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REPORT

Examining of facts in cases involving abstract control of normative acts

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1. Primary characteristic of the Constitutional Tribunal

The Constitutional Tribunal has traditionally been described as the "*court of law*". This description referred to the Kelsen's model of constitutional jurisprudence and was comprehended literally. While reviewing the hierarchic conformity of norms the Constitutional Tribunal was to act in disengagement to specific factual situations. The abstract control of norms was opposed against the activity of ordinary courts, which while resolving in individual cases referred to facts.

Traditional models of law application did not refer to the wider problem of abstract control of norms; neither did they take into account the interpretation of the constitution. For these models concentrated on judicial application of law. The investigation of facts was mainly analyzed with regard to the interpretation of provisions, which were to be the grounds for individual rulings (judgments, decisions).

2. Theoretical-legal grounds for investigation of facts. Collision of principles – problem of norms or facts?

From the very start the constitutional jurisprudence practice emphasized the significance of facts in the constitutional review of law. The so called *difficult cases*, frequently occurring in the jurisprudence of constitutional courts are of special interest in light of facts investigation.

The discussion on *difficult cases* was part of a broader dialogue which after World War Two, was connected with the criticism of legal positivism (*cf.* works of G. Radbruch, L. L. Fuller, or R. Dworkin). And this was conducted from different philosophical approaches. Positivism itself also evolved (known as *soft positivism*), mainly revealed in works of H.L. Hart[1]. Rapprochement of opinions was observed among others, in the area of relations between law and morality, especially intensified in the constitutional plane. The philosophical and theoretical-legal concepts directly or indirectly referred to the application of the constitution and to the constitutional review of law. R. Dworkin's theories were especially significant for the investigation of facts in the process of constitutional review of law. These referred to the origins of force and structure of norms, relations between the constitutional court and the legislator, and also to the role and position of the judge in the contemporary society[2]. *Dworkin's theory on the notion of the principle of law* deserves special emphasis. In his opinion, it imposes an obligation or prohibition of the proceedings, not determining conclusively however the decision of the organ applying the law. The application of the principle is not always necessary in certain circumstances.

The principle is rather an argument in favor of a specific legal consequence, than a norm automatically implying such consequences. In the legal system **conflicts of principle are inevitable**, especially on constitutional grounds. Prevalence of one of the principles, does not

[1] G. Radbruch, Rechtsphilosophie, Studienausgabe, Heidelberg 1999, R. Dworkin, Biorąc prawa Poważnie, Warszawa 1998, L.L. Fuller, Anatomia prawa, Lublin 1993, H. L. A. Hart, Pojęcie prawa, Warszawa 1998.

[2] The whole system of his opinions was expressed in the work mentioned above, as well as in the Law`s Empire, Oxford 1998 and A Matter of Principle, Cambridge – Massachusetts 1985

mean the derogation of the other principle. And so it is not precluded that in a different situation the second principle may prevail.

The described by Dworkin mechanism of resolving collisions between principles differed from the traditional methods of resolving conflicts of norms (e.g. *lex posteriori*) **. The sphere of facts constitutes an immanent element of this method i.e. the case of collision of principles[3].** In the 70-ies of the last century, Dworkin persuasively justified the necessity for constitutional courts to reach out to the fact-sphere[4]. Principles of law (constitutional principles), despite their general character, not only began to play the sole role of programmatic norms indicating the general directions of legislative activity, but also a new role as the grounds for ruling of specific cases by constitutional courts.[5]

Without going further into the problem, it can be clearly stated that the significance of facts in the process of abstract constitutional review of law[6] has been generally appreciated and emphasized on theoretical-legal grounds, for at least twenty years now.

3. The procedure and criteria of normative acts review

The Polish Constitutional Tribunal only examines the conformity of normative acts to the Constitution (statutes on law application remain outside its competence, i.e. judicial rulings or administrative decisions).

The constitutional review of normative acts follows three criteria:
1. the examination of the competence of public authority organs to issue a normative act,
2. the examination of the procedure for issuing a normative act, and finally
3. the examination of the substantial conformity of the normative act to acts of higher standing, especially the constitution.

Direct reference to facts is specifically made when the Constitutional Tribunal is determining whether the normative act has been issued in observance of the binding procedure. Especially interesting is however the role of fact examination when the substantial conformity of normative acts is the subject of review by the Constitutional Tribunal.

For obvious reasons, the area of facts is of significance when reviewing cases initiated by a constitutional complaint or a question of law initiated by court. Such cases are directly related with specific judicial proceedings. But the importance of facts for the case should also be analysed within the so called *abstract review*, when submitting an application having no reference to any specific fact of state.

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[3] R. Dworkin, Biorąc …, s. 56.

[4] In the civil law system, mostly the German doctrine referred to Dworkin's ideas, while developing their own suggestions for resolution of collisions of principles and conflicts of rules, adequate to the codified law system. R. Alexy, Teorie der Grundrechte, Baden – Baden 1985, J. R. Sieckmann, Regel und Priznipienmodelle des Rechtssystem, Baden – Baden 1990.

[5] The significant role of the fact sphere in the process of interpretation of law has also been recognized by representatives of other trends in legal philosophy, a.o. by representatives of the hermeneutics and the, so called theory of rational application of law. H.-J. Koch, H. Rüβmann, Juristische Begründumgslehre, München 1982.

[6] Probleme der Verfassungsinterpretation (Hrsg.) R. Dreier, Baden – Baden 1976.

4. Substantial review of norms

5. 4.1. Assessing the contents of a constitutional norm

Provisions of the Constitution, being the grounds for abstract review, are usually of general character and do not directly impose or forbid specific conduct. It is the legislator's task to decide on the method of reaching the goals provided for in the Constitution. The chosen method is however subject to constitutional review of law. Two fundamental objections appear here: First of all, the C**onstitution frequently refers to valuating, undetermined and general terms**. And so the assessment of conformity to the Constitution **requires making reference to the empirical plane and the correlating of this plane with the constitutional axiological plane**. Moreover, the goals accompanying the law-making procedure often collide with each other. This is most visible in cases involving the execution of rights of individuals, when the execution of rights of one category leads to the limitation of rights of others (e.g. in national security cases). The resolving of such collisions is impossible without referring to the fact sphere[7].

The **principle of proportionality** motivated by the prohibition of arbitrary actions and the prohibition against excessive interference by state organs into the rights of the individual, is an instrument of extraordinary significance for resolving collisions of constitutional principles. It contains an injunction for the legislator to choose the necessary means with regard to the anticipated goal (requirement of necessity), and the injunction to choose effective and least disturbing solutions (requirement of usefulness). The requirement of proportionality *sensu stricto* is also a necessary element of the principle of proportionality. **To assess the observance of these requirements, reference to the empirical (fact) sphere is imperative.** A legislator's rational behavior should be based on the assumption that he may not impose any limitations on the rights of the individual, if the achieving of the anticipated goal is impossible, even if it appears to be the best means. To approve such an assessment the constitutional court must rely on true facts and sometimes even on the axiology. The collision of constitutional provisions itself requires making reference to the fact-sphere. The judgment of 12th January 2000 (P 11/98), in which the collision between the protection of property and the rights of lodgers appears quite expressively, is such an example.

The application of the principle of proportionality is not the only situation in which the Constitutional Tribunal makes reference to facts in the process of interpreting of the Constitution. The collision of constitutional principles appears in numerous cases, it is almost a typical occurrence in the jurisprudence. Balancing is required, for example, in cases involving the protection of privacy and freedom of information, protection of economic freedom and consumer's rights, freedom of expression and protection of personal rights, freedom of assembly and public order, etc. **The process of balancing principles is immanently inscribed in the concept of interpretation and application of constitutional norms.** Making reference to the empirical sphere is inevitable in such cases. It would be difficult to mention all such cases in a brief presentation and so I shall limit myself to only a few.

The method of balancing principles may lead to a change in the understanding of the provisions of the Constitution, e.g. by expanding their scope of application or their regulation. The expanded and common interpretation of the right to privacy, for the need of personal data protection is such an example. Yet another is the interpretation of the right to access public information. The development of new carriers for data storage and transmission

[7] Por. K. Wojtyczek, Ciężar dowodu i argumentacji w procedurze kontroli konstytucyjności norm przez Trybunał Konstytucyjny, Przegląd Sejmowy z 2004 r., nr 1, s. .10.

influences the understanding of this right. **Changes in our reality cause changes in the understanding of constitutional patterns, constituting the grounds for abstract review of norms[8]. In Poland, the continuously changing situation having impact on the interpretation of the Constitution was, so far, mainly related to the political transition**. The judgment of 15th February 1994 (K. 15/93), extending the scope of the term "*veteran*" may serve as an example. The judgment illustrates the thesis that axiological changes imply changes in the assessment of facts (certain persons involved in the fight against communist oppression have been vested the status of a veteran). In light of the Constitutional Tribunal's jurisprudence certain facts and thus legal terms acquire a different meaning.

The change in the present social relations is also of significance in the interpretation of the Constitution. The change in family relations, for example, effects in the amendment of the provision on family protection or in the new interpretation of the child's rights. The term "fact" itself in such cases is understood very broadly and includes relations between particular persons. The judgment of 6th July 1999 (P 8/98) in which the Constitutional Tribunal considered the regulation, granting the right to earlier retirement to care for the child only to the mother and allowing earlier retirement for the father only if the mother could not benefit from this right, to be inconsistent to the principle of equality and discriminatory, is an example of referring to a fact situation. The Tribunal considered the traditional division of social functions assumed by the legislator inappropriate in this particular case and such differentiation unjustified.

The broadly interpreted factual situation is also significant for the **assessment of the degree of protection** to be guaranteed to particular persons by constitutional rights. The judgment of 4th April 2000 (K 11/00) in which the Constitutional Tribunal declared infringement of the principle of human dignity protection by provisions permitting *street-eviction* of persons in a difficult economic condition, can serve as an example. The issuing of the judgment was preceded by a detailed examination of the situation of such persons and of the number and consequences of evictions performed so far.

The examples given above indicate to the dynamic character of the Constitution interpretation being dependant on the changing reality. Changes in the fact sphere have impact on the new (modified) interpretation of provisions of the Constitution accomplished in the jurisprudence of the Constitutional Tribunal. The mentioned exemplary cases do not only indicate to the influence of fact sphere on the interpretation of the Constitution and the interpretation dynamics. These cases also point out to the need of a broader understanding of the term "*fact*" and "*fact sphere*" in the jurisprudence of the Constitutional Tribunal. These terms have a **broader meaning** in the abstract review of norms than when issuing specific-individual rulings. The most adequate, to observe this difference, seems to be the term "***legislative facts***" present in American theory of law[9]. These describe social occurrences **defining the social context of the functioning of a legal norm** and the mechanisms governing these phenomena[10].

4.2. Defining the contents of reviewed norms.

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[8] B-O Bryde, Tatsachenfestellungen und soziale Wirklichkeit in der Rechtsprechung de Bundesverfassungsgerichts (in) Festschrift 50 Jahre Bundesverfassungsgericht (Hrsg.) P. Badura, H. Dreier Erster Band, Mohr Sibeck 1999, s. 558.

[9] J. Monahm, L. Walker, Empirical Questions without Empirical Answers, Wisconsin Law Review 1991, s. 569.

[10] For more to this subject, see: K. Wojtyczek, jw., s. 13.

Many of the above remarks refer not only to constitutional patterns, but also to provisions reviewed by the Constitutional Tribunal. In this context the problem of differentiating between the sphere of law-making and application of law arises. **The significance of this differentiation mainly results from the form of the Polish constitutional complaint**. The exclusion of the constitutional complaint against judgments, decisions, or other acts of law application from the Polish review procedure requires a clear-cut separation of law-making from execution of law. The Constitutional Tribunal reviews only such complaints where the **normative act** is the source of constitutional rights' infringement and denies substantial complaint review to the **law application act**. **In practice the observance of this difference is difficult.** The dividing line between the contents of the normative act, its interpretation and individual ruling is vague.

In practice, the answer to the question whether the challenged provision itself or rather its interpretation and application practice is the source of constitutional rights infringement, is frequently disputable. However, if the infringement of constitutional rights occurred at the law application level the Constitutional Tribunal cannot review such rulings. The leaving of such judicial rulings outside the scope of review is however unacceptable. Sometimes, the Constitutional Tribunal itself, adopts an interpretation of the provision conforming to the Constitution in its judgments, thus resolving such cases and eliminating other forms of interpreting the provision (inconsistent to the constitution). This is the so called *interpretative judgment*. If, however a uniform judicial jurisprudence exists then such an interpretation becomes the grounds for establishing non-constitutionality, even though a different interpretation would be possible (consistent to the Constitution). With the above indicated meaning the judicial jurisprudence becomes a legislative fact. This matter has been widely analyzed by the Constitutional Tribunal in its judgment of 27th October 2004 (SK 1/04).

The need to include the understanding of the reviewed norms in judicial jurisprudence does not only appear in cases of constitutional complaints and questions of law, but also with applications of abstract character.

5. Examination of facts and the relation of the Constitutional Tribunal with the law-maker.

The defining of relations between the Constitutional Tribunal and the legislator is the main and one of most controversial problems of constitutional jurisprudence. It is worth considering how the **postulate of** http://www.dict.pl/plen?word=pow%C5%9Bci%C4%85gliwo%C5%9B%C4%87&lang=EN**restraint** (self-limitation) addressed to constitutional courts may be implemented in the process of abstract review of a normative act when interfering into the legislative sphere, with the Constitutional Tribunal making reference to facts.

I would like to limit myself here to two issues: the review of the so called legislative forecast by the Constitutional Tribunal and the distribution of the burden of proof in the proceedings before the Tribunal. The legislator while adopting an act of law on the grounds of existing facts, predicts the implications of the adopted act. And so a question arises, whether it can be alleged that in the process of constitutional review of a normative act the legislator erroneously evaluated the existing fact situation and the scope of facts considered was too narrow. This had impact on the functioning of the normative act. Can we discuss the legislator's "guilt" here? (Should he have been able to predict specific situations)?

The Constitutional Tribunal is usually in a better position than the legislator, being able to formulate his assessments *ex post.* It seems that in certain situations the Constitutional Tribunal may be able to evaluate the http://www.dict.pl/plen?word=trafno%C5%9B%C4%87&lang=ENaccuracy of normative solutions, also with reference to the fact sphere. Such evaluation has considerable significance, yet not decisive for the final wording of the judgment. **If a legal act is malfunctioning and thus infringes the Constitution, then law-maker's mistakes strengthen the evaluation of its non-constitutionality. Gross disfunctionality of a specific regulation, stated on the grounds of true assessment of its application may constitute the basis for determining inconsistency to the constitutional norm** (such an interpretation was adopted by the Constitutional Tribunal in the National Health Fund case – **K ..../04)**

However, it is not necessary to consider the legislator's "*fault*" in the process of abstract review of norms. **The fact situation existing at the moment of the judgment has fundamental significance for evaluating the constitutionality of a legal act. The legislator cannot be excused for being unable to predict the fact situation at the moment of issuing of the legal act. And so the rule of judicial restraint should not limit the possibility of fact examination in the process of abstract review of norms, and of the evaluating on the constitutionality of a legal regulation**.

The examination of facts in the course of abstract review of constitutionality of normative acts is related to the distribution of the burden of proof and argumentation. The subject initiating the procedure before the Constitutional Tribunal has to indicate arguments against the presumption of conformity to the Constitution.

Such an opinion is consistent to the postulate of judicial restraint. However, public interest sometimes justifies activities of evidence collection initiated by the Constitutional Tribunal itself[11]. This frequently concerns the evaluation of so-called legislative facts. Sometimes the recognition and assessment of these facts remains outside the applicant's possibilities. The examination of facts has however a significant impact on the final judgment in the case pending before the Constitutional Tribunal.

The transparency of motives, followed by the Constitutional Tribunal, requires the presentation of facts constituting the grounds for the decision. This results from the valid constitutional standards of judicial decision reasoning. In general these standards refer to rulings on the freedoms and rights of the individual.

The motives of judgment are important for both the applicant and all other subjects, who are entitled on the grounds of such judgment to request revoking of previously issued judicial decisions or administrative decisions (Article 190 (4) of the Constitution). Knowledge of motives is equally important for the legislator for future legal regulations necessary after the judgment. The duty to clearly present the reasons referring to the evaluation of facts, may be derived from the rule of a democratic state ruled by law, and especially from the principle of trust, prohibition against excessive interference, right to a fair trial, rule of democracy and the protection of dignity[12]. **The principle of trust of citizens to the state, implying a dialog**

[11] K. Wojtyczek, Ciężar ..., and a work, quoted by this author: J. Kokott, The Burden of Proof in Comparative and International Human Rights. Civil and Common Law Approaches with Special Reference to the American and German Legal System, The Hague – Boston 1998.

[12] For more to this subject, see: U. Kischel, Die Begrünndung. Zur Erläuterung der staatlicher Entscheidungen gegenüber dem Bürger, Tübingen 2003, s. 34, 63 i nast.

between the citizens and the courts deciding on their rights is particular significant. The indication, by the Constitutional Tribunal, of facts and of their role for the issued judicial decision, is the effect of this dialog.

6. The reasons for the judicial decisions of the Constitutional Tribunal and their consequences.

Facts also play an important role in the assessment of consequences of rulings passed by **the Constitutional Tribunal within the scope of abstract review.**

Judicial decisions of the Constitutional Tribunal are, to a certain degree, similar to results of legislative actions – they lead to amendments in the legal system. Sometimes the Constitutional Tribunal is in a similar position as the legislator developing the so called legislative prognosis. **When drafting its judicial decisions, the Constitutional Tribunal frequently refers to the existing and hypothetical legislative facts**. From the Polish perspective it is worth mentioning **two situations** in which true potential effects of judicial decisions may play an important role. The first refers to the **postponement of the loss of validity** of a provision considered by the CT as non-constitutional. The second to a specific reshaping, in the CT's judicial decision, of the **position of the person lodging a constitutional complaint**.

In the first case the Constitutional Tribunal can specify that the end of binding force of a normative act will be prolonged if immediate effect of judgment could lead to an even greater state of non-constitutionality or even a gap in law. The judgment of 12th January 2002 (P 9/01), where provisions referring to the use of official judicial forms for initiating the procedure before the court were considered by the Constitutional Tribunal non-constitutional, is an example. The Tribunal postponed the loss of validity of these provisions for over three months, declaring that their period is necessary to assure the possibility to initiate the procedure.

The applying of non-constitutional provisions for a specified period of time is provided for in the Constitution, but in case of the constitutional complaint appears to be difficult. Further application of the non-constitutional provisions could deprive the complainant of the possibility of changing his legal situation. Such a situation could be inconsistent to the sense of justice and the function of the constitutional complaint itself. For this reason the Constitutional Tribunal admits that only the applicant, even in the case of postponement of loss of validity of the non-constitutional provision, has the possibility of reopening of the proceedings, and the non-constitutional provision will not be then applied.

Such a decision was for the first time pronounced in the judgment of 18th May 2004 (SK 38/03). The Constitutional Tribunal considered non-constitutional the code of procedures in cases of minor offenses in the scope in which it deprived the victimof the right to participate in proceedings aiming at reversal of the penal fine issued to the offender. The Constitutional Tribunal postponed the loss of validity of the challenged provision, stating that legislator's interference is necessary to guarantee the rights of participants in offence cases. However, in its sentence the Tribunal explicitly stated that loss of validity of the provision does not make the re-opening of the proceedings by the applicant impossible. Without exaggerating, it can be said that the specific fact situation of the applicant has lead to the forming of the judgment's contents, to the issuing of the judgment.

The necessity to consider consequences of judgments stating non-constitutionality of reviewed provisions, is one of the reasons for issuing of such specific judgments by the Constitutional Tribunal. These judgments modify legal consequences of non-

constitutionality of provisions and adjust these consequences to the specificity of cases reviewed by the Constitutional Tribunal.

7. Conclusions

- The Polish Constitutional Tribunal cannot be characterised only as a "*court of law*", as the examination of facts is an inseparable element of abstract review of norms.
- The empirical area plays an important role in the interpretation of the Constitution, and while evaluating on the conformity of normative acts to its provisions.
- The above statement is of great significance for evidence collection by the CT and for the distribution of the burden of proof in this proceedings.
- The scope and method of fact examination during abstract review of constitutionality of norms improves the possibility legislation interference by the Constitutional Tribunal.
- The empirical sphere has impact on the method of defining consequences of own judgments by the Constitutional Tribunal.
- In case of the Polish Constitutional Tribunal the following problems connected with the examining of facts should be emphasized:
    - the recognition of uniformity of jurisprudence as a "*fac*t" imposing significance to the reviewed provisions,
    - making reference to fact situations to justify the postponement of validity of non-constitutional provisions,
    - granting the applicant lodging a constitutional complaint the right to re-open the proceedings, even when the Constitutional Tribunal postpones the loss of validity of non-constitutional provisions. The exceptionality of this situation results from the fact that such a right has neither been directly provided for in the Constitution, nor in the CT Act. The Tribunal derives its *ratio legis* from the specific situation of the person lodging the constitutional complaint.