social security (as it was mentioned before the issue was regulated in article 67 of the Constitution). The Constitutional Tribunal has indicated three rights that in its assessment constitute the social security right: social insurance right, social provision right and social welfare right. The Tribunal has found the first of the institutions mentioned to be the most important form of the right to social security.<sup>18</sup> It has stressed that the right to social security is a system of obligatory benefits connected with work that are claimable and that satisfy needs caused by random events, in particular by illness and the incapacity to work. Yet, the Tribunal emphasized that the Constitution does not stipulate individual insurance situations and thus does not create an appropriate claim on the part of the insured person, which may arise only from the legal act. In principle, the Constitution grants the Legislator the freedom to stipulate the type of benefits from social insurance, the conditions of their acquisition and expiration, their amount and awarding procedures.<sup>19</sup> The conclusion of the impossibility to derive the right to individual benefit from the content of constitutional provision results from the fact that the provision of article 67, section 1 of the Polish Constitution has left the scope and form of social security to be stipulated by the legal act. Therefore, we may only talk about the legislator's breach of the Constitution when the legislator has, for instance, adopted a legal act depriving a particular labour group of old age or disability pension.<sup>20</sup>

Social welfare is treated as a form that is to complete the scope of guarantees arising from article 67 of the Constitution. It embraces such cases in which benefits cannot be paid within the social insurance or social provision institutions. The institution of social welfare is intended to help people who are unable to provide means for independent existence. It is assumed, however, to be temporary by nature and to guarantee only the most necessary benefits.<sup>21</sup>

The right to health has been regulated in the Constitution in quite a detailed way. From article 68 of the Polish basic law regulating this issue, at least some rights may be derived:

- Every person's right to health care
- Citizens' right to equal access to health care financed by public funds
- Obligation of public authorities to provide special health care for children, pregnant women, the disabled and the elderly.

<sup>18</sup> Cf. verdict of 22.6.1999, K 5/99, OTK 1999, No. 5, item 100; verdict of 7.9.2004, SK 30/03, OTK-A 2004, No. 8, item 82)

<sup>19</sup> Verdict of the Constitutional Tribunal of 22.08.1990, K 7/90, OTK 1990, item 5

<sup>20</sup> Verdict of the Constitutional Tribunal of 6.02.2002, SK 11/01, OTK Series A 2002 No. 1, item 2

<sup>21</sup> A. Żukiewicz, *Prawo socjalne w systemie prawa stanowionego – przykład Polski, Polityka Społeczna* 2003, No. 2, p. 7 at seq.

It has been demonstrated in the Polish doctrine that the constitutional guarantee of the right to healthcare is not only of declaratory nature. It should be recognised that it is a legal norm that imposes certain obligations on public authorities.<sup>22</sup> The Constitutional Tribunal has indicated the following conclusions from provisions of the Constitution:

1) it is necessary to develop, within the wide concept of health care, the mechanisms for gathering public funds and then spending them on healthcare. A detailed assessment of the legal character of means contributed by citizens is not important; it only matters whether they may be classified as public funds.

2) financial benefits from the aforementioned means are supposed to be available for citizens (so not for “everyone” anymore), but it is not about just formal availability, declared by legal provisions that constitute a “policy statement”, but real availability,

3) access to benefits financed by public funds must be equal for all citizens, regardless of their financial situation.

4) it is the obligation of public authorities to ensure the above-mentioned standard of accessibility of financial benefits from public funds.<sup>23</sup>

The healthcare right guaranteed by the Constitution does not allow the types of benefit categories embraced in this benefit to be specified with more precision.<sup>24</sup> Nonetheless, on the basis of the analysed regulation, it is imperative that legislative provisions guarantee the minimum scope of benefits available to every citizen without charge (the so-called basket of guaranteed services).

The necessity to ensure particular support for the disabled has entailed providing the guarantee for a number of rights for them in article 69 of the Constitution, videlicet i) help to secure existence, (ii) vocational training and iii) social communication training. These rights, in accordance with the provision of the invoked article, are to be specified in the legal act. For that reason it does not constitute a source of subjective rights. According to the judicature of the Constitutional Tribunal, the provision of the Constitution regulating the rights of the disabled includes only an ascertainment of the public authorities’ obligation to create appropriate legislative mechanisms.<sup>25</sup> The Constitution leaves the legislator with the freedom to choose the measures to perform the obligations indicated in it.<sup>26</sup> The Constitutional Tribunal has also ascertained that article 69 “cannot be considered to be the constitutionalisation of a specific level of benefits, their form, specific scope or the procedures of obtaining them. The indicated constitutional model should be interpreted as the responsibility of public authorities to create mechanisms for the performance of the tasks indicated in it. The mechanism must ensure the effective accomplishment of the objective.”<sup>27</sup> At the same time, however, attention should be paid to the Tribunal’s position that there are no grounds for a narrow understanding of article 69 of the Constitution (the sole determination of the relation between the state and the disabled), the breach of

<sup>22</sup> J. Cierniewski, *Konstytucyjne podstawy praw pacjenta, Materiały Konferencji „Godność człowieka podstawą praw chorego i pacjenta”*, 8th International Day of the Sick

<sup>23</sup> Verdict of the Constitutional Tribunal of 7.01.2004, K 14/03, OTK Series A 2004 No. 1, item 1

<sup>24</sup> D.E. Lech, *Zasada równego dostępu do świadczeń opieki zdrowotnej*, Warszawa 2011, p. 145.

<sup>25</sup> Verdict of 23.10.2007, P 28/07, OTK-A 2007, No. 9, item 106

<sup>26</sup> Verdict of 16.3.1999, K 35/98, OTK 1999, No. 3, item 37

<sup>27</sup> Verdict of 23.10.2007, P 28/07, OTK-A 2007, No. 9, item 106.

which would exclusively consist in the limitation of the rights of the disabled by those regulations which would directly harm the existence, vocational training and social communication of the disabled. Article 69 of the Constitution also protects the disabled against practices leading in an indirect (often hidden) way to the violation of their rights.

The rights regulated in article 75 of the Constitution are frequently referred to as the state's assistance in meeting the citizen's housing needs. The Public Authorities' obligation to pursue a policy that creates favourable conditions for meeting the citizen's housing needs does not mean that they are obligated to build flats, but orders the creation of legal, political, social conditions, etc. that provide the opportunity for meeting personal housing needs by every citizen. The Constitution does not provide precise guidelines on what actions should be taken by public authorities. It must be noted, however, that it does assess the importance of particular aims of those actions by using the phrase "in particular", determining those to which it gives priority. Those aims embrace the prevention of homelessness, support of social housing development and support of the citizen's activities to obtain their own homes"<sup>28</sup>

The provision of article 75 on the policy of meeting the citizen's housing needs has constituted an inspection model for a number of rights within the wide concept of the right to accommodation. For example, it may be indicated that on the basis of this provision, the Constitutional Tribunal has recognized that it imposes on the legislator the obligation to provide every tenant (and not only the lessees) protection against the threat of homelessness by providing stability (but not absolute inviolability) of the legally acquired legal title to the occupied flat. This provision may not be treated as the source of claims to achieve the position of the owner. The statutory regulation of the protection of tenants' rights may not reach so far as to grant them the right to decide who may become the owner of the flat they occupy, as it would be contrary to the constitutional principle of the protection of ownership.<sup>29</sup> The Tribunal has also derived from article 75 of the Constitution the principle of the protection of tenants against excessive rents for using flats.

Finally it is time to analyse article 65, section 5 of the Constitution. It indicates that public authorities pursue a policy aiming at full, productive employment, by implementing programmes to combat unemployment, including the organization and support of vocational consultancy and training, as well as public works and intervention works. This regulation has the character of the programme norm.<sup>30</sup> It indicates a certain objective (task) and gives public authorities the freedom to choose the measures to accomplish that objective. The Constitution indicates some methods to combat unemployment (programmes to combat unemployment, organising and the support of vocational consultancy and training, as well as public works) but it must be recognized that they are of an illustrative nature and they are not exhaustive. It must be also recognized that the methods to combat unemployment indicated in the Constitution are obligatory<sup>31</sup>, i.e.

<sup>28</sup> B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa, p. 154.

<sup>29</sup> Verdict of the Constitutional Tribunal of 30.10.2001, K 33/00, OTK 2001 No. 7, item 217.

<sup>30</sup> M. Gersdorf, *Podstawowe dylematy związane z rozwojem prawa pracy w okresie transformacji ustrojowej*, *Praca i Zabezpieczenie Społeczne* 2003, No. 5, p. 5.

<sup>31</sup> A. Świątkowski, *Polityka społeczna i prawo do pracy wobec bezrobocia*, *Państwo i Prawo* 2002, No. 8, p. 15 at seq.

public authorities are obligated to use them in the first place in a situation when there is unemployment.<sup>32</sup> While interpreting the principle of perusal of the full employment policy, the Constitutional Tribunal recognized that job creation must constitute an element of the policy of the state, as referred to in article 65, section 5 of the Constitution that uses the wording: “full, productive” employment. Yet, there is no constitutional right to employment in the sense in which the principle of proportionality refers to the protection of rights and freedom of other persons and, indubitably, it is not the obligation of the state to create jobs. Otherwise, the solution to all the problems of the labour market would be mandatory employment of all unemployed persons in the wide concept of the state-budget sector. On the other hand, the state’s policy should not lead to a decrease in the number of jobs due to the excessive constraint of entrepreneurship and the hindering of flexible employment in non-public sector. It must be emphasised that the constitutional legislator has explicitly explained what the pursuit of the full and productive employment policy should consist of. It has indicated that this policy should be manifested by the implementation of the programmes to fight unemployment<sup>33</sup>, including the organization and support of vocational consultancy and training, as well as public works and intervention work.<sup>34</sup>

### *Personal scope*

The Polish Constitution stipulates in many different ways the range of entities which are entitled to the rights described above that constitute the social security rights. Some of them are granted to every person, regardless of citizenship or national status. This refers to fundamental rights of rudimentary nature. Such rights include the right to health, guaranteed in article 68, section 1 of the Constitution. It is treated as the human right and such rights cannot depend on citizenship. As it was rightly discerned by the Constitutional Tribunal, the subjective individual right to health and the objective order to public authorities to undertake such actions that are necessary for appropriate protection and implementation of that right<sup>35</sup>, should be derived from the regulation of article 68, section 1 of the Constitution. In my opinion, the Polish Constitution also obligates public authorities to provide particular health care for children, pregnant women, the disabled and the elderly (article 68, section 3) for all persons who stay in the territory of the Republic of Poland, regardless of their citizenship or lack of it. It should be noted that the aforementioned rights refer directly to the issue of human dignity and express its essence. They are of fundamental nature and as such they do not depend on the lawmaker’s will or on law-practicing authorities (courts, public administrative bodies). As it has been emphasised in the judicature of the Constitutional Tribunal, “Such understanding refers to

<sup>32</sup> Verdict of the Constitutional Tribunal of 10.1.2005, K 31/03, OTK-A 2005, No. 1, item 1.

<sup>33</sup> Cf. Szerej W. Padowicz, Rosnące bezrobocie i kryzys zatrudnienia w Polsce (przyczyny i uwarunkowania), *Praca i Zabezpieczenia Społeczne* 2002, No. 1, pp. 2–11, B. Błaszczyk, Bezrobocie i wykluczenie najważniejsze kwestie społeczne współczesnej Europy, [in:] *Europa w gospodarce, polityce i kulturze światowej. Między dziedzictwem i przyszłością* eds. J. Osiński, Warszawa 2004, pp. 405–418.

<sup>34</sup> Verdict of the Constitutional Tribunal of 21.04.2004, K 33/03, OTK Series A 2004 No. 4.

<sup>35</sup> Verdict of the Constitutional Tribunal of 23.3.1999, K 2/98, OTK 1999, No. 3, item 38.



the preamble and article 1 of the Declaration of Human and Citizen Rights, of which the principle emerges that one is human by birth – and not on the basis of any acts and legal actions – human beings constitute the subject of all rights arising from their humanity. In this denotation, human dignity does not depend on the legislator (lawmaker)<sup>36</sup>.

Yet, the group of persons to whom most rights guaranteed by provisions of the Constitution, constituting social security rights, are addressed, has been limited to Polish citizens. This includes the right to health care financed by public funds (article 68, section 2 of the Constitution). Similarly, solely Polish citizens have been indicated as beneficiaries of the obligation of public authorities to pursue a policy that creates favourable conditions for meeting the citizen's housing needs, including actions to prevent homelessness. The same range of the entitled persons has been determined by the Constitution in regard to the social security right in the event of incapacity to work due to illness or disability, as well as after reaching the age of retirement (article 67, section 1 of the Constitution).

It is worth noticing that the Polish Constitution does not define the term citizenship. It is also not defined by legislative provisions.<sup>37</sup> Hence, it should be assumed that the status of the citizen will depend on the formal criterion, such as obtaining citizenship. In accordance with the Act on Polish Citizenship of 2 April 2009<sup>38</sup>, Polish citizenship may be acquired: 1) by the virtue of the law, 2) by the granting of citizenship, 3) by the recognition of Polish citizenship, 4) by the restoration of Polish citizenship<sup>39</sup>. In the analysed context, it is worth drawing attention to the fact that the right to apply for recognition of Polish citizenship may be exercised by, among others, a foreigner who has been constantly abiding in the territory of the Republic of Poland for at least 3 years on the basis of the permanent residence permit, long term European Union resident's permit or the right of permanent residence, who has a stable and regular source of income in the Republic of Poland and a legal title to the occupied abode, a foreigner who has been constantly abiding in the Republic of Poland for at least 2 years on the basis of the permanent residence permit, long term European Union resident's permit or the right of permanent residence, who has been married to a Polish citizen for at least 3 years or who does not have any citizenship.<sup>40</sup>

The limitation of the range of beneficiaries of many of the constitutional rights solely to persons who have the citizen status has been mostly justified by the necessity to maintain the stability of the state's finances that may not intrinsically incur excessive costs in such spheres as health care or social security. I consider, however, that in some cases, the lawmaker has wrongly excluded persons without Polish citizenship from the range of persons entitled to constitutional rights. It is true, for instance, in the case of the obligation to prevent homelessness. The right to accommodation or shelter should be treated as the fundamental right of human beings originated in human dignity. This position has

<sup>36</sup> Verdict of the Constitutional Tribunal of 15.11.2000, P 12/99, OTK 2000, No. 7, item 260

<sup>37</sup> A. Wróbel, *Obywatelstwo polskie a prawa i wolności konstytucyjne*, [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J. Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa*, T. I *Zasady ogólne*, Kraków 2002, pp. 148–152

<sup>38</sup> Dz. U. [Journal of Laws] from 2012, item 161.

<sup>39</sup> Article 4 of the Act of Polish Citizenship.

<sup>40</sup> Article 30 of the Act of Polish Citizenship.

been supported by the provisions of the Universal Declaration of Human Rights, ratified by Poland. Article 25, section 1 of this act indicates that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including, among other things, housing. Depriving non-citizens of the possibility to use the social security rights as guaranteed by the Constitution is also contrary to the more and more common phenomenon of constitutional universalisation of civil rights. As it has been emphasized in the doctrine, it should be “[...] noted that the catalogue of civil rights restricted solely for the citizens of a given country is being continually limited by the clear intervention of the lawmaker, who universalizes civil rights and freedom in such a way that they are qualified to be human rights [...] The extension of the constitutional catalogue of human rights by the elimination of the scope of civil rights is undoubtedly closely related to the issues of obligating the states by provisions of international conventions and agreements that define human rights.”<sup>41</sup>

Finally, it should be noted that only defined groups are entitled to the part of the constitutional guarantees regarding social security. This refers to the status of children, pregnant women or the elderly where the right to particular health care is concerned. Similarly, special status has been conferred to the disabled who are exclusive recipients of the right to special help pursuant to article 69 of the Constitution.

### **The constitutional regulations’ impact on the content of social security rights in the domestic legal system**

The constitutional provisions have an undoubtedly significant impact on the content of social security rights in the Polish legal system.

Most importantly, the constitutional norms define the minimum standards of social rights. Thus, they constitute, at least in theory, the guarantees that the legislator will not limit the rights to a standard below the minimum which arises from the Constitution. Yet, it does not mean that the rights may not be modified and even limited. It may not, however, lead to a breach of the essence of this right. Every right that constitutes the content of the social security has some characteristic features, without which it would be impossible to say that this right exists and it would be necessary to recognize that it is about some other rights. The collection of such features is frequently referred to as the core or kernel of the right. As it has been noted by the Constitutional Tribunal, the legislator’s competence to modify and limit the social and economic rights may not be used to undermine the essence of those rights.<sup>42</sup>

It is also worth indicating that many constitutional norms regarding the social security right have the status of legislative provisions. These norms constitute certain direction that should be followed by the legislator. Therefore, the social rights are not static but

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<sup>41</sup> A. Wróbel, *Obywatelstwo polskie a prawa i wolności konstytucyjne*, [in:] M. Chmaj, L. Leszczyński, W. Skrzydło, J. Z. Sobczak, A. Wróbel, *Konstytucyjne wolności i prawa*, T. I *Zasady ogólne*, Kraków 2002, p. 155.

<sup>42</sup> Verdict of the Constitutional Tribunal of 15.10.1997, K 11/97, OTK 1997 No. 3–4, item 39.

dynamic.<sup>43</sup> Constitutional regulations influence their often slow but stable development. The provisions of article 67, section 1 of the Polish Constitution offer a good example. It imposes on public authorities the obligation to pursue a policy aiming at full, productive employment, by implementing programmes to combat unemployment, including the organization and support of vocational consultancy and training, as well as public works. This regulation is considered to be the typical programme norm.<sup>44</sup> Notwithstanding, the Constitutional Tribunal has, on the basis of this regulation, recognized that this regulation indicates a certain objective (task) for the public authorities. At the same time it should be noted that there is a dispute on the grounds of the Polish Constitution over the extent to which the legislator is obligated by the guidelines arising from the programme norms. It seems that the position in favour of admitting the normative nature only to those provisions of the Constitution from which it is possible to derive specific obligations for authorities that use them, is prevalent. Regardless of whether the programme norms included in the regulations on the social security rights are acknowledged as binding or just indicate a certain course of action, in my opinion their significance is crucial for the development of rights arising from the Polish Constitution.

Finally, the constitutional norms introduce an axiological element to the procedure of lawmaking.<sup>45</sup> Axiology, understood as a specific system of values, plays a significant role in the shaping of the social security rights as analysed in this study. One may even propose a thesis that the system in which social rights are to function and develop, must adhere to specific values. Those values on the grounds of the Polish legal and axiological system include, for example, social solidarity, democratic principles of the rule of law, concern about providing everyone with the basic conditions of social security. Naturally, the Polish Constitution embraces not only values fostering the development of social rights but also those that limit them. Such rights include the obligation to consider the necessity to ensure the budget equilibrium of the state and in consequence, the adaptation of the scope of social rights to the economic capacities of the State Treasury. Likewise, the recognition of the primacy of the interests of the individual, and not the community, in many issues may be interpreted as a difficulty in developing social rights. According to the judicature of the Constitutional Tribunal, "The obligation imposed on the legislator to fulfil the social guarantees expressed in the Constitution by means of appropriate normative regulations does not entail the obligation to increase the benefit system to the maximum. The protection of social rights should denote such a shaping of statutory solutions that will constitute the optimal realization of the content of the constitutional law."<sup>46</sup>

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<sup>43</sup> Na temat skutków orzeczeń Trybunału Konstytucyjnego cf. R. Banińska-Górecka, *Skutki prawne orzeczeń Trybunału Konstytucyjnego w dziedzinie ubezpieczenia społecznego*, Warszawa 2014.

<sup>44</sup> T. Zieliński, Prawo do pracy – problemy konstytucyjne, *Państwo i Prawo* 2003, col. 1, p. 11.

<sup>45</sup> A. Kość, Relacja prawa i wartości w społeczeństwie otwartym, [in:] *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego* eds. I. Bogucka, Z. Tobor, Kraków 2003, pp. 142–146.

<sup>46</sup> Verdict of the Constitutional Tribunal of 11.12.2006, SK 15/06, OTK-A 2006, No. 11, item 170.

### Threats to social security rights in times of economic crisis

It cannot be denied that economic crisis in the overwhelming majority of cases results in the limitation of social rights. It is caused by the fact that it is these very rights that generate the greatest costs for the budget of the state and, as such, they are the easiest way to counteract the decrease in income from taxes during a time of economic slowdown. Two cases resulting in the limitation of social rights might be indicated. First of all, the state may use institutional constraints. In this case, the withdrawal of certain benefits, the elimination of allowances or their suspension for a definite or indefinite period of time takes place. The second form, which causes a breach of social rights, entails the introduction of quantitative limits. These limits result from a lack of financial resources, as a result of which the state has no capacity to pay benefits. These limits mainly apply to benefits of an optional nature, initiated depending on the financial resources available in the budget of the entity responsible for the payment of a given benefit. In extreme cases, this limit may lead to the fact that obligatory benefits (e.g. pensions) are not provided. The more serious threat for social security rights is undoubtedly the first of the aforementioned limits. If a certain institution of a social right has been eliminated from a given legal order, the process of its restoration is long and very difficult. Yet, these situations are not as common as the cases of quantitative limits I have mentioned.

On the grounds of the Polish legal system, the economic crisis poses the greatest threat for those social provisions guaranteed by the Constitution, the content of which has been delegated by the lawmaker to the ordinary legislation or limiting the capacity of pursuing its performance only within the limits stipulated in the legal act. In such a case, provisions of the Constitution may, to a certain extent, prevent the limitation of social rights. According to the judicature of the Constitutional Tribunal, there are two categories of social rights, stipulated by provisions of the Constitution: those that may be pursued only “within the limits stipulated in the legal act” (generally their constitutional guarantees assume the form of the programme norms); and those to which no such limits apply. Obligating the Legislator with the latter constitutional guarantees is undoubtedly stronger, despite the fact that the concretisation of the scope and content of the rights belonging to that category will repeatedly take place by statutory authorisations. In consequence, it must be stated that the limits and character of reference to the statutory regulation cannot be the same for both analysed categories. With regard to the rights and freedom that may be pursued solely within the limits stipulated in the act<sup>47</sup>, establishing the content and wording of particular rights is left to the freedom of the legislator, in the case of the latter category, the content of rights in their fundamental elements and their limits are directly shaped by the constitutional norm, even if the concretisation or method of realisation of those guarantees depended on statutory regulations. It should be noted that the Polish Constitution allows the perusal of the majority of the social law guarantees discussed in this study, only within the limits prescribed by a legal act. This solution should be considered as negative. Social rights are, in my view, human rights and as such they should not depend in their entirety or in any substantial part on the ordinary legislator’s opinion.

<sup>47</sup> The catalogue of such rights is regulated on the grounds of the Polish Constitution in article 81.

Their content (the core) should be defined by constitutional provisions. Such a solution provides a strong guarantee that the essence of social rights will not be violated.

An important role in preventing the threat that the economic crisis poses to the social security rights is played by the repeatedly quoted Constitutional Tribunal. It is a judicial authority, inducted to assess the compliance of normative acts with the Constitution. The Constitutional Tribunal adjudicates on the cases of compliance of international acts and agreements with the Constitution, the compliance of acts with ratified international agreements, the ratification of which required prior consent expressed in an act, the compliance of provisions of the law issued by central state authorities with the Constitution, ratified international agreements and acts and so on. It also examines constitutional complaints which may be lodged by everyone whose constitutional rights or freedom have been violated.<sup>48</sup> The Tribunal is perceived as a law enforcement body protecting the observation of rights and freedom, including the social security rights, as guaranteed by the Constitution.<sup>49</sup>

In respect to the analysed subject, the role performed by the Tribunal is mostly about adjudicating whether the ordinary legislator has not violated the constitutional standards of the social security rights. Furthermore, it exerts considerable influence on the interpretation of constitutional decisions and determines the precise content of often general regulations.

Within its judicature, the Constitutional Tribunal has discerned the threat which the attempts to limit the effects of economic crises pose to the social security rights. It has indicated that the concept of social equality and solidarity require that the burden of economic crisis be imposed on all social strata and not fall in particular on only some of them and that social solidarity underpins the redistributive function of the principle of social justice.<sup>50</sup> It has also indicated that the constitutional social security right does not therefore mean that the citizen should not suffer the consequences of the economic misfortunes of the country. It by no means absolves the legislator making decisions in view of the crisis of public finances from spreading specific burdens fairly to particular groups of citizens with respect for constitutional principles, norms and values.<sup>51</sup> It should be further noted that the Constitutional Tribunal consistently indicates that social rights are not absolute and may be limited in a situation of economic difficulties. The border of acceptable limitations is, in such cases, the obligation to ensure the minimum guarantees arising from constitutional provisions.

Finally, it is worth noting that the economic crisis in Poland, milder than in other countries suffering from an economic slowdown, has had a lesser impact on the social security rights. The legislator has made endeavours to eliminate the effects of economic

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<sup>48</sup> Z. Czeszejko-Sochacki, *Orzeczenia Trybunału Konstytucyjnego: pojęcia, klasyfikacja i skutki prawne*, *Państwo i Prawo* 2000, col. 12, p. 19.

<sup>49</sup> J. Trzeciński, *Trybunał Konstytucyjny – regulacja konstytucyjna i praktyka*, [in:] *Sądy i Trybunały w Konstytucji i praktyce* eds. W. Skrzydło, Warszawa 2005, p. 102 at seq.

<sup>50</sup> Verdict of the Constitutional Tribunal of 30 January 2001, file no. K 17/00, OTK ZU No. 1/2001, item 4.

<sup>51</sup> Cf. Verdict of the Constitutional Tribunal of 16 June 1999, file no. P 4/98, OTK ZU No. 5/1999, item 98, part III, point 4.

crisis, mainly by the liberalisation of provisions regulating the entitlements of persons that regulate employment.<sup>52</sup> This mainly refers to solutions regarding working time or the conclusion of employment contracts for a definite period of time. Despite choosing this direction of eliminating the effects of economic slowdown, even in Poland some erosion of social rights may be noticed.

### **Assessment of the future of social security rights in light of the Constitution**

The evaluation of social rights through the prism of the Polish Constitution leads to moderately optimistic conclusions. There are basic rights within the social security rights in the Polish Constitution. The definite stand of the Constitutional Tribunal on the necessity of the Legislator's maintenance of the minimum as guaranteed by the provisions of the basic law allows the assumption that social rights will constitute a permanent and vital element of the Polish legal system. It should be particularly noticed that many constitutional norms indicate the necessity to undertake positive action that should, in consequence, lead to the development of social rights.

One should also discern numerous threats. Many social security rights regulated in the provisions of the Constitution are the programme norms – hence, the Constitution indicates their realisation as a certain objective, and leaves the methods of its realisation to the legislators' discretion. In such cases the influence of the constitutional provisions on creating specific legal regulations is limited and often even illusory. The economic crisis may also have an adverse effect on the rights of Poles within the social rights. In this case, however, the impact should not be significant, as the economic crisis in Poland has not been particularly severe to the Polish economy. Finally, it is necessary to emphasise that judicatures of the Constitutional Tribunal have been repeatedly ignored. This carries the risk of the attempt to circumvent the minimum standards of social rights stipulated in provisions of the Polish basic law.

Despite the threats which have been indicated, in my opinion, social rights have found a permanent place in the Polish law system and even though they may be temporarily limited, these changes will not be of a fundamental nature. In conclusion, it is worth referring again to the position of the Constitutional Tribunal whose verdict issued on 14 June 2014 indicated that “the legislator's freedom to shape the scope and form and concretization of the content of social rights, including the right to sickness benefit is far-reaching. It is determined by the nature of social rights denoting the obligation for benefits, which requires the harmonization of needs and expectations as well as the possibility to satisfy them. In practice, the scope of implementation of the social security rights depends on the state's economic situation, the ratio of the number of working individuals to contribution-payers, the number of beneficiaries and their affluence, the established social pattern of securing one's existence in old age or in the period of decrease in vital forces, as well as anticipated economic and social trends, in particular the demographic

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<sup>52</sup> In particular, the act of 01.07.2009 on mitigating the effects of economic crisis for employees and entrepreneurs (Dz.U. [Journal of Laws] No. 125, item 1035, as amended.) constituted the element of anti-crisis legislature.

ones (...) The legislator's freedom to shape this right is not, however, unlimited; (...) while regulating the subjective social security right, the legislator may not disregard the principles of the binding social insurance system, by which he became obligated within the legislative freedom granted and all the more may not violate the essence of this right (...) the obligation to maintain the essence of the social security right constitutes, in fact, the minimum scope of this right which the legislator is obliged to maintain (...). This is understood as the necessity to secure the individual's basic needs such as human dignity, freedom and equality which arise from such values of the democratic state.”

### **Summary**

The evaluation of social rights through the prism of the Polish Constitution leads to moderately optimistic conclusions. There are basic rights within the social security rights in the Polish Constitution. The definite stand of the Constitutional Tribunal on the necessity of the Legislator's maintenance of the minimum as guaranteed by the provisions of the basic law allows the assumption that social rights will constitute a permanent and vital element of the Polish legal system. It should be particularly noticed that many constitutional norms indicate the necessity to undertake positive action that should, in consequence, lead to the development of social rights.

**Keywords:** Poland, social security rights, constitution

