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(Citation)

Kobe University law review, 53:1-9

(Issue Date)

2020

(Resource Type)

departmental bulletin paper

(Version)

Version of Record

(JaLCDOI)

<https://doi.org/10.24546/81012635>

(URL)

<https://hdl.handle.net/20.500.14094/81012635>



# **Pensions and pension insurance contributions in the light of Polish constitutional regulations - outline of the problem**

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## **Abstract:**

The Constitution of the Republic of Poland in a general way regulates both the issue of pension insurance contributions (Article 84 and Article 217 of the Constitution of the Republic of Poland) and the problem of pensions (Article 67(1) of the Constitution). Pension insurance contributions are treated as the implementation of the constitutional obligation to sustain public burdens and benefits. In turn, the right to a pension is derived from Article 67(1) of the Constitution of the Republic of Poland, which guarantees the right to social security. The aforementioned provisions of the Constitution of the Republic of Poland regulate the issues of rights and obligations in the sphere of retirement benefits and contributions for this insurance in a framework manner, referring for details to statutes.

## **Key words:**

Constitution of the Republic of Poland, public levies, contributions, pensions

## **1. Introduction**

The issue of old age benefits (pensions) is currently a multi-faceted problem — legal, economic, and social, and concerns all democratic countries. An important legal act, regarding old age benefits, is undoubtedly Convention No. 102 of the International Labour Organization adopted in Geneva on 28 June 1952.<sup>2</sup> Its provisions stipulate (Article 25), inter alia, that each State should provide old-age benefits for protected persons. Article 26(1) states that the object of protection should cover the case of survival beyond a prescribed age, not exceeding sixty-five years. However,

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2 Journal of Laws of 2005 no. 93, it. 775.

a higher age may be fixed by the competent authorities on account of the working ability of elderly persons in the country concerned (Article 26(2)).

In Poland, the framework regulations concerning pensions are contained in Article 67(1) of the Polish Constitution of 2 April 1997.<sup>3</sup> According to its provisions a citizen has the right to social security in case of inability to work due to illness or invalidity and upon reaching retirement age, and the scope and forms of social security are defined by the Act. The Constitution therefore requires the legislator to adopt specific, detailed solutions.

Old-age benefits must be financed from public funds. Owing to the current demographic situation, they constitute a very important element of budgetary expenditure in Poland. Therefore, it has been assumed that the entitlement to a pension (in principle) is a derivative of the previous payment of contributions (however, this does not apply to all social and professional groups, such as judges). Also in this respect, the Constitution of the Republic of Poland introduces framework regulations - Article 84 states that everyone is obliged to comply with their responsibilities and public duties, including the payment of taxes specified by statute. Article 217 of the Constitution of the Republic of Poland remains in functional relation to this provision, according to which the imposition of taxes, other public levies, determination of subjects of taxation and tax rates, as well as the rules for granting allowances and redemptions and categories of entities exempt from taxes is carried out by way of an act.

The aim of the article is to analyse the provisions of the Constitution of the Republic of Poland relating to the issue of old-age benefits and mechanisms of their financing. The objective of the study is also to determine whether there exists a correlation between the right to retirement benefits and the obligation to pay public levies (pension insurance contributions) under the Constitution of the Republic of Poland.

## 2. Pensions

Article 67(1) of the Constitution of the Republic of Poland contains guarantees concerning the right to social security, including those which apply to people upon reaching retirement age<sup>4</sup>. However, the concept of “social security”, owing to the absence of a constitutional or statutory definition, raises doubts as to its interpretation. The literature on the subject is helpful for their clarification. Although it does not formulate a single, universal definition of social security, there is a whole range of interesting and valuable definitions, which differ not in the degree of correctness, but mainly in the perspective and distribution of points of emphasis<sup>5</sup>.

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<sup>3</sup> Journal of Laws of 1997 no. 78, it. 483 as amended.

<sup>4</sup> G. Szyburska-Walczak defines Article 67 as a constitutional model of regulation in matters of social security – G. Szyburska-Walczak, *Ubezpieczenia społeczne. Repetytorium [Social security. Repertory]* Warszawa 2019, p. 29.

<sup>5</sup> J. Wantoch-Rekowski, *System ubezpieczeń społecznych a budżet państwa. Studium prawnofinansowe [The social security*

For example, a definition from over fifty years ago can be pointed out. According to J. Piotrowski, social security is the entirety of the means and activities of public institutions through which society seeks to protect its citizens from a deficiency that is not attributable to them, from the threat of inability to satisfy basic needs, socially recognised as important<sup>6</sup>.

Social security is not a uniform institution, it consists of several components. According to J. Piotrowski, public social security institutions are realised using three methods (techniques):

- 1) insurance,
- 2) provisioning,
- 3) welfare<sup>7</sup>.

In principle, only the insurance method involves contributions. The other methods are financed by the State budget.

It should be emphasized that the insurance method applies in Poland to the majority of the economically active population. It should be divided into general social insurance and agricultural social insurance. Both types of insurance are not uniform, and within their framework “detailed” types of insurance is distinguished, of which pension insurance is the most important. Acquisition of the right to universal and agricultural retirement benefit depends on being subject to retirement insurance, and the amount of benefit depends (directly or indirectly) on the amount of pension insurance premiums paid.

As I. Jędrasik-Jankowska points out, “Pursuant to Article 67 of the Constitution of the Republic of Poland, social insurance is a social and economic instrument whose creation is the duty of the state, not the citizens. It is the state that is to establish and manage the system of protection of citizens in case of certain random events and not only to oblige citizens to insure themselves”<sup>8</sup>.

The Court of Appeal in Szczecin in the judgment of 26 April 2018<sup>9</sup> ruled that Article 67(1) of the Constitution of the Republic of Poland does not establish *expressis verbis* the right to a specific type of social security benefit. This provision is only a model that defines in general terms the social security framework and state policies and is addressed mainly to the legislative authorities. It is therefore a source of guarantee, not a citizen’s subjective rights for social security, which are only becoming concrete in ordinary laws. The court indicated that “the above views correspond to the position expressed in the decisions of the Constitutional Tribunal. The view that the legislator’s freedom to shape the scope and forms and to concretise the content of social rights is far-reaching is well-established. This is determined by the very nature of social rights which boil down to the obligation to

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system and the state budget. *Legal and financial study*], Warszawa 2014, p. 23.

6 J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody* [Social security. Problems and methods], Warszawa 1966, p. 8.

7 J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody*. [Social security. Problems and methods], Warszawa 1966, pp. 164-165.

8 I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego* [Legal concepts and structures of social security], Warszawa 2018, p. 51.

9 III AUa 417/17, LEX no. 2531841.

provide benefits, which requires the harmonization of needs and expectations and the possibility of satisfying them. In practice, the scope of exercising the right to social security depends on the economic situation of the state, the relationship between the number of people working and paying contributions, the number of recipients and their financial standing, the patterns established in a given society for securing one's existence in old age or weakening of vital forces, as well as the anticipated economic and social trends, especially demographic ones (...) Therefore, the constitutional right to social security does not provide a specific content with regard to citizen's rights. The Constitution does not determine either the forms of social security or its scope. Therefore, from Article 67(1) of the Constitution it is not possible to derive the constitutional right to any specific form of benefit. Although the provisions of the Acts regulating these issues in detail find their legal basis in the constitutional norm, it is they, and not Article 67(1) of the Constitution – that constitute the basis for possible claims of persons applying for a pension, retirement pension, sickness benefit, or another form of social security<sup>10</sup>.

In turn, the Court of Appeal in Białystok, in the judgment of 14 November 2017<sup>11</sup>, indicated that Article 67(1) is a standard addressed to the State, which, on the one hand, imposes an obligation to create legal regulations ensuring the implementation of the right of every citizen to social security, and, on the other, gives the legislator the power to regulate issues related to the right in question.

### 3. Pension insurance contributions

Contributions to pension insurance are the main source of funding of those old-age benefits that operate under pension insurance.

Article 84 of the Constitution of the Republic of Poland provides for the obligation to comply with responsibilities and public duties, including taxes, specified in the Act. This provision implies the competence of the legislator to impose all responsibilities and public duties. A special role has been assigned to taxes, which have been mentioned by name as the only type of responsibilities and public duties.

Article 84 does not specifically refer to pension insurance contributions, but there is no doubt that they also fall within the scope of responsibilities and public duties. The literature points out that the obligation to comply with them is imposed on every entity within the jurisdiction of the Polish state. As far as natural persons are concerned, this position is obviously correct. It should be remembered, however, that the sphere of obligations connected with responsibilities and public duties also concerns legal persons and organizational units without legal personality.

According to T. Dębowska-Romanowska, "Taxes (and other public levies) are

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10 In this excerpt, the Court referred to the judgment of the Constitutional Tribunal of 6 February 2002, SK 11/01, OTK ZU No. 1/A/2002, item 2.

11 III AUa 316/17, LEX no. 2409286.

distinguished among all the public burdens and benefits by the fact that they are a permanent element of the state's political system – an opposition towards freedom and civil rights, not an exception to them. Without taxes, the state cannot function”<sup>12</sup>.

It should be pointed out that all public expenditure could be financed primarily through taxation. However, the legislator introduces other public levies into the legal system (e.g. contributions, fees, duties), which also serve to finance expenditure. The elimination of e.g. pension contributions or other social security contributions is theoretically possible, but in order to maintain the implementation of expenditure on pension insurance and other benefits from other insurance, it would be necessary to increase taxes.

Extensive comments on pension insurance contributions, in the context of Article 84 of the Constitution of the Republic of Poland, are expressed in judicial decisions. For example, in the judgment of the Court of Appeal in Katowice of 5 April 2019<sup>13</sup>, it was written that Article 84 sets out the obligation to bear contribution burdens. According to the court, contributions for pension insurance are public benefits of a public law nature. These contributions are non-returnable, compulsory, and gratuitous.

Article 84 of the Constitution of the Republic of Poland corresponds to Article 217, according to which the imposition of taxes, other public imposts, the specification of those subject to the tax and the rates of taxation, as well as the principles for granting tax reliefs and remissions, along with categories of taxpayers exempt from taxation, must be by means of statute.

The literal interpretation of Article 217 leads to the conclusion that the legislature classifies taxes as public levies, but, because of their importance, lists them ‘by name’ as the only public levy, before ‘other imposts’. A. Bień-Kacała indicates that “The principle of the taxing power finds its normative basis in several constitutional provisions. Article 84 determines the necessity of everyone’s compliance with the responsibilities and public duties specified in the Act. The content of the tax laws is defined in Article 217 of the Constitution of the Republic of Poland”<sup>14</sup>. In further part of her argument she writes: “The basis for imposing taxes and other public levies is therefore statute”<sup>15</sup>. It should be emphasized that in the scope of the implementation of the state’s authority to impose financial duties on citizens is the exclusivity of statute as an appropriate form to regulate specific issues<sup>16</sup>.

B. Brzeziński, who distinguishes four basic categories of public levies (taxes, fees, surcharges, and duties), indicates that they also include “various types of obligatory contributions for purposes recognized as public. However, they are treated

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12 T. Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną* [Financial law. Constitutional and general part], Warszawa 2010, p. 124.

13 III AUa 1934/18, LEX no. 2702631.

14 A. Bień-Kacała [in:] *Prawo konstytucyjne* [Constitutional Law], eds. Z. Witkowski and A. Bień-Kacała, Toruń 2015, p. 658.

15 *Ibidem*, p. 659.

16 See more broadly: A. Bień-Kacała, *Zasada władztwa daninowego w Konstytucji RP z 1997 r.* [The principle of power of taxation in the Constitution of the Republic of Poland of 1997], Toruń 2005, p. 79 et seq.

as legal constructs differing from the others mainly because the proceeds from them usually do not go to the budget, but are organized in a different way (e.g. they feed the resources of special purpose funds)<sup>17</sup>. Thus, B. Brzeziński has no doubt that social security contributions are counted as public levies<sup>18</sup>.

When including social insurance contributions in public levies, it should be stressed that the same regulations of Articles 84 and 217 of the Constitution of the Republic of Poland include contributions for pension insurance, accident insurance, sickness insurance, and disability insurance.

It should be stressed that at present in Poland it is not reasonable (also on the constitutional level) to identify pension insurance contributions with taxes. “These are two distinct legal institutions. The main differences boil down to the fact that tax is paid to the State Treasury or local government units, while pension contributions are allocated to social insurance institutions. Moreover, the payment of tax does not give a right to any benefits: it is gratuitous. Paid pension contributions generate rights, and are an element of legal title to a specific benefit from pension insurance – in this sense, contributions are characterized by payment. The tax is of a general nature – it is intended to finance all the tasks of the state or local government. The contributions are targeted – they are intended to finance tasks in the field of social insurance”<sup>19</sup>.

T. Dębowska-Romanowska writes extensively on social security contributions as part of public levies. She points out that in the light of the Constitution of the Republic of Poland of 1997, contributions are non-tax, targeted levies, partly equivalent, and reciprocal. The degree of this equivalence is varied and the contributions from the point of view of the employer or other insurer bear the traits of a special-purpose levy, however non-equivalent, which is “felt” as a tax. “Certainly, however, all such contributions are ‘other imposts’ within the meaning of Article 217 for a specific and separate purpose. What distinguishes them in the group of special-purpose levies is the permanence of their separate purpose and their partial equivalence. However, they continue to constitute a part of the state revenue within the meaning of Article 219(3) of the Constitution of the Republic of Poland, even though they are not and cannot constitute a source of budgetary revenue. The implementation of the broadly understood social security system is a constitutional obligation of the state. It must therefore be a separate, targeted, and partially equivalent system of financing, which nevertheless remains part of the state system”<sup>20</sup>.

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17 B. Brzeziński, *Prawo podatkowe. Zagadnienia teorii i praktyki [Tax law. Theoretical and practical issues]*, Toruń 2017, p. 129.

18 As regards the inclusion of social insurance contributions (including pension contributions), see extensive analyses in: J. Wantoch-Rekowski, *Do the social insurance contributions payable in Poland constitute a tax?* [in:] *European financial law in times of crisis of the European Union*, ed. by Gábor Hulkó and Roman Vybiral, Budapest 2019, pp. 595-604.

19 J. Wantoch-Rekowski, *Składki na ubezpieczenie emerytalne – konstrukcja i charakter prawny [Pension insurance contributions - structure and legal nature]*, Toruń 2005, p. 112; extensively on the payment of pension contributions – J. Wantoch-Rekowski, *Składki na ubezpieczenia społeczne i ich charakter prawny [Social insurance contributions and their legal character]*, Gdańskie Studia Prawnicze, vol. XVI, 2007, pp. 356-357.

20 T. Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną [Financial law. Constitutional*



T. Dębowska-Romanowska also points out that “Public imposts other than taxes - including those for both general and targeted purposes – are therefore also compulsory, pecuniary benefits, imposed by means of statute which determines in a general and abstract manner the creation of an obligation, the amount of the provision, the manner and the date of its realization, also intended to finance collective needs - as are taxes”<sup>21</sup>.

According to G. Uścińska, social insurance contributions (including: pension insurance) are a pecuniary, compulsory, purposeful, payable, and non-returnable benefit. The contributions have a different structure, although – according to the principle of purposefulness – they all have the same purpose, which is to finance benefits related to a given social insurance<sup>22</sup>.

The original approach to contributions is presented by I. Jędrasik-Jankowska, according to whom “Since it is the duty of this state to create a system and not only to oblige citizens to insure themselves (i.e. to allocate a part of their income to contributions), it should be assumed that funds for social insurance do not come from a specific part of remuneration for work compulsorily directed to an insurance fund in the form of a contribution, but from a separate part of national income allocated to social insurance, “allocated” to particular income generators and called a contribution. In practice, this “allocation” took the form of an increase in remuneration for work and was called a contribution. In reality, however, the contribution is not part of the remuneration for work, although this approach has allowed it to be partly “privatised””<sup>23</sup>. It seems that the attempt to “deprive” social security contributions, including pension contributions, of the character of a public levy does not seem justified.

For some time now, concepts of creating the so-called “uniform impost” have been formulated in Poland. It would be of a universal nature, i.e. it would cover all types of professional activity subject to social insurance and income tax<sup>24</sup>. Certainly, the path to creating a uniform levy is still a long one. However, there is no doubt that its concept does not violate either Article 84 or Article 217 of the Polish Constitution.

## 4. Conclusion

It should be stressed that the right to an old-age pension defined in Article 67(1) of the Constitution of the Republic of Poland does not depend - on the

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*and general part*], Warszawa 2010, pp. 135-136.

21 T. Dębowska-Romanowska, *Prawo finansowe. Część konstytucyjna wraz z częścią ogólną* [Financial law. Constitutional and general part], Warszawa 2010, p. 136.

22 G. Uścińska, *Prawo ubezpieczeń społecznych. Zasady, finansowanie, organizacja* [Social security law. Principles, financing, organization], Warszawa 2019, pp. 53-54.

23 I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego* [Legal concepts and structures of social security], Warszawa 2018, pp. 51-52.

24 Broadly on this topic – P. Wojciechowski, *Programowanie reformy jednolitej daniny w 2016 r. w świetle koncepcji bazy i nadbudowy* [Programming the uniform levy reform in 2016 in the light of the base and superstructure concept], *Ubezpieczenia społeczne. Teoria i praktyka*, no. 1/2019 (140), pp. 3-23.



constitutional level - on complying with the responsibilities and public duties as regulated in Articles 84 and 217 of the Constitution of the Republic of Poland.

The right to social security benefits, including pensions, is derived from the tasks performed by the state. Details concerning the rules of acquiring the right to benefits and determining their amount are determined by law. No provision of the Constitution prescribes that there should be a link between benefits and contributions. There are also no regulations that prohibit this. It is clear, however, that the State distributes public levies, thus making the right to benefits conditional on the prior payment of contributions or other public imposts.

Articles 84 and 217, on the other hand, provide for certain unconditional obligations in the sphere of public levies. The Constitution does not guarantee any reciprocal benefit from the State to those who pay taxes, fees, contributions or duties.

The Constitution of the Republic of Poland attaches great importance to statutory regulations, in the area of fundamental matters – concerning contributions and pensions - it adopts only solutions of a framework nature.

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