Procedural decision of 17th July 2003, K 13/02

INADMISSIBILITY OF RE-OPENING PROCEEDINGS BEFORE THE CONSTITUTIONAL TRIBUNAL. THE PROBLEM OF EXCLUSION OF A JUDGE. THE LIMITS OF THE *NE BIS IN IDEM* PRINCIPLE

Type of proceedings: Abstract review **In this case:** Motion to re-open the proceedings **Initiator:** Polish Autocephalic Orthodox Church	**Composition of Tribunal:** Plenary session	**Dissenting opinions:** 0

On 2nd April 2003 the Constitutional Tribunal, sitting in plenary session and having considered an application from the Polish Autocephalic Orthodox Church alleging the unconstitutionality of several provisions of the 1991 Act regulating the property status of that Church, pronounced a judgment (reference number as above) in which it ruled that the challenged provisions were in conformity with the Constitution.

Subsequently, in June 2003, the Polish Autocephalic Orthodox Church lodged a motion for the Constitutional Tribunal to re-open the aforementioned proceedings, which had formally concluded with the Tribunal's judgment of 2nd April 2003. The applicant alleged that one of the judges having deliberated in the April judgment was a Senator during the time when the draft of the 1991 Act was under consideration by the Senate (the upper house of the Polish parliament) and had voted on one of the amendments to the bill. The applicant argued that Article 26(1) point 1 of the Constitutional Tribunal Act 1997 excluded this judge *ex lege* from participating in the adjudication of this case, since he had "participated in the enactment of [the challenged] normative act."

Article 20 of the Constitutional Tribunal Act 1997 provides that matters concerning proceedings before the Tribunal that are not regulated by this Act shall, as appropriate, be governed by the provisions of the Civil Procedure Code 1964. The provisions of the Code allow for the re-opening of civil proceedings where a judge excluded by virtue of law (so-called automatic disqualification) has participated in the pronouncement of a judgment where the party could not demand his exclusion (Article 401(1) of the Civil Procedure Code).

RULING

The Tribunal discontinued the proceedings regarding the motion to re-open the proceedings – by reason of the inadmissibility of pronouncing judgment, pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act 1997.

PRINCIPAL REASONS FOR THE RULING

1. The provisions of the Civil Procedure Code in relation to the re-opening of proceedings do not have appropriate application to proceedings before the Constitutional Tribunal. The issue of the legal status and stability of the Tribunal's judgments may not,

in any sense, be regarded as "a matter not regulated in [this] Act" within the meaning of Article 20 of the Constitutional Tribunal Act 1997. On the contrary, this issue has been the subject of legal regulation of a constitutional nature. Articles 188-197 of the Constitution, which comprehensively regulate the scope of the Tribunal's jurisdiction, the principles of procedure and adjudication, and the organization and legal status of the Tribunal, do not provide a procedure for the re-opening of proceedings. According to Article 190(1) of the Constitution: "Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final", which precludes the existence of any procedure for re-opening proceedings before the Tribunal or any other means of challenging its judicial decisions. A comparative-law analysis also supports the conclusion that the inadmissibility of re-opening proceedings involving the constitutional review of legislative norms is directly linked to the legal character of a constitutional court's judicial decisions, which lead to the shaping of a new normative situation; any alteration to the normative situation created by such decisions may only arise by virtue of legislative intervention.

2. Article 20 of the Constitutional Tribunal Act 1997 provides only for the "appropriate" (i.e. as opposed to the complete and unconditional) application of the Civil Procedure Code's provisions to proceedings before the Tribunal in "matters not regulated by the Act". Reference to the need for "appropriate" application (*mutatis mutandis*) implies that the scope and manner of resorting to the Code's provisions and procedures should take account of the specificity and the unique functions of proceedings before the Tribunal, which adjudicates on the conformity of a normative act with the Constitution or other acts of higher status.

3. The applicant's primary reason for having filed the motion to re-open proceedings is the participation of a Constitutional Tribunal judge in an earlier case (resulting in the aforementioned judgment of 2nd April 2003) where the applicant unsuccessfully challenged the constitutionality of a statute on which that judge had voted in the Senate, whilst being a Senator of the Republic of Poland. Given the "vagueness" (i.e. normative ambiguity) of a number of elements of Article 26 of the Constitutional Tribunal Act (grounds and procedures provided for challenging a judge with respect to adjudicating a case) the primary question to be answered is whether the fact of voting on a draft normative act (and, in particular, on amendments thereto) is, in itself, synonymous with the notion of having "participated in the enactment of [the challenged] normative act", within the meaning of Article 26(1). Following the principles of systematic interpretation, it was assumed in the practice of applying this provision that, when the legislator used the term "participated", this was intended to indicate that the relevant participation, for the purposes of excluding the Constitutional Tribunal judge from proceedings in which that act is reviewed, regards above all actions which are connected with an active influence over the contents and shape of the given act (e.g. having initiated the legislative adoption of the act; having actively participated in parliamentary debate surrounding the act's adoption; having acted as reporting Deputy; having submitted amendments to the draft statute). It may not, therefore, be determined *in casu* whether the pre-requisite for excluding a judge on the basis of his "participation" in enacting a normative act was fulfilled merely by virtue of that judge having previously voted on amendments to the statute in the Senate. Such an interpretation of Article 26 of the Constitutional Tribunal Act 1997 is supported by the principles governing the appointment of judges to the Constitutional Tribunal, as defined in

the Constitution, which allow for the election of persons having previously been members of collective legislative organs. To give this provision a more stringent interpretation would pose serious difficulties in the functioning of the Constitutional Tribunal, especially in examining cases in plenary session since, amongst the Tribunal's judges, there are (and always have been) persons who had previously participated in legislative work in the Sejm or the Senate.

4. As regards the second claim raised in the motion for re-opening the proceedings – the omission from the judgment of 2nd April 2003 of materially essential aspects of the constitutional basis of review of the statute challenged by the applicant (Article 2) – it should be stressed, that the *ne bis in idem* principle does not generally preclude in the future, in new proceedings before the Constitutional Tribunal, a possible referral to these aspects which were, according to the applicant, omitted in case K 13/02. The aforementioned principle only relates to those aspects of the constitutional basis which found actual and visible application in the substance of the Tribunal's judgment. The existence of a judgment does not preclude the Tribunal from subsequent reviewing the conformity of the same provisions of an act with the same constitutional basis of review, provided that the subject initiating the new review indicates material circumstances, evidence or arguments which were not previously considered by the Tribunal and were not indicated in the reasons for its judgment. It will then be for the Tribunal to consider whether pronouncing another judgment is justified, or whether this would be superfluous (Article 39(1) of the Constitutional Tribunal Act 1997).

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:
1) the conformity of statutes and international agreements to the Constitution
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
4) the conformity to the Constitution of the purposes or activities of political parties;
5) complaints concerning constitutional infringements, as specified in Article 79, para. 1.

Art. 189. The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State.

Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.
2. Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*.
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.
5. Judgments of the Constitutional Tribunal shall be made by a majority of votes.

Art. 191. 1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:
1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,
2) the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
3) the constitutive organs of units of local self-government;
4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;

5) churches and religious organizations;
6) the subjects referred to in Article 79 to the extent specified therein.

2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

Art. 192. The following persons may make application to the Constitutional Tribunal in respect of matters specified in Article 189: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Supreme Administrative Court and the President of the Supreme Chamber of Control.

Art. 193. Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

Art. 194. 1. The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.
2. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

Art. 195. 1. Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.
2. Judges of the Constitutional Tribunal shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of the office and the scope of their duties.
3. Judges of the Constitutional Tribunal, during their term of office, shall not belong to a political party, a trade union or perform public activities incompatible with the principles of the independence of the courts and judges.

Art. 196. A judge of the Constitutional Tribunal shall not be held criminally responsible or deprived of liberty without prior consent granted by the Constitutional Tribunal. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The President of the Constitutional Tribunal shall be notified forthwith of any such detention and may order an immediate release of the person detained.

Art. 197. The organization of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute.

CT Act

Art. 20. In relation to cases not regulated in the Act concerning the proceedings before the Tribunal, the provisions of the Code of Civil Procedure shall apply as appropriate.

Art. 26. 1. A judge of the Tribunal shall be subject to challenge with respect to adjudicating cases in which:
1) he/she enacted or participated in the enactment of a normative act, judgment, administrative decision or another settlement;
2) he/she was a representative, attorney, legal counsel of or advisor to one of the participants in the proceedings;
3) there are other reasons for challenging the judge as specified in Article 48 of the Code of Civil Procedure.

2. A judge of the Tribunal may be excluded from participating in the proceedings at his/her request or the request of a participant in the proceedings or ex officio if circumstances which are not specified in paragraph 1 and which may engender doubts as to his/her impartiality may reasonably be thought to exist.
3. The President of the Tribunal shall decide on any challenge to a judge for reasons specified in paragraph 1 and the Tribunal - for reasons specified in paragraph 2.
4. Until the issue of a challenge is resolved, the judge of the Tribunal may only perform acts of the utmost urgency.

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:
1) if the pronouncement of a judicial decision is superfluous or inadmissible;
2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.