JUDGEMENT OF 13th March 2007, K 8/07

PROPERTY STATEMENTS OF MEMBERS OF LOCAL GOVERNMENT

(OTK ZU 2007, No. 3A, item 26)

Type of proceedings:	Composition of Tribunal:	Dissenting opinions:
Abstract review **Initiator:** A group of Deputies	5-judge panel	0

Legal provisions under review	Basis of review
Expiry of a mandate of a councillor or a head of a commune (mayor, president of a city) as a result of a failure to submit, within specified time frames, a property statement or a statement concerning economic activity conducted by closest relatives. [Act of 16th July 1998 – Electoral Law to Commune Councils, District Councils and Regional Assemblies: Article 190 paragraph 1 point 1a; Act of 20th June 2002 on direct elections of heads of communes, mayors and presidents of cities: Article 26 paragraph 1point 1a]	Principle of a state ruled by law Principle of proportionality [Constitution: Article 2, Article 31 paragraph 3]
Specification of the date from which the 30 day period for the submission of the above-mentioned declaration begins to run. [Act of 8th March 1990 on commune self-government: Article 24h paragraph 4, Article 24j paragraph 3]	Principle of a state ruled by law [Constitution: Article 2]

Polish law envisages that each newly elected commune councillor or head of a commune (mayor, president of a city) shall submit to appropriate organs a set of statements – in particular, a statement of their personal property as well as a statement concerning economic activity conducted by their closest relatives (spouse, ascendants, descendants as well as siblings), where the economic activity is conducted in the same commune. Respective acts specify time frames for the submission of the statements.

The subject of constitutional review in the present case, initiated upon a motion put forward by a group of Deputies, were two sets of provisions associated with the obligation to submit such statements by members of local governments.

First, the initiator challenged regulations that specify sanctions resulting from a failure to submit the statements in question. Pursuant to the challenged Article 190 paragraph 1 point 1a of the Act of 16th July 1998 – Electoral Law to Commune Councils, District Councils and Regional Assemblies (hereinafter referred to as: the Electoral Law) as well as Article 26 paragraph 1 point 1a of the Act of 20th June 2002 on direct elections of heads of communes, mayors and presidents of cities, failure to submit a statement within the time period specified in separate provisions results in an instantaneous forfeiture of a mandate of a councillor or a head of a commune (mayor, president of a city).

Second, the initiator challenged provisions that define the moment from which the 30 day period envisaged for the submission of the aforementioned statements begins to run. Pursuant to Article 24h paragraph 4 of the Act of 8th March 1990 on commune self-government, a councillor or a head of a commune (mayor, president of a city) shall submit a statement of their personal property within the period of 30 days

following “the day of taking the oath”. In turn, Article 24j paragraph 3 of the same Act stipulates that the statement concerning economic activity conducted by relatives (as well as other statements enumerated in the provision) shall be submitted by a councillor or a head of a commune (mayor, president of a city) within the period of 30 days running from “the day of election”.

The initiator of the constitutional review in the present case challenged, above all, too rigorous a nature of sanctions consisting in the forfeiture of a mandate even in cases where the failure to meet the deadline was faultless or where the interested party merely exceeded the deadline envisaged for the submission of the statement, which, in the opinion of the initiator, infringes the constitutional principles of proportionality (Article 31 paragraph 3) and a state rules by law (Article 2). The initiator also pointed out that the ambiguity of provisions specifying the initial date from which the 30 day periods for submission of statements begin to run infringes the constitutional principle of a state ruled by law (Article 2). Furthermore, the authors of the application initiating present proceedings recognised that in the currently binding legal order two different acts comprise two different sanctions for the failure to submit a statement within a specified time frame. The self-government Electoral Law (Article 190 paragraph 1 point 1a) envisages a forfeiture of a mandate of a councillor or a head of a commune (mayor, president of a city), while the Act on commune self-government (Article 24k paragraph 1) envisages a sanction consisting in the loss of an allowance or remuneration. In the opinion of the initiator, such a situation is impermissible in a democratic state ruled by law (Article 2 of the Constitution).

The political background to the judgment of the Constitutional Tribunal discussed herein were numerous instances where members of local governments, elected in elections held on 12th and 26th November 2006 respectively failed to submit appropriate statements in time.

Preliminary issue examined by the Constitutional Tribunal, before it proceeded with the consideration of the case on its merits, concerned the designation of the challenged provisions contained in the acts on self-government. The *petitum* of the application referred to provisions of amending acts (of 8th July 2005 and of 23rd November 2002) that add new content to provisions concerning the submission of statements by members of self-government, which are, in turn, contained in three different acts (i.e. in the Local Electoral Law, the Act on direct elections of heads of communes, mayors and presidents of cities as well as in the Act on commune self-government). The Constitutional Tribunal, on the grounds discussed in points 1-3, decided that the review of constitutionality shall encompass legal norms arising from the amended provisions.

RULING

1. Article 190 paragraph 1 point 1a of the Act of 16th July 1998 – Electoral Law to Commune Councils, District Councils and Regional Assemblies does not conform to Article 31 paragraph 3 and Article 2 of the Constitution.

2. Article 26 paragraph 1 point 1a of the Act of 20th June 2002 on elections of Heads of Communes, Mayors and Presidents of Cities does not conform to Article 31 paragraph 3 and Article 2 of the Constitution.

3. Article 24h paragraph 4 of the Act of 8th March 1990 on commune self-government, insofar as it specifies a time frame for the submission of property statements, conforms to Article 2 of the Constitution.

4. Article 24j paragraph 3 of the above-indicated Act does not conform to Article 2 of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. Amending provisions may be subject to a review by the Constitutional Tribunal only in case where the challenge concerns either the procedure in which they had been adopted or the manner of their coming into force. The issue of whether the subject of review by the Tribunal shall comprise amended or amending provisions is of fundamental significance form the perspective of the effects in the event the provisions have been declared unconstitutional.

2. According to the principle *falsa demonstracio non nocet*, of decisive importance is the essence of the case, as opposed to a faulty designation thereof in a procedural letter. In proceedings before the Constitutional Tribunal the content expressed both in the *petitum* of an application and in the reasoning thereof, make up the essence of the application.

3. It stems from the reasoning of the application submitted by a group of Deputies that in the present case this was actually the content of the amended norms, altered by way of the adoption of amending provisions, that has been challenged. Accordingly, the subject of review by the Tribunal concerns norms of the amended acts.

4. The allegation regarding lack of proportionality of a legal regulation may be based on Article 31 paragraph 3 (prerequisites for the admissibility of limitations upon constitutional freedoms or rights) or Article 2 of the Constitution (the principle of a democratic state ruled by law) – depending on whether this is the encroachment of the legislator into a constitutional right that is subject to review or the allegation concerns an inexplicable intensity of activity on the part of the legislator, the latter, however, bearing no connection to the limitations upon freedoms or rights.

5. The right to vote, which is a constitutional right (Article 62 of the Constitution), relates to all forms of elections irrespective of the level or hierarchy of organs or representatives chosen in such elections. The right stems from the principle of the sovereignty of the Nation (Article 4 of the Constitution).

6. The right to be elected, even though not characterised by any separate constitutional basis in provisions concerning the freedoms and rights of the individual (Chapter II of the Constitution), has also the nature of a constitutional right. The right is derived from the principle, according to which the Nation shall exercise power directly or though their representatives (Article 4 paragraph 2 of the Constitution). The Constitution stipulates the legal regime of elections to the Sejm and the Senate, as well as election of the President of the Republic (Article 99, Article 127 paragraph 3 of the Constitution), while in respect of local elections it regulates the procedure of elections to constitutive organs of local self-government (Article 169 of the Constitution).

7. The right to be elected not only encompasses the right to stand as a candidate in elections, but also involves the right to exercise the mandate obtained by way of elections

conducted in a non-defective manner. In consequence, the right is not exhausted in the act of voting, while the forfeiture of a mandate constitutes an infringement thereof. Regulations concerning the forfeiture of a mandate should, therefore, meet the constitutional criteria of proportionality (Article 31 paragraph 3 of the Constitution).

8. The assessment of proportionality of a regulation requires that the following issues be addressed: first, the usefulness of the norm (i.e. whether the norm is capable of producing effects intended by the legislator); second, the legislator's necessity to act (i.e. whether the challenged norm is indispensable for the protection of the public interest, with which the norm is associated); third, the proportionality *stricto sensu* (i.e. whether the effects of the norm are proportionate to the burdens or limitations it places upon a citizen). Accordingly, where a given objective may be attained by way of a measure that limits the rights and freedoms to a lesser degree, then the application of a measure that is more burdensome is not necessary, and therefore constitutes an infringement of the Constitution.

9. Failure to submit a property statement within a specified period, contrary to other prerequisites for the expiration of a mandate (e.g. death, deprivation of the right to be elected, violation of the prohibition regarding accumulation of public functions), may result from temporary and removable obstacles. Hence, the imposition of sanctions appropriate for irreversible conditions, in instances where a removable obstacle exists, does not fulfil the prerequisite of necessity, and is, therefore, disproportionate. The challenged regulation is characterised by an incomprehensible severity of sanctions, and, simultaneously, does not guarantee any appropriate verification procedure for the determination of the reasons behind the breach or for rectification of a potential oversight.

10. The right to vote manifests itself in both the very act of voting and in the effectiveness of the choice made. Consequently, the challenged regulation tilts the balance between the rights of voters and the necessity of attainment of a goal set by the legislator, as the sanction consisting in the automatic forfeiture of a mandate torpedoes the decision made by voters on the grounds of a trivial and temporary circumstance.

11. The allegation regarding lack of horizontal conformity between provisions of the same rank is beyond the scope of control undertaken by the Constitutional Tribunal. In such circumstances these are the organs applying the law that are obliged to rectify any such nonconformity by way of appropriate interpretation of law.

12. Diversification of periods envisaged for the submission of statements, is not, *per* se, inconsistent with the principle of correct legislation (Article 2 of the Constitution). It does, however, lead to "information noise" that may not be justified by legislative needs. Furthermore, while the term "the day of taking the oath" (Article 24h paragraph 4 of the Act on commune self-government) relates to an event that is precisely located in time, the notion of "the day of election" (Article 24j paragraph 3 of the above indicated Act) remains ambiguous. The usage of the above term, instead of the term "the day of elections" brings about a question of whether it refers to the day on which the elections were held, to the day on which the results of elections were published or to the day on which the final election results were announced.

13. The existence of the possibility of various interpretations of a given provision may not, in itself, determine the unconstitutionality thereof. However, where the provision imposes obligations, especially ones that are connected with the sanction operating *ex lege*, shattering the outcome of an election, then the prerequisites behind the obligations should be defined in an unambiguous manner. It is all the more important in the present case, since

the challenged indeterminateness affects both the confidence in the law of direct addressees of the norm, and the trust of voters.

14. Where the Constitutional Tribunal declares the content of a legal act unconstitutional, the judgement, in principle, waives the binding force of a norm as of the date of official publication of the decision in an appropriate official gazette (Article 190 paragraph 3 of the Constitution). The finding of unconstitutionality of a regulation on the grounds of a faulty procedure for the adoption thereof or its entry into force would mean, however, that the temporal effects of the decision would have to be linked not to the date of promulgation of the judgement, but rather with the moment of the adoption of the regulation found unconstitutional.

15. The presumption of constitutionality of a provision under review by the Constitutional Tribunal shall be rebutted as of the date of a public delivery of a judgement by the Tribunal declaring the provision unconstitutional (i.e. prior to the promulgation of the Tribunal's decision in the official gazette). Hence, the organs applying provisions declared unconstitutional should take into account the fact that they deal with provisions that lost their presumption of constitutionality, even though the intertemporal principles argue in favour of the application thereof or where the Tribunal decided to postpone the entry into force of the judgment (see Article 190 paragraph 3 sentence 1 of the Constitution). This is because a decision regarding unconstitutionality overrides the general rules of intertemporal law and the principles behind the choice of a legal provision appropriate at the moment of applying the law. In case of a decision regarding unconstitutionality, it is the intertemporal norm of a constitutional nature that should be applied. Such norm shall have precedence over general intertemporal norms that bring about changes to the legal environment as a result of the legislator's activity. Moreover, it would be illogical to assume that the constitutional legislator, while allowing for the possibility of reopening proceedings that have already been resolved against the background of norms deemed unconstitutional (Article 190 paragraph 4 of the Constitution), would approve of the possibility of further infringement of the Constitution by way of application of the provision deemed unconstitutional in proceedings, in which – in accordance with the general intertemoral principles – the unconstitutional provision would continue to be applied by courts. Yet, the assessment of a particular instance and the choice of a remedy that should be applied accordingly is vested in the organ applying the law.

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. 4. 1. Supreme power in the Republic of Poland shall be vested in the Nation.
2. The Nation shall exercise such power directly or through their representatives.

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. 62.1. If, no later than on the day of vote, he has attained 18 years of age, a Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local self-government.
2. Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote.

Art. 99.1. Every citizen having the right to vote, who, no later than on the day of the elections, has attained the age of 21 years, shall be eligible to be elected to the Sejm.
2. Every citizen having the right to vote, who, no later than on the day of the elections, has attained the age of 30 years, shall be eligible to be elected to the Senate.

Art. 127.[…] 3. Only a Polish citizen who, no later than the day of the elections, has attained 35 years of age and has a full electoral franchise in elections to the Sejm, may be elected President of the Republic. Any such candidature shall be supported by the signatures of at least 100,000 citizens having the right to vote in elections to the Sejm.

Art. 169.1. Units of local self-government shall perform their duties through constitutive and executive organs.
2. Elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot. The principles and procedures for submitting candidates and for the conduct of elections, as well as the requirements for the validity of elections, shall be specified by statute.
3. The principles and procedures for the election and dismissal of executive organs of units of local self-government shall be specified by statute.
4. The internal organizational structure of units of local self-government shall be specified, within statutory limits, by their constitutive organs.

Art. 190.[…] 3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.
4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.