

Judgment of 29<sup>th</sup> January 2002, [K 19/01](#)  
**SUSPICION OF COMMISSION OF AN OFFENCE AS AN OBSTACLE  
 TO APPOINTMENT TO A BANK'S BOARD OF DIRECTORS**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Admissibility to refuse to consent to the appointment of a member to a bank's board of directors, where criminal or fiscal criminal proceedings are pending against the person in question <small>[Banking Act 1997: Article 22(6) point 2 and Article 22(8)]</small>	Rule of law Presumption of innocence <small>[Constitution: Articles 2 and 42(3)]</small>

The reviewed provisions of the Banking Act require the Commission for Banking Supervision to refuse to consent to the appointment of a member to a bank's board of directors, including renewal of such an appointment for a subsequent term of office, where criminal or fiscal criminal proceedings are pending against the person in question. The Commissioner for Citizens' Rights submitted that this infringed the principle of the presumption of innocence (Article 42(3) of the Constitution). He claimed, furthermore, that the statute violated the principle of the rule of law (Article 2 of the Constitution), by dealing with different situations in the same restrictive legal manner.

### RULING

**The challenged provisions [are not inconsistent](#) with Articles 2 and 42(3) of the Constitution.**

### PRINCIPAL REASONS FOR THE RULING

1. Article 65(1) of the Constitution must be understood as permitting the legal regulation of preconditions for recruitment to certain posts. It is self-evident that the level of legally-prescribed qualifications required from employees may increase alongside the rank of their employment position.
2. The high qualification requirements demanded of persons applying for employment as members of a bank's board of directors are based on justified economic and social expectations as to the level of functioning of such institutions, which have the duty to observe the highest possible levels of trade diligence. Appointment to such a position is an expression of social promotion and recognition of the appointed person's professional and moral values and impeccable character.
3. The main task of Article 42 of the Constitution is to provide the accused in criminal proceedings with procedural guarantees. In other non-criminal proceedings of a "repressive" nature (e.g. disciplinary proceedings), application of both the presumption

of innocence and the *nullum crimen sine lege* principle require certain modification, if only because assessment of one's conduct in such cases is not performed by a court and the conduct in question does not amount to a criminal offence.

4. The presumption of innocence, contained in Article 42(3) of the Constitution, has no application in statutory proceedings which do not have as their purpose the ascertainment of reprehensible behaviour and the imposition of repressive sanctions.
5. The challenged provisions – Article 22(6) point 2 and Article 22(8), read in conjunction with Article 22(3)), of the Banking Act of 29 August 1997 – require the Commission for Banking Supervision to refuse to consent to the appointment of a member to a bank's board of directors (including renewal of such an appointment for a subsequent term of office) where criminal or fiscal criminal proceedings are pending against the person in question. This procedure forms part of legal regulations aimed at maintaining the required high level of qualifications of banks' management personnel. Although the provisions in question create a temporary hindrance, in the form of particular requirements demanded of members of a bank's board of directors, they do not pose an obstacle for the candidate to occupy such a position following the conclusion of proceedings against him (unless the person has been convicted by a final decision of a court). Furthermore, since such procedures are not of a repressive nature, their application may not be deemed to violate the principle of presumption of innocence. This provision is functionally coherent with Article 138(4) of the Banking Act 1997 which was not challenged in the current proceedings and which allows a member of a bank's board of directors to be suspended from his position in the same circumstances.
6. Under the old Constitution, last amended in 1989, the principle of proportionality stemmed from the rule of law principle. The new Constitution expresses this fundamental principle independently in Article 31(3). Therefore the latter article, rather than Article 2 of the Constitution, represents the appropriate basis of review if the applicant alleges a violation of the principle of proportionality by the legislator.

#### Provisions of the Constitution

**Art. 2.** The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

**Art. 31.** [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

**Art. 42.** 1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.

3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

**Art. 65.** 1. Everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work. Exceptions shall be specified by statute.