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The Right to Social Security in the Event of Incapacity to Work Due to Sickness in Light of Article 67 (1) of the Constitution of the Republic of Poland

Prawo do zabezpieczenia społecznego w razie niezdolności do pracy ze względu na chorobę w świetle art. 67 ust. 1 Konstytucji RP

ABSTRACT

The topic of this study is to determine the substance of the right to social security in case of incapacity to work due to sickness in the light of Article 67 (1) of the Polish Constitution, and to establish the scope and form of social security on this account. The author presents and justifies the concept of social protection in the event of incapacity to work due to sickness based on the assumption that, although it is granted in connection with professional activity, it does not always have to be associated with loss of earnings. On the other hand, as for the scope of social security, it was assumed that it can cover (in the subjective aspect) not only persons subject to general social insurance and farmers' social insurance, but also uniformed services as well as judges and prosecutors, while (in the objective aspect) also benefits from the employment (service) relationship, i.e. employee sick pay and emoluments (remuneration) for the time of incapacity to work due to sickness to which professional soldiers, police officers, judges or prosecutors are entitled. The latter is related to the formulation of the thesis that the exercise of the right to social security in case of incapacity to work due to sickness does not take place exclusively in the form of insurance disbursement, since – due to the open content of the norm included in Article 67 (1) of the Polish Constitution – it is also permissible to use other methods of legal protection, including

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the financing of benefits in this area from the own funds of the employing entities. The discussion is preceded by remarks on the concept of the right to social security, particularly with regard to the legal nature of Article 67 of the Polish Constitution and the essence of this right.

Keywords: right to social security; incapacity to work due to sickness; scope and form of social security; sickness benefits

INTRODUCTION

One aspect of the right to social security in terms of Article 67 (1) of the Constitution of the Republic of Poland of 2 April 1997[1] is incapacity to work due to sickness. This matter has not yet been analyzed within a broader and more detailed research,[2] nor has it been the topic of a monograph. It therefore seems that there is a justified need to take a closer look at this issue and formulate some generalizations of a theoretical nature, especially in the area of the content of the right to social security in the event of incapacity to work due to sickness, and the scope and form of social security on this account. In connection with the above, the main questions to be resolved are whether:

- social protection in the event of the occurrence of sickness risk is applicable only when the result of incapacity is the loss of income, which will allow the formulation of a conclusion on the content of the right to social security due to sickness (protection due to the loss or inability to earn income from paid work);
- the constitutional subjective and objective scope of social security due to sickness may also include – in addition to social insurance institution (general and farmers') – employee sick pay and emoluments or remuneration payable to persons in the service relationship within the uniformed services[3] (hereinafter: service relationship) and those in the employment relationship connected to the appointment to the position of judge and prosecutor.[4] The

[1] Journal of Laws 1997, no. 78, item 483, as amended, hereinafter: the Polish Constitution. English translation of the Constitution is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.11.2023).

[2] At best, studies were undertaken in the broader context of the analysis of Article 67 of the Polish Constitution. See K. Ślebzak, *Prawo do zabezpieczenia społecznego w Konstytucji RP. Zagadnienia podstawowe*, Warszawa 2015, pp. 111–114.

[3] For the purposes of this paper, the term "service relationship of the uniformed services" has been limited to persons in a service relationship who are professional soldiers and police officers.

[4] Although judges and prosecutors also have a service relationship (see Article 65 (1) of the Act of 27 July 2001 – Law on common courts organization, consolidated text, Journal of Laws 2023, item 217, as amended, hereinafter: LCCO; Article 91 (1) of the Act of 28 January 2016 – Law on the Public Prosecutor's Office, consolidated text, Journal of Laws 2023, item 1360, as amended, hereinafter: LPPO), but the issue of remuneration addressed in this study falls within the scope of the employee status of judges and prosecutors and not their public status, so it is reasonable to use the term "employment relationship"

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above consideration is guided by the view that, since in Article 67 (1) second sentence of the Polish Constitution, it is determined that the scope and form of social security in the above area is determined by statute, then the implementation of the constitutional rule to ensure the citizen's right to social security in the event of incapacity to work due to sickness is based on a broad view of this scope;

- employee sick pay and emoluments (remuneration) for the duration of incapacity to work due to sickness received by professional soldiers, police officers, judges or prosecutors may – despite being located outside the sphere of (law) of social security – constitute a form of exercising the right to social security under Article 67 (1) of the Polish Constitution, particularly when they are classified in the category of social benefits aimed at establishing legal protection for these professional groups in connection with the occurrence of the risk of sickness causing temporary suspension of professional activity.

However, before I go into details concerning the content of the right to social security in the event of incapacity to work due to sickness and the determination of the scope and form of this security, some space should be devoted to the very concept of the right to social security in terms of Article 67 of the Polish Constitution.

THE CONCEPT OF THE RIGHT TO SOCIAL SECURITY

From the doctrinal,[5] international[6] and constitutional[7] perspective on the right to social security, it is clear that it is one of the social rights qualified as a fundamental human right. However, it must be stipulated that the constitutional scope of this right, limited only to Article 67 of the Polish Constitution, does not coincide with the object

in this context. See K. Gonera, *Status pracowniczy sędziego. Czy sędzia jest pracownikiem?*, [in:] *Pozycja ustrojowa sędziego*, ed. R. Piotrowski, Warszawa 2015, pp. 39–42; T. Duraj, [in:] *System Prawa Pracy*, vol. 4: *Indywidualne prawo pracy. Pozaumowne stosunki pracy*, ed. Z. Góral, Warszawa 2017, pp. 487–489.

[5] See W. Osiatyński, *Prawa człowieka i ich granice*, Kraków 2011, p. 176 ff.; W. Brzozowski, [in:] W. Brzozowski, A. Krzywoń, M. Wiącek, *Prawa człowieka*, Warszawa 2021, pp. 33–34.

[6] The right to social security is mentioned in Article 22 of the Universal Declaration of Human Rights of 10 December 1948 (the English version uses the phrase "right to social security", which is erroneously translated as "right to social insurance" in the Polish text of the Declaration), Article 9 of the International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 (Journal of Laws 1977, no. 38, item 169), and above all in Article 12 titled "The right to social security" of the European Social Charter, Turin, 18 October 1961 (Journal of Laws 1999, no. 8, item 67, as amended), hereinafter: ESC.

[7] In the Polish Constitution, the right to social security – placed in chapter II in subchapter titled "Economic, social and cultural freedoms and rights" – is granted in the event of incapacity to work due to sickness or disability and upon reaching retirement age (Article 67 item 1) and for being unemployed involuntarily and lacking other means of support (Article 67 item 2).

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of social security presented especially in the Social Security (Minimum Standards) Convention of the International Labour Organization, 1952 (No. 102),[8] which defines individual objects of protection from the point of view of the occurrence of social risks. In other words, the formal scope of the right to social security under Article 67 of the Polish Constitution is narrower than the scope of social security conceived as a system of benefits guaranteed by the state[9] or treated in terms of a separate branch of law.[10] Therefore, the opinion that Article 67 of the Polish Constitution cannot be considered a provision that exhausts the matter of social security is correct.[11] Thus, it should be stated that – in accordance with the objective scope of the social security law – it still includes, at the very least, issues related to the right to health care (Article 68 (1) of the Polish Constitution) and the right to special assistance for families in a difficult material and social situation, especially numerous and single-parent families (Article 71 (1) of the Polish Constitution).

As the right to social security is not bound by the restriction that it can be asserted within the limits specified by statute (Article 81 of the Polish Constitution), the question arises as to whether Article 67 of the Polish Constitution is suitable for direct application (Article 8 (2) of the Polish Constitution). In this context, the position has been expressed that – despite giving the right to social security the character of a subjective right (protected by constitutional complaint)[12] – it is impossible to assert claims on its basis due to the insufficiently specific content of this legal norm.[13] The meaning of this regulation, in fact, comes down to the imposition on the state (public authorities)[14] of the obligation to create appropriate institutional and legal solutions to ensure the realization of the constitutional guarantee of the right to social security, which, moreover, is clearly reflected in provisions contained in both paragraphs of Article 67 of the Polish Constitution that "the scope and forms of social security

[8] Journal of Laws 2005, no. 93, item 775, hereinafter: the ILO Convention No. 102.

[9] Undoubtedly, "benefit" is the most common element appearing in various approaches to the definition of "social security". See K. Ślebzak, *Prawo…*, pp. 13–16; G. Uścińska, *Prawo zabezpieczenia społecznego*, Warszawa 2021, p. 19; R. Babińska-Górecka, [in:] *Wielka encyklopedia prawa. Prawo socjalne*, ed. H. Szurgacz, vol. 12, Warszawa 2017, pp. 367–368.

[10] Such importance to social security is given by J. Jończyk (*Prawo zabezpieczenia społecznego*, Kraków 2006) and G. Uścińska (*op. cit.*).

[11] See M. Zieleniecki, *Prawo do zabezpieczenia społecznego*, "Gdańskie Studia Prawnicze" 2005, vol. 13, p. 582.

[12] See M. Florczak-Wątor, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, LEX/el. 2021, commentary on Article 67 point 1; P. Jarosz-Żukowska, L. Garlicki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, eds. L. Garlicki, M. Zubik, vol. 2, LEX/el. 2016, commentary on Article 67 point 7.

[13] See K. Ślebzak, [in:] *Konstytucja RP. Komentarz*, vol. 1: *Art. 1–86*, eds. M. Safjan, L. Bosek, Warszawa 2016, pp. 1507–1508 and the judicial decisions of the Constitutional Tribunal cited therein.

[14] Public authorities as the addressee of Article 67 of the Polish Constitution are also indicated by K. Ślebzak (*ibidem*, p. 1521) or A. Krzywoń ([in:] W. Brzozowski, A. Krzywoń, M. Wiącek, *op. cit.*, p. 330).

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shall be specified by statue". Such an approach to the right to social security leads to the formulation of a view of the open content of this constitutional norm,[15] with the reservation, however, that the freedom of the legislator in this area must not violate the essence of this right (which will be discussed later).

In view of the above, I believe that – if the right to social security were to be qualified in terms of a subjective right – it should be described as a defective or incomplete subjective right,[16] that is to consider that *de facto* Article 67 of the Polish Constitution exhibits the characteristics of a programmatic norm,[17] which formulates an objective for the public authorities, without indicating the means for its realization, in the form of an order to organize a system of legal protection in the event of incapacity to work due to sickness or disability and upon reaching retirement age or due to being unemployed involuntarily and lack of other means of support. In other words, the exercise of the right to social security under Article 67 of the Polish Constitution is achieved through the establishment of social security bodies and legislation (in particular, the rules of financing and the conditions for acquiring benefits), and not by granting citizens claims for specific benefits, as these are granted on the basis of statutory provisions.[18] At the same time, unlike the rights enumerated in Article 81 of the Polish Constitution, the content of the rights expressed in Article 67 of the Polish Constitution and their limits are directly shaped by the constitutional norm, which determines that the realization of these constitutional social guarantees (models) must involve maintaining them at a statutorily determined level – not lower than the minimum set by the essence of the right in question.[19]

Thus, both in doctrine and judicature, the violation of the essence of the right to social security (Article 67 (1) in conjunction with Article 31 (3) second sentence of the Polish Constitution) is primarily linked to the assessment of benefits, i.e. lower than the minimum for life, existence or social.[20] Hence, special importance

[15] In the sense of including new forms of social security within the scope of this law. See T. Bińczycka-Majewska, *Konstrukcja zabezpieczenia ryzyka starości w nowym systemie prawnym*, [in:] *Konstrukcje prawa emerytalnego*, ed. T. Bińczycka-Majewska, Kraków 2004, p. 40, 43.

[16] See W. Brzozowski, *op. cit.*, p. 28.

[17] See R. Babińska-Górecka, *Skutki prawne orzeczeń Trybunału Konstytucyjnego w dziedzinie ubezpieczenia społecznego*, Warszawa 2014, pp. 228–230; K. Roszewska, *Ryzyko niezdolności do pracy*, Warszawa 2018, p. 171 ff. See also the arguments of D.E. Lach (*Zasada równego dostępu do świadczeń opieki zdrowotnej*, Warszawa 2011, p. 23 ff.) in the context of Article 68 (2) of the Polish Constitution as a programmatic norm.

[18] See, e.g., judgment of the Constitutional Tribunal of 19 December 2012, K 9/12, OTK-A 2012, no. 11, item 136, part III, points 4.3.4 and 4.3.9; judgment of the Supreme Court of 24 June 2015, I UK 371/14, LEX no. 1771087.

[19] See, e.g., judgment of the Constitutional Tribunal of 8 May 2000, SK 22/99, OTK 2000, no. 4, item 107, part III, point 2; judgment of the Supreme Court of 20 October 2016, I UK 197/16, LEX no. 2151408.

[20] See P. Jarosz-Żukowska, L. Garlicki, *op. cit.*, commentary on Article 67 point 18 and judicial decisions of the Constitutional Tribunal mentioned therein.

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is attached to the institution of indexation to preserve the real value of long-term benefits (disability and retirement pensions).[21] In this context, it is also no less important to ensure the minimum level of benefits, of which the lowest pensions are a manifestation. The essence of the right to social security also includes the legal mechanisms of making the amount of insurance benefits dependent on the previously made contribution[22] (reciprocity) and allowing the insured to benefit from funds not earned by themselves (solidarity).[23]

THE CONTENT OF THE RIGHT TO SOCIAL SECURITY IN THE EVENT OF INCAPACITY TO WORK DUE TO SICKNESS

The right to social security in the event of incapacity to work due to sickness concerns the establishment of legal protection against the occurrence of sickness risk (inability or impossibility to provide work) as one of the social risks.[24] The content (and, at the same time, the effect) of the occurrence of this risk is a temporary (i.e. of a temporary rather than permanent nature) incapacity to work caused by an insurance event (the sickness that is the cause of this incapacity),[25] which interrupts the performance of employment (carrying out activities) and causes a loss of income.[26] Similarly, the object of protection under this title is defined in Article 14 of the ILO Convention No. 102, in which "loss of earnings"[27] is indicated as a constitutive effect of incapacity to work due to sickness.[28] At the same time, Poland is not formally covered by this provision due to its failure to assume the obligations of Part III, "Sickness allowance", although the view has been expressed in the literature[29] that Poland is bound by the standards stipulated in the

[21] See K. Ślebzak, [in:] *Konstytucja…*, p. 1519 and judicial decisions of the Constitutional Tribunal mentioned therein.

[22] Of course, not understanding the contribution-benefit relationship in equivalent terms.

[23] See K. Antonów, *Solidarność w prawie zabezpieczenia społecznego (ubezpieczeniach społecznych i zdrowotnym)*, [in:] *Państwo solidarne*, ed. A. Łabno, vol. 3, Warszawa 2018, pp. 161–162.

[24] See J. Jończyk, *op. cit.*, pp. 16, 170–171.

[25] Incapacity to work due to sickness is treated equally with impossibility to perform work, as detailed in Article 6 (2) of the Act of 25 June 1999 on cash benefits under social insurance in the case of sickness and maternity (consolidated text, Journal of Laws 2022, item 1732, as amended), hereinafter: SMBA.

[26] See J. Jończyk, *op. cit.*, p. 16; I. Jędrasik-Jankowska, *Pojęcia i konstrukcje prawne ubezpieczenia społecznego*, Warszawa 2018, pp. 274–275.

[27] In the English version, "suspension of earnings".

[28] Identically as in the ILO Convention No. 102, the object of this protection is formulated in Article 7 (b) of the Medical Care and Sickness Benefits Convention of International Labour Organization, 1969 (No. 130). See also Article 14 of the European Code of Social Security of 1964 and Article 13 of the European Code of Social Security (revised) of 1990, which have not been ratified by Poland.

[29] See K. Ślebzak, *Prawo…*, p. 112.

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ILO Convention No. 102 in connection with the reference contained in Article 12 (2) ESC, i.e. the obligation to maintain the social security system at a satisfactory level at least equal to the required for ratification of ILO Convention No. 102. This maintenance, as well as to rise progressively the system of social security to a higher level, according to Article 12 ESC, should consist of guaranteeing benefits to those affected by the occurrence of social risks (including the incapacity to work due to sickness) associated with the loss of livelihood or reduced ability to support themselves.[30]

This view of the issue, however, assumes that incapacity to work is inextricably linked to the earning of income at the time of the occurrence of the sickness risk. This is indeed the situation we are dealing with, among others, in the case of an employee's title to sickness insurance, which results in particular from the regulation that sickness benefits[31] are not due for periods during which the insured person is entitled to remuneration (Article 12 (1) and Article 22 SMBA). It should be remembered, however, that this issue looks different with regard to persons conducting non-agricultural activities (especially business activities) and farmers, since – due to the specific nature of these activities (e.g. the inconstancy of the services provided or the seasonality of work in agriculture) – the acquisition of the right to sickness allowance is sometimes independent of earning income at the time of the insurance event; instead, the decisive factor is the emergence of incapacity to work due to sickness in the course of voluntary (applied for) or compulsory subjection to general or farmers' social insurance. Hence, the object of protection in terms of sickness risk cannot be narrowed down to protection against loss of earnings.[32] The object is broader and concerns protection against the risk of incapacity to work due to sickness, which in some cases is unrelated to the insured person's income condition.[33]

In essence, therefore, this is protection in the event of inability to earn income due to sickness, even if there was no loss of earnings at the time of the occurrence of sickness. This model of insurance protection in this area is also emphasized by other legal solutions, in particular those providing for the forfeiture of the right to sickness benefits in the event of performing paid work during the period of medically certified incapacity for work or using sick leave from work in a manner inconsistent with the purpose of that leave (Article 17 (1) SMBA, including in conjunction with Article 22

[30] See A.M. Świątkowski, *Karta Praw Społecznych Rady Europy*, Warszawa 2006, pp. 379–380.

[31] Using the term "sickness benefits", I mean, in addition to sickness allowance, also rehabilitation benefit.

[32] Although this is undoubtedly the main function of the sickness allowance. See judgment of the Constitutional Tribunal of 25 February 2014, SK 18/13, OTK-A 2014, no. 2, item 15, part III, point 3.

[33] An extensive discussion of this topic is provided by D. Dzienisiuk, *Przedmiot ochrony zapewnianej przez zasiłek chorobowy*, [in:] *Między ideowością a pragmatyzmem – tworzenie, wykładnia i stosowanie prawa. Księga jubileuszowa dedykowana Profesor Małgorzacie Gersdorf*, eds. K. Rączka et al., Warszawa 2022, p. 990 ff.

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SMBA, and in the case of farmers in conjunction with Article 52 (1) (2) of the Act of 20 December 1990 on social insurance for farmers[34]).[35] It seems that this provision most fully illustrates the current concept of protection for incapacity to work due to sickness consisting in the use of the allowance period exclusively for the restoration of health, the logical consequence of which is the imposition of sanctions on persons undertaking paid work during this period.[36] It is also a precaution that employees should apply for insurance coverage in situations of actual incapacity to work due to sickness, rather than be provoked into behavior contrary to insurance rules. That is when they want to obtain sickness benefits being convinced that assuming paid work while on sick leave is not contrary to the principle that such benefits are due for the lack of other sources of income, and their purpose is to replace temporarily lost earnings or to compensate for the lack of earnings in a situation where there was no earnings at all at the time of the event occurrence.

The determination of the content of the right to social security due to sickness is also affected by the provisions excluding the right to sickness allowance, the emoluments of persons in a service relationship or the remuneration of judges and prosecutors. As for the sphere of social insurance law, it should be noted that sickness benefits are not paid for periods of incapacity to work falling during unpaid and parental leave (Article 12 (2) (1) and (2) and Article 22 SMBA) or during personal care of a child, among others, by persons conducting non-agricultural business activity or contractors who have ceased or suspended this activity or stopped performing civil-law contracts (Article 6a of the Act of 13 October 1998 on social insurance system[37]). In the latter case, the lack of insurance coverage in the event of incapacity to work due to sickness results from the fact that there is no provision at all to cover these compulsory pension and disability insurance titles with the right to voluntary sickness insurance (cf. Article 11 (2) SISA). In turn, under Article 286 (2) HDA, a professional soldier on parental leave is not paid emoluments and other amounts due (the same is true of judges and prosecutors, although there are no explicit legal regulations in this regard). Thus, it is necessary to exclude those periods in which the occurrence of incapacity to work does not affect the temporary suspension of employment (business) from the scope of legal protection in the event of the occurrence of sickness risk due to

[34] Consolidated text, Journal of Laws 2023, item 208, as amended, hereinafter: ASIF.

[35] The same or similar regulations are contained in provisions relating to both the emoluments to which professional soldiers and police officers are entitled (see Article 279 (3), (7) and (10) of the Act of 11 March 2022 on homeland defense, consolidated text, Journal of Laws 2022, item 2305, as amended, hereinafter: HDA; Article 121e (3), (7) and (10) of the Act of 6 April 1990 on the Police, consolidated text, Journal of Laws 2021, item 1882, as amended), as well as the remuneration of judges and prosecutors (see Article 94c (3) LCCO and Article 118 (2) LPPO).

[36] See D. Dzienisiuk, *Przedmiot*..., pp. 976–978.

[37] Consolidated text, Journal of Laws 2023, item 1230, as amended, hereinafter: SISA.

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the fact that during this period, most often for personal reasons (such as child care), such people are not professionally active.

In view of the above, it can be concluded that the content of the right to social security due to sickness is to guarantee social protection in the event that temporary (short-term) incapacity to work arises due to the inability to earn (current or future) income from professional activity (work/service or non-/agricultural activity) covered by compulsory or voluntary social insurance (general and farmers') or resulting from a service relationship or in judicial or prosecutorial status. Consequently, it is fair to consider the exclusion of this protection in the event of obtaining income from work/service or non-/agricultural activity as well as from other social benefits, or in the event when professional activity has been interrupted (e.g. by being on parental leave) or terminated as a result of establishing the right to a retirement or disability pension.

Ultimately, therefore, insurance coverage, in the sphere of social insurance (general and farmers'), is also granted due to the mere fact of incapacity to work due to sickness, i.e. being unrelated to loss of earnings. However, it seems that such a deviation from the general purpose of social insurance benefits (replacing work income with them) can be considered as justified, bearing in mind that the irregularity of income of entrepreneurs or farmers is a natural feature associated with performing these professions, and therefore this circumstance should be, also for the sake of realizing the social purpose of social insurance (general and farmers'), accepted in both legal regimes. In addition, it must also be assumed that there are times when the occurrence of sickness while not earning an income can lead to the exclusion of the possibility of undertaking business or agricultural activities previously planned for the period of incapacity that has already begun, which can be called a secondary (consequential) loss of earnings, undoubtedly deserving the award of sickness benefits.

THE SCOPE OF SOCIAL SECURITY IN THE EVENT OF INCAPACITY TO WORK DUE TO SICKNESS

According to the second sentence of Article 67 (1) of the Polish Constitution, among others things, the scope of social security on account of sickness is determined by statute. Therefore, it is a matter of statutory specification of the subjective and objective scope of such security, i.e. indicating who is covered by legal protection on this account and what benefits belong to this protection.

The considerations on this subject should start with the determination of the above-mentioned scopes in terms of the relation of the existing statutory solutions to the provisions of Part III of ILO Convention No. 102, without deciding whether these regulations are part of the Polish legal order at all.[38] The main controversy

[38] See comments in the context of footnote 29.

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relates to the fact that ILO Convention No. 102 provides that protection for incapacity to work due to sickness is to be provided by means of sickness allowances. Meanwhile, in Poland, sickness allowances, as benefits implementing the right to social security due to sickness, occur in the sphere of social insurance (general social insurance and farmers' social insurance), while in the remaining scope (not omitting also the role of rehabilitation benefit), the function of benefit for the time of incapacity to work due to sickness is fulfilled by sick pay received by employees for 14/33 days in a calendar year and remuneration (emolument) paid to professional soldiers, police officers, judges or prosecutors. Thus, the provision of Article 15 (a) or (b) of ILO Convention No. 102, which stipulates that the scope of protection should cover at least 50% of the total number of employees or other groups of the economically active population at least 20% of the total population, does not fit in well with the Polish reality, given the variety of benefits granted in the event of the occurrence of a sickness risk. Hence, it would be unreasonable to possibly argue that our legislation does not meet the above criteria simply because in certain situations or certain occupational groups are not entitled to sickness allowance, but to sick pay or remuneration (emoluments) for the time of incapacity to work due to sickness.

Polish legal regulations relating to this sickness benefit are, in principle, in line with other guidelines arising from the provisions of Part III of ILO Convention No. 102. In fact, in the design of sickness allowance from social insurance (general and farmers'), one may notice elements of the regulations contained in Articles 16–18 of ILO Convention No. 102, such as periodicity of this benefit (payment counted in days or months), 26-week period of its collection (i.e. standard 180/182-day benefit period) or fulfilment of the requirement to have a certain length of service in order to avoid fraud, which may be connected with acquiring the right to sickness allowance after the expiry of waiting (grace) periods, i.e. in compulsory or voluntary social sickness insurance after 30 or 90 days of uninterrupted continuation of sickness insurance, and in farmer's accident, sickness and maternity insurance upon application, after a 12-month uninterrupted period of insurance (Article 4 (1), Article 8 (1) and Article 11 (1) and (4) SMBA and Article 14 (2) and Article 15a (1) ASIF).

As for the amount of sickness allowance, the conventional minimum is 45% of previous earnings increased by the amount of family allowances (Schedule to Part XI of ILO Convention No. 102, unadopted by the Polish side, titled "Periodic payments to standard beneficiaries"). There are no major problems with the implementation of this provision in the case of sickness allowance from social sickness insurance, since, as is known, the monthly amount of this benefit according to Article 11 (1) and (2) SMBA is 80% or 100% of the assessment basis. On the other hand, the case is different in the case of sickness allowance for farmers, as the amount of this benefit is only PLN 20 for each day of temporary incapacity to work (§ 2 of the Regulation of the Minister of Agriculture and Rural Development of

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20 December 2021 on determining the amount of lump-sum compensation in respect to accident at agricultural work or agricultural occupational disease and sickness allowance[39] in conjunction with Article 14 (8) ASIF). Thus, if this incapacity had lasted for a full month (30 days), the sum of PLN 600 would have been less than the amount representing 45% of the income previously received, and would thus have resulted in a failure to comply with the Convention condition of maintaining the appropriate amount of benefit paid periodically (Article 65 of ILO Convention No. 102 located in the unadopted by the Polish side Part XI).

The subjective scope of social security for sickness covers, as a rule, economically active persons (employed or conducting non-/agricultural activities), including those in a service relationship and those appointed to the position of judge or prosecutor, subject to the provision that in the sphere of general insurance, there is a large margin of voluntary insurance addressed in particular to contractors and entrepreneurs. The reasons for the exclusion of these professional groups from the compulsory insurance are related to circumstances such as incidental (short-term) or subsidiary performance of civil law contracts in relation to the compulsory title or the recognition that it is the self-employed person who should independently assess whether, due to the specifics of the activity, they want to collect sickness benefits during the period of incapacity to work due to sickness, which would prevent them, in the legal sense, from performing paid work and obtaining current income. It seems rational, therefore, to leave the above-mentioned group of people the right to choose whether (or not) to use insurance coverage.

However, as for the objective scope of social security due to sickness, taking into account the benefits for those in the service relationship, judges and prosecutors, the following benefits are provided:

- sick pay, sickness allowance and rehabilitation benefit under labor law and social insurance law, with sick pay only payable for employment-based jobs and only for those in an employment relationship who are entitled to sickness allowance (*a contrario* Article 92 § 3 (2) of the Act of 26 June 1974 – Labor Code[40]);
- sickness allowance under the social insurance of farmers, provided that if after exhaustion of the benefit period (180 days) the insured person is still unable to work, and as a result of further treatment and rehabilitation they have every chance to regain the ability to work, the sickness allowance is extended for the period necessary to restore the ability to work, but no longer than for a further 360 days (Article 14 (3) ASIF), which in practice means that the extended sickness allowance fulfills the function of a rehabilitation benefit from social sickness insurance, which can be collected for no longer than 12 months (Article 18 (2) SMBA);

[39] Journal of Laws 2021, item 2396.

[40] Consolidated text, Journal of Laws 2023, item 1465.

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- the emoluments of a professional soldier and a police officer during the period of sick leave due to sickness (Article 451 HDA and Article 121b of the Police Act);
- judges' and prosecutors' remuneration during the period of absence from work due to sickness (Article 94 LCCO and Article 115 LPPO).

The above statements were based on the assumption that the right to social security may – in connection with the open formula of the norm expressed in Article 67 (1) of the Polish Constitution, authorizing the legislator to relatively freely construct mechanisms of legal protection on account of sickness among other things – also be realized in the form of employee sick pay and remuneration or emoluments as benefits from the employment (service) relationship financed from the funds of the employer (service institution).[41] Thus, although the effects of sickness risk are compensated by the payment of a benefit formally called "remuneration" ("emoluments"), in essence, the purpose and nature of these benefits, collected during the period of short-term inability to work, is similar to sickness allowance. This is because they are paid for the time of non-performance of work (service), so their amount (as a rule, capped at 80%) is not reflected in the value of work (service)[42] of the beneficiary, and, as already mentioned, they are received on condition that during the period of medically certified incapacity to work they do not perform paid work or use the sick leave in a manner inconsistent with its purpose. Consequently, the above-mentioned forms of remuneration (including sick pay in particular) and emoluments perform the function of social benefits, showing similarities to sickness insurance benefits.[43]

THE FORM OF SOCIAL SECURITY IN THE EVENT OF INCAPACITY TO WORK DUE TO SICKNESS

It follows from the second sentence of Article 67 (1) of the Polish Constitution that, in addition to the scope, the form of social security due to sickness is also determined by statute. In this context, the position developed by J. Piotrowski about three techniques (methods) of social security has been repeated for years: insurance method, provision method and welfare method.[44] Such an approach to this issue,

[41] On this concept, see T. Kuczyński, [in:] *System Prawa Pracy*, vol. 7: *Zatrudnienie niepracownicze*, ed. K.W. Baran, Warszawa 2015, p. 414 ff.

[42] In view of this, the literature (in the context of sick pay) indicates that it is characterized by non-reciprocity and non-equivalence. See M. Mędrala, *Społeczny charakter świadczeń w polskim prawie pracy*, Warszawa 2020, p. 413.

[43] Likewise (concerning sick pay) D. Dzienisiuk, *Prawo pracy a prawo ubezpieczeń społecznych*, Warszawa 2016, p. 315; M. Mędrala, *op. cit.*, p. 415.

[44] J. Piotrowski, *Zabezpieczenie społeczne. Problematyka i metody*, Warszawa 1966, p. 160 ff. See also I. Jędrasik-Jankowska, *op. cit.*, pp. 27–28; W. Jaśkiewicz, C. Jackowiak, W. Piotrowski,

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however, is increasingly criticized in relation primarily to the lack of justification for operating with the concept of "social provision", the inadequacy of this division in light of the emergence of new forms of social security (e.g. funded pension schemes, social compensation,[45] social support[46]) or the complex legal structure of existing regulations (e.g. in the sphere of social insurance of farmers) that do not reflect the principles of the above-mentioned techniques.[47]

With this in mind, I propose a different approach on the issue, namely, to separate forms of social security from methods of legal protection in the event of the occurrence of social risks. By the form of social security I mean an institution of existing law such as social insurance, general health insurance or social assistance. While I understand the method of legal protection to be associated with the adopted method of securing members of a particular community against the occurrence of social risks, i.e. the existence (or not) of a community of protected covered persons, the technique of financing benefits (contributory or non-contributory) and the solutions used in the field of determining and granting rights.

In view of this, the desirable change to the above model in my opinion should consist of: first of all – modifying the existing understanding of the methods of legal protection, and second of all – accepting that even as a result of the application of the modified division, it will not always be possible to assign each new social institution implementing the right to social security to a specific method of legal protection due to the specificity of the given form both in terms of its socio-economic purpose and detailed legal structure. However, referring to the first proposal, I distinguish three methods of legal protection within the new approach: insurance method, provision method[48] and subsidiary method, to which the following (most important) forms of social security correspond:

- under the insurance method – social insurance, social insurance for farmers and general health insurance;

Prawo pracy w zarysie, Warszawa 1985, p. 452; L. Kaczyński, *Pojęcie zabezpieczenia społecznego i kryterium rozróżnienia jego technik*, "Praca i Zabezpieczenie Społeczne" 1986, no. 5–6, p. 24 ff.; K. Kolasiński, *Prawo pracy i zabezpieczenia społecznego*, Toruń 1999, p. 105; W. Muszalski, *Ubezpieczenie społeczne*, Warszawa 2004, pp. 18–21.

[45] In monographic form, see K. Stopka, *Świadczenia odszkodowania socjalnego w prawie polskim*, Warszawa 2018.

[46] In monographic form, see M. Lewandowicz-Machnikowska, *Regulacja prawna socjalnego wsparcia dla osób o niskich dochodach*, Wrocław 2013.

[47] See J. Jończyk, *op. cit.*, pp. 59–60; K. Ślebzak, *Prawo…*, p. 17 ff.; K. Antonów, *Sprawy z zakresu ubezpieczeń społecznych. Pojęcie oraz właściwości postępowań przedsądowych i ochrony cywilnosądowej*, Warszawa 2011, pp. 33–34.

[48] In this view, in contrast to the previous meaning, the provision method is not aimed at the general public, it is related to professional activity, and benefits are not uniform and set at a minimum level defined by law. See I. Jędrasik-Jankowska, *op. cit.*, p. 28.

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- under the provision method – retirement and disability pensions and accident benefits for uniformed services, as well as emoluments for retired judges and prosecutors and their family emolument;
- under the subsidiary method – social assistance, assistance to the unemployed and to families.

Since the topic of the study is the right to social security in case of incapacity to work due to sickness, I will limit the explanation of the above division to the methods used within the sphere of sickness risk. There should be no doubt that the insurance method covers the security against the risk of incapacity to work due to sickness in the sphere of social sickness insurance and accident, sickness and maternity insurance of farmers. In both of these cases, we are dealing with a contributory technique of financing benefits[49] and a clear distinction of a solidary risk community of people endangered with the same event, i.e. sickness, the result of which may be temporary incapacity to work/farm. Common elements are also found in the field of benefit entitlement, although, of course, the most serious difference concerns the determination of the amount of the sickness allowance, i.e. in social insurance of farmers, a uniform amount of PLN 20 is applied for each day of incapacity to work on the farm, while in social sickness insurance the basic allowance is 80% of the assessment basis in relation to the average salary (income) of the insured before the onset of incapacity.

As for the payment of employee sick pay and emoluments or remuneration for incapacity to work due to sickness for persons in the service relationship and judges and prosecutors, it should be considered that in this case we are dealing with the realization of the right to social security due to sickness outside the accepted understanding of the social security law. This sphere is included in the so-called primary protection, which, however, remains closely related to the object of this right.[50] Moreover, views are formulated that the instruments of this protection (including sick pay) are an expression of the right to social security, and thus that the means of realization of this right is labor law (the provisions of the Labor Code).[51] An even more far-reaching

[49] In both types of insurance, the contribution is paid in full from the insured's (farmers') own resources, with the stipulation that in social sickness insurance it amounts to 2.45% of the assessment basis (Article 22 (1) (3) SISA), while in accident, sickness and maternity insurance of farmers, its amount is set by the Council of Farmers in accordance with Article 8 (4) ASIF (as of the q4 of 2022, it amounts to 60/180 PLN per month/quarter). It should also be emphasized that – unlike in the case of the loss-making, and thus subsidized, sickness fund of the Social Insurance Fund – the statutory rule for the operation of the Contribution Fund of the Farmers Social Insurance in the Agricultural Social Insurance Fund is self-financing, i.e. to ensure that its expenditure is fully covered mainly through contributions to accident, sickness and maternity insurance (Article 77 (2) ASIF), which, incidentally, is closely related to the lack of coverage of the contribution fund by the state guarantee of benefit payments (Article 76 (3) ASIF), following the example of the Pension Fund.

[50] See J. Jończyk, *op. cit.*, p. 54.

[51] See K. Stopka, *O realizacji zabezpieczenia społecznego w przepisach Kodeksu pracy*, "Przegląd Prawa i Administracji" 2020, vol. 120(2), pp. 649–650.

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position was expressed by D. Dzienisiuk, who explicitly stated that sick pay is a social security benefit realized by the employer.[52] Therefore, there should be no doubt that whether a particular legal institution realizes the right to social security under Article 67 (1) of the Polish Constitution is not determined by its formal affiliation (or not) to the social security law, but by the function it is supposed to fulfill in terms of mitigating the consequences of the occurrence of adverse life situations and the social character of the benefits to which the beneficiaries are entitled for protection in the event of the occurrence of a risk, in this case, sickness risk.

This does not contradict the thesis presented earlier that it is often impossible to qualify a given social measure under one of the three methods of legal protection. We undoubtedly face such a situation with regard to employee sick pay and emoluments or remuneration for incapacity for work due to sickness for persons in a service relationship and judges and prosecutors. This is because in this case, the original characteristic of this form of social security is the incurring of expenses for the payment of benefits for incapacity to work due to sickness from the own funds of the employing entities.[53] Thus, a non-contributory financing technique is used here, but – at least as far as employee sick pay is concerned[54] – this usually has nothing to do with the provision method, in which funds for the payment of benefits (e.g. military and police disability and retirement pensions) come from state budget (tax) sources.

However, similarly to provision method, there are no normative manifestations of solidarity between those in an employment (service) relationship and those receiving the above benefits. Remuneration (including sick pay) and emoluments are social benefits received for the exclusive benefit of a specific employee and are not in any relationship with others employed by the same employer or, even more so, by another employer (service entity). Therefore, there are no conditions here for the creation of a community of risk, as in the insurance method, among which the burden of financing these benefits would distributed to a broad collective of persons who are compulsorily or voluntarily subject to social insurance and pay a contributions for it, and whose purpose would be not only to provide protection on an individual basis but also on a community basis.[55]

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[52] D. Dzienisiuk, *Prawo…*, p. 316.

[53] The literature explains that the burden on employers to disburse sick pay is a manifestation of individual solidarity functioning alongside the universal solidarity realized in social insurance. See A. Sobczyk, *Prawo pracy w świetle Konstytucji RP. Wybrane problemy i instytucje prawa pracy a konstytucyjne prawa i wolności człowieka*, vol. 2, Warszawa 2013, p. 179.

[54] It can be argued that the situation is different in the case of judges' and prosecutors' remuneration and emoluments of the uniformed services, since, although these benefits are also paid from the funds of the employing (service) entities, they (as personnel expenses) are *de facto* financed from the state budget, i.e. from the parts whose administrators are individual ministries.

[55] See K. Antonów, *Kilka uwag na temat związku prawa pracy z prawem ubezpieczeń społecznych*, [in:] *Między ideowością a pragmatyzmem…*, pp. 944–945.

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Therefore, it can be concluded that employee sick pay and other remuneration or emoluments are separate forms of social security in the event of incapacity to work due to sickness, provided that – as to their qualification from the point of view of a particular method of legal protection – employee sick pay, due to the legal construction of this benefit (similar to sickness allowance, as mentioned in the previous section), is closer to the insurance method, while remuneration (emoluments), considering the way they are financed, are closer to the provision method.

CONCLUSIONS

To summarize this discussion, there are three main conclusions to be drawn from the research:

1. The content of the right to social security due to sickness should be associated with the provision of social protection in the event of the emergence of temporary incapacity to work resulting not so much (not always) in the loss of income, but, more broadly, in the inability to earn income from work activity performed (at the time of the onset of the sickness) or such planned for the future, i.e. work/service or non-/agricultural activity.
2. The constitutional subjective and objective scope of social security due to sickness includes in the first place active persons (taking into account the partial optionality of this protection in the form of voluntary insurance) and social benefits that provide income during incapacity to work, to which I also include employee sick pay and remuneration/emoluments for the period of incapacity to work due to sickness of judges, prosecutors and persons in a service relationship, since their legal construction is close to sickness insurance benefits (sickness allowance).
3. Constitutional forms of social security due to sickness are social sickness insurance and farmers' accident, sickness and maternity insurance (covered by the insurance method of legal protection), as well as the above-mentioned remuneration (including sick pay) and emoluments financed from the own funds of the employing entities (separate institutions in which legal protection is close to the insurance or provision method), provided that the latter can be given such legal qualification not only because the social purpose and nature of these benefits determines this, but above all because of the multiplicity and diversity of applied legal forms of realization of the right to social security, permissible in light of the open content of the norm included in Article 67 (1) of the Polish Constitution.

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ABSTRAKT

Przedmiotem opracowania jest ustalenie treści prawa do zabezpieczenia społecznego w razie niezdolności do pracy ze względu na chorobę w świetle art. 67 ust. 1 Konstytucji RP oraz określenie zakresu i formy zabezpieczenia społecznego z tego tytułu. Autor przedstawia i uzasadnia koncepcję ochrony socjalnej na wypadek powstania niezdolności do pracy z powodu choroby opartą na założeniu, że przysługuje ona wprawdzie w związku z prowadzoną aktywnością zawodową, ale nie zawsze musi się wiązać z utratą zarobków. Natomiast co do zakresu zabezpieczenia społecznego przyjęto, że może on obejmować (w aspekcie podmiotowym) nie tylko osoby podlegające ubezpieczeniom społecznym (powszechnym i rolników), lecz także służby mundurowe oraz sędziów i prokuratorów, jak również (w aspekcie przedmiotowym) świadczenia ze stosunku pracy (służbowego), tj. pracownicze wynagrodzenie chorobowe oraz wynagrodzenia (uposażenia) za czas niezdolności do pracy wskutek choroby przysługujące żołnierzom zawodowym, policjantom, sędziom czy prokuratorom. Ta ostatnia kwestia wiąże się ze sformułowaniem tezy, że realizacja prawa do zabezpieczenia społecznego w razie niezdolności do pracy ze względu na chorobę nie odbywa się wyłącznie w formie ubezpieczeniowej, gdyż – ze względu na otwartą treść normy ujętej w art. 67 ust. 1 Konstytucji RP – dopuszczalne jest również stosowanie innych metod ochrony prawnej, w tym polegającej na finansowaniu świadczeń z tego obszaru ze środków własnych podmiotów zatrudniających. Rozważania zostały poprzedzone uwagami na temat pojęcia prawa do zabezpieczenia społecznego, w szczególności w odniesieniu do charakteru prawnego art. 67 Konstytucji RP oraz istoty tego prawa.

Słowa kluczowe: prawo do zabezpieczenia społecznego; niezdolność do pracy z powodu choroby; zakres i forma zabezpieczenia społecznego; świadczenia chorobowe