

Judgment of 10<sup>th</sup> April 2002, [K 26/00](#)  
**STATUTORY PROHIBITIONS OF POLITICAL PARTY MEMBERSHIP**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> Plenary session	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Provisions contained in 18 different statutes prohibiting political party membership of persons holding public office	Freedom of association Freedom of creating and functioning of political parties Principle of proportionality Principle of equality Right to equal access to public service  [Constitution: Articles 11(1), 31(3), 32, 58(1) and 60; International Covenant on Civil and Political Rights: Article 22; (European) Convention for the Protection of Human Rights and Fundamental Freedoms: Articles 11 and 17]
Suspension of political party membership for the time in office of a member of the National Broadcasting Council  [Broadcasting Act 1992: Article 8(3)]	Constitutional prohibition of political party membership of members of the National Broadcasting Council  [Constitution: Article 214(2)]

In Poland, many categories of persons holding public office are subject to statutory rules prohibiting them from being members of a political party. Aside from the principle of political neutrality of the Armed Forces, which has its roots in pre-war tradition, the current prohibitions regarding party membership may be explained as a reaction to experiences under Communist rule, when State institutions and officials of the United Polish Workers' Party were obliged to serve a totalitarian regime. Furthermore, there is widespread concern within the society that the involvement with political parties of personnel employed in sensitive areas of the State could pose a threat to the young and insecure democratic system, which could facilitate exploitation of the State for particular party interests.

For certain State offices, the prohibition of political party membership is expressly provided for by the Constitution. Such a prohibition applies to judges (Article 178(3)); judges of the Constitutional Tribunal (Article 195(3)); the President of the Supreme Chamber of Control (Article 205(3)); the Commissioner for Citizens' Rights (Article 209(3)); members of the National Broadcasting Council (Article 214(2)); and the President of the National Bank of Poland (Article 227(4)). Furthermore, many ordinary statutes contain similar prohibitions against political party membership. Such statutory prohibitions are currently in force in respect of: career soldiers; public prosecutors; police officers; state security officers; border guards; penitentiary officers; public service fire-fighters; members of municipal police forces; chairmen and other permanent members of self-government boards of appeal (administrative appeals in cases falling within the competence of local self-government); Vice-Presidents and directorates-general of the Supreme Chamber of Control; customs officers and Customs Inspection officers (the so-called customs police); the Data Pro-

tection Commissioner; the Public Interest Commissioner (the public prosecutor in lustration proceedings concerning prior co-operation of important office holders with communist secret services); the chairman and other employees of the National Election Office; and, last but not least, members of the Civil Service corps as defined in Article 153 of the Constitution (employed as civil servants in ministries and other government authorities).

In the present proceedings, the Commissioner for Citizens' Rights challenged all ordinary statutes prohibiting political party membership where such a prohibition was not provided for by the Constitution. The applicant alleged breaches of various constitutional provisions – Article 11(1) (freedom of creating and functioning of political parties); Article 31(3) (principle of proportionality); Article 32 (principle of equality); Article 58(1) (freedom of association) and Article 60 (equal access to the public service). The various statutes were also alleged to violate Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 11 and 17 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

The applicant stressed that freedom of association is one of the most important fundamental rights guaranteed both by the Constitution and by international law. Although restrictions on this fundamental right are permitted, they must not infringe upon the very essence of the right, and must be limited to the minimum necessary extent. In this respect the ICCPR and the ECHR provide States with more discretion in relation to members of the armed forces and the police than, for example, in relation to members of the civil service.

The applicant considered that the scope and intensity of the prohibitions in question are unprecedented among the democratic States of Europe. In the European Union (EU) a comparable prohibition exists only in France in respect of career military. In principle, all State employees in EU countries have rights which are equal to other citizens. This is proof that the challenged prohibitions are in no way 'necessary in a democratic state'.

The applicant argued that the drafters of the Constitution conclusively regulated the public offices to which the prohibition of party political membership applies. For this reason alone, ordinary legislation ought not to be able to extend this prohibition to other categories of employees.

The applicant also claimed that the statutory provisions in question failed to distinguish between, on the one hand, the requirement for political neutrality in the performance of public duties and, on the other hand, the generally unnecessary prohibition of political party membership. Such a differentiation was said to be implicit in Article 26(2) of the Constitution, in respect of the armed forces, and Article 153(1), in respect of civil servants in government administration. Ordinary statutes also make such a distinction, such as those relating to parliamentary officers and employees of the Chancellery of the Sejm (i.e. the first chamber of the Polish Parliament), the Senate (i.e. the second chamber of the Polish Parliament) and the President of the Republic of Poland, which demand political neutrality of the public servant in the performance of his duties but do not prohibit political party membership *per se*.

In addition to the challenges against various statutes prohibiting political party membership, the applicant also challenged Article 8(3) of the Broadcasting Act 1992 on the basis that, although Article

214(2) of the Constitution explicitly prohibits political party membership in respect of members of the National Broadcasting Council, the 1992 Act merely requires such persons to suspend their party membership.

#### RULING

**1. All of the challenged statutory provisions prohibiting political party membership conform to Article 11(1), Article 31(3), Article 32, Article 58(1) and Article 60 of the Constitution, as well as to Article 22 of the International Covenant on Civil and Political Rights and Articles 11 and 17 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms.**

**2. Article 8(3) of the Broadcasting Act 1992 does not conform to Article 214(2) of the Constitution.**

#### PRINCIPAL REASONS FOR THE RULING

1. Article 31(3) of the Constitution establishes a general principle which applies to all fundamental rights and freedoms, as defined in Chapter II. Where a constitutional provision governing a fundamental right contained in that Chapter does not specifically provide for restrictions, such restrictions are nevertheless possible in accordance with Article 31(3). Where such a constitutional provision does, however, specifically provide for restrictions, Article 31(3) fulfils a supplementary function; it is necessary to comply with the requirements of this provision which are not covered by the more specific constitutional provisions and which are not explicitly excluded by these provisions. Restrictions on any particular fundamental right are assumed to be impermissible only where this is explicitly stated in the provisions of the Constitution or international agreements.
2. The values enshrined in Article 31(3) of the Constitution express the concept of public interest as the prevailing factor for determining where to delineate general restrictions on the rights and freedoms of individuals. As a general clause, this concept must be constantly re-interpreted in the light of changing social contexts. The general concept of the public interest is then sub-divided into six categories of a more precise nature.
3. The first sentence of Article 31(3) of the Constitution emphasizes that any limitations placed on fundamental rights must be ‘necessary in a democratic State’. Thus, each restriction of an individual’s rights and freedoms must, in the first analysis, be assessed from the perspective of the following question – is such a restriction necessary or, in other words, would it have been possible to achieve the same effect by other means which would be less burdensome for the citizen and which would interfere less in the sphere of the citizen’s rights and freedoms?
4. The freedom guaranteed by Article 58 of the Constitution allows the creation of various kinds of citizens’ associations, including political parties. The essence of this freedom (to use the language of Article 31(3)) is the possibility for citizens to create organizational links whose objectives and purposes are not regulated by the State. Such freedom is essential for the functioning of civil society. The essence of this free-

dom would be violated in respect of particular categories of people if they were prohibited from associating in such organizations, since they would thereby be excluded from civil society.

5. Article 11(1) of the ECHR and Article 22(2) of the ICCPR permit restrictions on the right to form associations within defined parameters, to a lesser or greater degree. The permissible degree of such restrictions depends upon the situation in the relevant country, how well the mechanisms of democracy work therein and the traditions that underlie the workings and character of that country's relevant institutions. The assessment thereof lies within the competence of the national legislator.
6. The freedom to form political parties is not an autonomous value but is closely linked to the role accorded by Article 11 of the Constitution to political parties within the political framework of the State. Accordingly, the right to belong to a political party must be understood as being one means among many which may be used to influence the policies of the State.
7. The spectrum of measures available for citizens to realize their right to influence State policy extends far beyond membership of political parties. Therefore, depriving certain categories of State officials or members of the civil service the right to become members of a political party neither violates the essence of the freedom of association nor the right to influence State policy.
8. Constitutional provisions prohibiting certain categories of persons from membership of political parties (Article 178(3); Article 195(3); Article 205(3); Article 209(3); Article 214(2); and Article 227(4)) may not be considered to be exhaustive. Since these provisions apply in respect of constitutional organs, the prohibition of party membership is a matter of constitutional significance. Similarities in the functions of an organ established by ordinary legislation and those of a constitutional organ, to which a constitutional prohibition applies, can justify the existence of a statutory provision containing a similar prohibition in respect of non-constitutional organs.
9. Article 60 of the Constitution does not give every Polish citizen enjoying full public rights the right to demand acceptance into the civil service. It remains within the competence of the State to determine both the number of posts available within the civil service and the conditions for those wishing to occupy such posts. Nevertheless, the aforementioned constitutional provision does require that all Polish citizens enjoying full public rights shall have equal access to employment in the civil service (i.e. the principles of such access should be equal). Consequently, the statute should specify the objective selection criteria for candidates to the civil service as well as the principles of, and procedures for, the selection of such persons, in order to ensure equal opportunities to all candidates, without any discrimination or unjustifiable limitations.
10. Article 60 of the Constitution does not prevent public authorities from laying down specific preconditions for appointment to a particular office, with regard to the nature and essence of that office. This applies, in particular, to the legislator prohibiting political party membership, provided that such a prohibition fulfils the conditions laid down in Article 31(3).

11. Justification for the statutory prohibitions of party membership, as referred to above in point 1 of the Tribunal's ruling, may be found in the principles of citizens' trust in the State, the protection of State security and public order and the protection of the rights of third parties. These restrictions on the constitutionally secured freedom of association do not extend beyond what is necessary and do not violate the essence of this freedom, since the affected person may enjoy his or her freedom of association by other means. In this respect, the current provision may be altered if the legislator considers that the democratic mechanisms already operate sufficiently well so as to render the retention of these restrictions unnecessary.
12. Membership of a political party does not preclude anyone from applying for a position to which a prohibition of party membership applies. Not until the candidate has accepted the office or been appointed or elected does such a prohibition become relevant. In most cases, statutes provide that a person's membership of a political party shall cease upon their appointment. Where the relevant legal provisions do not contain such a clause, it will be for the person having been appointed to resign their party membership.
13. For the sake of political neutrality, the Armed Forces may be subject to considerably more stringent restrictions under Article 26 of the Constitution than other groups of society.
14. The neutrality of the Armed Forces in political matters (Article 26(2) of the Constitution) has two aspects. Firstly, it means that the Armed Forces may not be an autonomous entity within the State political structure, capable of influencing political decisions of State constitutional organs. This political neutrality is secured in particular through civil control, by subjecting the military to the constitutional organs of the Republic. The second aspect of the neutrality of the Armed Forces is that they must be removed from the sphere of direct influence of political parties.
15. From the perspective of the principle of equality (Article 32 of the Constitution), members of the career military may not simply be compared with ordinary citizens with regard to their legal position, but rather only with those groups whose career and functions within the state are similar to those of the career military (e.g. members of other uniformed services).
16. Article 153(1) of the Constitution requires members of the Civil Service Corps employed in organs of government administration to maintain political neutrality whilst carrying out their State functions, in particular in relation to the interests of political groups and any disputes between these groups or individual politicians.
17. Article 214(2) of the Constitution contains a prohibition of party membership of members of the National Broadcasting Council. However, Article 8(3) point 1 of the Broadcasting Act 1992 states that party membership of members of the National Council "is suspended". Whilst such a suspension does not terminate the party membership, it temporarily precludes the exercise of membership rights. This allows a member of the National Broadcasting Council to be a member of, and be associated with, a political party, which contradicts Article 214(2) of the Constitution.

18. Article 2(2) of the Act of 27th June 1997 on Political Parties does not authorize the limitation of the scope of political party membership. It merely refers to appropriate provisions of other statutes.

**Provisions of the Constitution, the International Covenant on Civil and Political Rights and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms**

**Constitution**

**Art. 11.** 1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.

2. The financing of political parties shall be open to public inspection.

**Art. 26.** 1. The Armed Forces of the Republic of Poland shall safeguard the independence and territorial integrity of the State, and shall ensure the security and inviolability of its borders.

2. The Armed Forces shall observe neutrality regarding political matters and shall be subject to civil and democratic control.

**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. 32.** 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

**Art. 58.** 1. The freedom of association shall be guaranteed to everyone.

2. Associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited. The courts shall adjudicate whether to permit an association to register or to prohibit an association from such activities.

3. Statutes shall specify types of associations requiring court registration, a procedure for such registration and the forms of supervision of such associations.

**Art. 60.** Polish citizens enjoying full public rights shall have a right of access to the public service based on the principle of equality.

**Art. 153.** 1. A corps of civil servants shall operate in the organs of government administration in order to ensure a professional, diligent, impartial and politically neutral discharge of the State's obligations.

**Art. 178.** [...] 3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

**Art. 195.** [...] 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. 205.** [...] 3. The President of the Supreme Chamber of Control shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.

**Art. 209.** [...] 3. The Commissioner for Citizens' Rights shall not belong to a political party, a trade union or perform other public activities incompatible with the dignity of his office.

**Art. 214.** [...] 2. A member of the National Broadcasting Council shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function.

**Art. 227.** [...] 4. The President of the National Bank of Poland shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.

**International Covenant**

**Art. 22.** 1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

**European Convention**

**Art. 11.** 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a

democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

**Art. 17.** Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.