

THE PRINCIPLES OF SOCIAL JUSTICE – THE PROCEDURAL ASPECT

Prof. Dr. habil. Janusz Niczyporuk

Maria Curie-Skłodowska University in Lublin, Poland
e-mail: janusz.niczyporuk@mail.umcs.pl: <https://orcid.org/0000-0003-1632-1784>

Abstract. We still do not have a fully developed theory of principles of social justice, although it refers broadly to the theory of justice comprehensively outlined. Although it remains important to determine the nature of the principles of social justice, which must be properly addressed at the outset, it is only the starting point for determining the way the principles of social justice should operate. It is both legal basis and properly structured legal procedures that are essential for the application of the principles of social justice. As far as legal basis is concerned, reference must always be made to the Polish constitutional provision which requires “implementing the principles of social justice”. On the other hand, the aspect of legal procedures must take account a certain type of constitutional review of “the implementation of the principles of social justice”. The constitutional review of the “implementation of the principles of social justice” was based on the constitutional complaint and the extraordinary complaint.

Keywords: constitutional complaint; extraordinary complaint; implementation of the principles of social justice; principles of social justice.

INTRODUCTION

The issue of the principles of social justice has so far been addressed in few academic studies, which do not yet allow final conclusions to be drawn on all the issues subject to analysis [Lang and Wróblewski 1984; Sadurski 1988; Ziemiński 1996]. As a result, we do not have a fully developed theory of the principles of social justice, although it is, of course, based on a comprehensively established theory of justice [Tokarczyk 2005, 203-36]. Basically, there were attempts to answer two questions: “what are” the principles of social justice and “how” do the principles of social justice work. Obviously, these two questions complement each other, and there is also a matter of correct sequence of asking these questions. While the answer to the first question has been subject to an in-depth legal analysis, it cannot be found with regard to the second question. The constitutional postulate of “implementation of the principles of social justice” by the Republic of Poland forces

a change in the current approach.¹ Although the determination of the nature of the principles of social justice is still an important issue to be properly resolved, it only marks a starting point for determining the operation of the principles of social justice.

It first seems necessary to state that the principles of social justice are a legal term that should additionally be considered constitutional. The very term “principles of social justice”, which must also, after all, be “implemented” (respected) by the authorities of the Republic of Poland, is not a specific name, but defines a certain way of directing the actions of the State authorities and of other entities who have powers of a similar kind, so that it always follows a certain pattern of the arrangement of social life [Ziemiński 1996, 9]. As a result, the principles of social justice identify criteria in which: the possibility of extreme differentiation between members of society is limited; formulas are adopted which are rather substantive but not too radically divergent from egalitarian ones; the idea (by the way: convergent with Christian social doctrine) that everyone should be assisted to meet their needs if they are unable to meet them on their own is adopted; in particular, this help concerns the start in life of young people [ibid., 88-89].

Since the term “principles of social justice” does not have a legal definition, it is of course necessary to look for its legal meaning. Unfortunately, the principles of social justice are difficult to clearly define, even though their positive charge and capacity to realise the very specific values of any community may be sensed [Chauvin 2020, 5]. In general, this is a consequence of the three concurrent ways of understanding social justice: a model of analysis derived from Catholic social teaching combining social justice with the principles of common good and subsidiarity interpreted as a duty of the community; the postulate, linked to the left-wing (not only socialist) tradition, to uplift the living conditions of the working class; the model developed within the tradition stemming from John Rawls’ thought, which can be described as social democratic liberalism [Morawski 2014, 116]. Admittedly, the first way of understanding social justice seems to be dominant, mostly due to the established line of case law of the Polish Constitutional Court [Trzeciński 2016, 186].

1. THE ESSENCE OF THE PRINCIPLES OF SOCIAL JUSTICE

The essence of the principles of social justice in the legal system most often boils down to a general clause and a legal principle [Chauvin 2020, 7]. From the perspective of the identification of social justice principles as a general

¹ Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended [hereinafter: the Constitution of the Republic of Poland].

clause, it is necessary to assume that actually this is about an extra-systemic reference. Accordingly, extra-legal rules would ultimately be incorporated in the legal system based on a reference provision that directly sets out the principles of social justice. However, this implies vagueness of the assessments that could legitimately be made on the basis of principles of social justice. As regards the identification of social justice principles as a legal principle, the problematic issue is its prescriptive relevance, as they would then have to be used to assess a substantive rule of law, while these have a rather descriptive meaning, as they only affect the ordering of the norms of the legal system [Ziemiński 1996, 53]. Therefore, social justice principles cannot be considered as a typical general clause or legal principle.

With such an assumption, the principles of social justice cannot have a normative character. It should also be noted at this point that there is a norm applicable under an explicit constitutional provision, which requires that the principles of social justice be implemented in law making and law application [ibid., 52]. It is therefore necessary here to distinguish the normatively imposed obligation to implement the principles of social justice from the very set of these principles [Chauvin 2020, 7]. As this set consists not of directly applicable legal norms (norms-rules), but of principles that only point to the direction for the exercise of the legislative competence or a right vested in someone [ibid.]. After all, they refer to the postulated or implemented way of regulating matters in a given area [Ziemiński 1996, 53]. In fact, they present a descriptive approach, which should nevertheless be understood in a specific way, as they serve to define the guiding idea when it comes to a certain fragment of the legal system [ibid.].

The principles of social justice certainly do not become binding legal norms, even if they are given the shape of specific rules of conduct [ibid.]. This is so because they are merely directives for independent assessment or, in other words, directives to formulate evaluations of cases under consideration and to determine the legal consequences following these evaluations [Nowacki 2003, 141]. Nonetheless, we can only speak here of reference to one's own assessments, which have yet to be formulated in the process of making them [ibid.]. Thus, these assessments cannot refer to extra-systemic rules, because these simply do not exist [ibid., 140-41]. The assessment process should therefore take into account all, including: "the distinctiveness of each individual case", "the circumstances of each individual case", "the totality of all the circumstances of a particular case", "the circumstances of the case existing at a particular place and time" [ibid., 138]. Hence, only an individualised assessment of the "case" under consideration makes it possible to determine its legal consequences [ibid., 138-39]. It is therefore practically impossible to present the principle of social justice in the singular form when the

constitutional provision forces the use of the plural form [Ziemiński 1996, 52].

2. THE MECHANISM OF SOCIAL JUSTICE PRINCIPLES

The mechanism of social justice principles must always be analysed in the context of legal transactions. Legal transactions are to be understood here as the entirety of legal relationships that arise as a result of acts in law. First, this requires consideration of the context in which the principles of social justice have been established. This is so because the principles of social justice must be interpreted taking into account other constitutional principles, such as in particular the principle of justice, the principle of equality, the principle of the common good and the principle of solidarity [Sokolewicz 2003, 58-59]. Furthermore, the principles of social justice must be subject to interpretation, which will additionally have regard to constitutional institutions, particularly: freedom of choice of profession and place of work, fiscal justice, the requirement of creating healthy and stable economic development, fiscal sustainability, the right of citizens and their representatives to set the directions and priorities of social and economic policy using democratic procedures [ibid., 60, 62].

The context of the application of the principles of social justice must then be concurrently considered. Essentially, it is about the application of the principles of social justice by State organs, which refers directly to the judicial bodies that exercise the constitutionally assigned administration of justice in the Republic of Poland. In that case, their application must fall within the competence of specific State organs. In contrast, this does not cover the application of the principles of social justice by other legal subjects, as this does not involve civic participation. Moreover, claims of a subjective nature cannot be directly derived in their application [Wróbel 2013, 144]. It is both legal bases and properly structured legal procedures that are essential for the application of the principles of social justice. As far as legal bases are concerned, reference must always be made to the Polish constitutional provision which requires “implementing the principles of social justice”. On the other hand, the aspect of legal procedures must each time take account of a certain type of constitutional review of “the implementation of the principles of social justice”.

The constitutional review of the “implementation of the principles of social justice” was based on the constitutional complaint and the extraordinary complaint. These two remedies are intended to protect the constitutional order in different areas of the operation of the legal system [Dobrowolski and Stępkowski 2022, 67]. This is so because while the constitutional complaint is a means of constitutional review of lawmaking processes, the extraordinary complaint turns out to be a means of constitutional review of the

application of law. It should also be added that constitutional complaint is a means of constitutional review of lawmaking process due to its object: the legal basis of a judicial or administrative decision; its purpose: the protection of constitutional freedoms or rights; and its model: constitutional freedoms and rights or obligations. In contrast, the extraordinary complaint is characterised by being a means of constitutional review of the application of law from the perspective of its object: a ruling of a common court or military court, its purpose: particularly the protection of constitutional principles or freedoms and rights of a human being and a citizen, its model: democratic state ruled by law and implementing the principles of social justice.

3. CONSTITUTIONAL COMPLAINT

Of course, constitutional complaint is a means of protecting constitutional freedoms and rights, and the right to exercise it is a constitutional subjective right of anyone whose freedoms or rights have been violated by a provision under which a court or public administration body has made a final decision on that person's freedoms or rights or obligations set out in the Constitution of the Republic of Poland [Florczak-Wątor 2019a, 260]. The Constitutional Tribunal then reviews constitutionality of the provision which was the basis for the final ruling in the individual case and which is of a normative nature, i.e. allows a general and abstract rule to be identified [Florczak-Wątor 2019a, 261].² The constitutional complaint is therefore always a complaint “against the provision”, not against a “specific, flawed application, even if that would lead to an unconstitutional effect.”³ The declaration of unconstitutionality of the legal basis of the ruling “should lead to the removal of unconstitutionality as far as possible, also in respect of individual decisions based on the unconstitutional norm.”⁴

Due to its characteristic structural features, the constitutional complaint in the Polish legal system aims primarily at protecting constitutionality of the legal order, whereas the elimination of individual unconstitutional decisions from legal transactions takes place only within the framework of regulating the consequences of a ruling on unconstitutionality.⁵ This requires the initiation of a separate proceeding, under the rules and procedure laid down in applicable provisions (Article 190 (4) of the Polish Constitution). Only Polish citizens, foreigners, stateless persons, legal persons and organisational

² Judgment of the Constitutional Tribunal, ref. no. SK 45/09, OTK ZU 2011, No. 9/A, item 93.

³ Decisions of the Constitutional Tribunal of 7 May 2013, ref. no. SK 31/12, OTK ZU 2013, No. 4A; and of 2 December 2010, ref. no. SK 11/10, OTK ZU 2010, No. 10A.

⁴ Judgment of the Constitutional Tribunal, ref. no. SK 14/18, OTK ZU 2019, No. A.

⁵ Judgment of the Constitutional Tribunal, ref. no. SK 7/06, OTK ZU 2007, No. 9A.

units without legal personality have a capacity to lodge a complaint if they demand the protection of constitutionally defined freedoms or rights or obligations,⁶ while public authorities and entities performing public functions, including local government units do not have this capacity.⁷ At the same time, it must be noted, when looking at the jurisprudence of the Constitutional Court, that such standing of the so-called public business entities is a contentious issue [Florczak-Wątor 2019b, 261].

Thus, it should generally be added that the jurisprudence of the Constitutional Tribunal allows the principles of social justice to be discussed by reference to its classical formulas. These formulas generally include the following: distributive and compensatory (commutative) formulas, contractual and non-contractual, formulas of reward (payment) and punishment (retribution), static and dynamic, substantive and formal, substantive and procedural [Tokarczyk 2005, 222]. As regards the principles of social justice, the following formulas will be the most appropriate: distributive, dynamic and substantive. Naturally, the principles of social justice are defined in a distributive formula, since we recognise when distributing public goods in society that: “just is what provides a balance and is proportional.”⁸ On the other hand, the principles of social justice in the dynamic formula refer to the rational ideal of “multiple cases of an arbitrary and variable nature” [Dupreel 1969, 266]. Finally, the principles of social justice correctly endorse the substantive formula as it renders “to anyone, according to what the law admits” [Domańska 2001, 52].

4. THE EXTRAORDINARY COMPLAINT

The extraordinary complaint should be considered as an extraordinary appeal against a final decision of only a common court or a military court ending the proceedings in the case, based on a general ground and at least one of three specific grounds, and this decision cannot be annulled or amended by way of other extraordinary appeals.⁹ The need for the state to comply with the principle of democratic state ruled by law implementing the principles of social justice is then considered as the general ground, while the specific grounds are: violation of the principles or freedoms and human and civil rights set out in the Constitution of the Republic of Poland, gross violation of the law by misinterpretation or misapplication, obvious contradiction of the relevant findings made the court with the content of the evidence collected

⁶ Judgment of the Constitutional Tribunal, ref. no. K 6/99, OTK ZU No. 7/1999.

⁷ Judgment of the Constitutional Tribunal, ref. no. K. 19/00, OTK ZU No. 4/2001.

⁸ Judgment of the Constitutional Tribunal of 22 August 1990, ref. no. K 7/90, OTK ZU 1990, item 5.

⁹ See Article 89(1) of the Act of 8 December 2017 on the Supreme Court, Journal of Laws of 2023, item 1093 as amended.

in the case. The consequence of combining the general ground with specific grounds using the phrase “provided that” is that there must always be the general ground and at least one of the three specific grounds.

The main purpose of the extraordinary complaint is to challenge final rulings issued by common or military courts that are in conflict with the listed constitutional principles, norms or values [Radajewski 2020, 64]. In essence, it serves to remove from legal transactions genuinely unjust decisions of those courts whose validity is not otherwise challenged. The capacity to file a complaint is only exercised by the public entity directly indicated here, namely: Prosecutor General, Commissioner for Human Rights and, within the scope of their exclusive competence, the President of the State Attorney Office of the Republic of Poland, Ombudsman for Children, Ombudsman for Patients’ Rights, Chairman of the Financial Supervision Commission, Financial Ombudsman, Ombudsman for Small and Medium Enterprises, President of the Office for Competition and Consumer Protection.¹⁰ In view of this, an individual can only ask the designated public entity to file an extraordinary complaint, moreover, the entity will be able to bring such a complaint *ex officio* against this individual’s will [Ereciński and Weitz 2019, 11]. The participation of the public interest spokesman is also allowed in the extraordinary complaint proceedings.¹¹

In view of this, it should generally be considered that the role of the Supreme Court is not to eliminate from legal circulation all defective judgments of common and military courts when carrying out a specific constitutional review of them, but only those that are detrimental to the bases of the social contract, which shapes the foundation of a democratic state ruled by law, implementing the principles of social justice, and thus concerning a specific shape of relations between the individual and the public authority.¹² The justice aspect of the general ground is therefore an essential criterion on the basis of which it is possible to repeal or amend such judicial decisions. Undoubtedly, the general ground for the extraordinary complaint is to ensure corrective justice, since it cannot be found in a specific judgment of a general or military court [Szcucki 2018, 56]. The general ground for the extraordinary complaint is based on the assumption that such court rulings are to be fair *i.e.* made based on properly interpreted legal provisions and the evidence collected and properly assessed [Góra-Błaszczkowska 2018, 58].

¹⁰ See Article 89(2) of the Act of 8 December 2017 on the Supreme Court.

¹¹ See Article 93 of the Act of 8 December 2017 on the Supreme Court.

¹² Decision of the Supreme Court of 12 May 2021, I NSNK 4/20, Lex no. 3229431.

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