Procedural decision of 22nd June 2005, K 42/04

# SUPERFLUITY OF A CHALLENGE CONCERNING THE CAPACITY TO BE SUED IN PROCEEDINGS TO COMPENSATE HARM CAUSED BY LEGISLATIVE UNLAWFULNESS

| Type of proceedings: Abstract review<br>Initiator: Marshal of the Sejm | Composition of Tribunal: 5-judge panel | Dissenting opinions: 0 |
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The Marshal of the Sejm (first chamber of Polish Parliament) questioned the conformity with the Constitution of two provisions regulating legal representation in court of the State Treasury in civil cases: Article 67 § 2 of the Civil Procedure Code and Article 17a(1) of the Principles for Executing State Treasury Rights Act 1996 (as inserted by the Amendment Act 2000). The first of the challenged provisions envisages that procedural actions shall be undertaken on behalf of the State Treasury by an organ of the State organisational unit (the so-called *statio fisci*) to whose activity the claim is related, or an organ of the superior unit. The second of the aforementioned provisions refers to "relevant provisions" as regards representation of the State Treasury. Within the application submitted to the Constitutional Tribunal, the applicant alleged that a problem remained unresolved regarding legal representation in court proceedings against the State Treasury in respect of so-called legislative unlawfulness (i.e. failure to issue a statute despite a constitutional obligation to do so, or issuing a statute which does not conform to the Constitution).

The Marshal of the Sejm's application indirectly relates to cases in which the State Treasury was sued by public healthcare institutions seeking compensation for the introduction of a statutory wage increase for their employees (the so-called *lex* 203) without having secured the necessary means for financing this, leading to disruptions in the functioning of these institutions (cf. the Constitutional Tribunal's judgment of 18th December 2002, K 43/01, summarised separately). The provisions challenged in the present case did not unambiguously state which *statio fisci* should be sued in connection with such legislative unlawfulness. The common courts sometimes recognised the Sejm's capacity to be sued in such proceedings, obliging the Sejm to pay compensation or, alternatively, the Sejm and the National Health Fund (*Narodowy Fundusz Zdrowia*) – jointly and severally. A Supreme Court judgment of 24th September 2003, I CK 143/03, assumed that the Sejm was the only entity capable of being sued in such proceedings, stating that a failure to legislate amounted to a "tort of the Sejm", as the "principal organ enacting laws in the form of statutes".

The Sejm's organs were concerned by this line of judicial jurisprudence. The budget of the Chancellery of the Sejm did not, and does not, allocate financial resources to compensate for legislative unlawfulness.

The applicant alleged that this defect within the statutory provisions constitutes an infringement of the constitutional guarantees of the right to court (Articles 45 and 77(2)) and the constitutional regulation of matters concerning representation of the State Treasury (Article 218).

The Marshal of the Sejm submitted this application in November 2004.

Liability for legislative unlawfulness, as derived from the principle expressed in Article 77(1) of the Constitution, is regulated within the Civil Code, as amended by the Amendment Act of 17th June 2004 which entered into force on 1st September 2004. Where harm was caused by the issuing of a normative act, compensation would be granted once it was confirmed, within relevant proceedings, that this act did not conform to the Constitution, a ratified international agreement or a statute (Article $417^1$ § 1 of the Civil Code). Where harm was caused by failure to issue a normative act which was required by law to have been issued, the contrariness to the law of such a failure shall be confirmed by the court hearing the compensation claim (Article $417^1$ § 4 of the Civil Code).

The procedural consequences of liability for legislative unlawfulness were explicitly regulated in the Civil Procedure Code Amendment Act of 22nd December 2004 (adopted following the initiation of proceedings in the present case), which entered into force on 21st January 2005. The new § 3 was inserted into Article 67 of the Civil Procedure Code, constituting *lex specialis* with respect to the challenged § 2 (cited above). The new provision is worded as follows: "Where compensation is claimed for harm caused by the issuing of a statute or Council of Ministers' Regulation which does not conform to the Constitution, a ratified international agreement or a statute, or where compensation is claimed for harm caused by a failure to issue a normative act which was required by a legal provision to have been issued, procedural actions shall be undertaken on behalf of the State Treasury by the Minister of the State Treasury. Where compensation is claimed for harm caused by another constitutionally authorised organ having issued, or failed to issue, a regulation, procedural actions shall be undertaken on behalf of the State Treasury by this organ".

The latter amendment became the reason why proceedings in the present case were discontinued.

## RULING

**The Tribunal discontinued proceedings, pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act – given that it would be superfluous to pronounce judgment.**

## PRINCIPAL REASONS FOR THE RULING

1. The grounds for the allegations formulated within the Marshal of the Sejm's application were eliminated with the adoption and entry into force of Article 67 § 3 of the Civil Procedure Code.

2. From a substantive perspective, the aforementioned amendment corresponds to the hypothesis of Article 39(1) point 3 of the Constitutional Tribunal Act, which envisages the discontinuance of proceedings following legislative activity. Nevertheless, in the present case, the legislator's activity did not consist in eliminating the challenged provision but, on the contrary, in the insertion of a provision whose absence was challenged by the applicant. Accordingly, proceedings shall be discontinued on the grounds contained in Article 39(1) point 1 of the Constitutional Tribunal Act, concerning the superfluity of adjudication.

**Provisions of the Constitution and the Constitutional Tribunal Act**

**Constitution**

**Art. 45.** 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.
2. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly.

**Art. 77.** 1. Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law.
2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

**Art. 218.** The organisation of the State Treasury and the manner of management of the assets of the State Treasury shall be specified by statute.

**CT Act**

**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.

2. If the circumstances referred to in paragraph 1 above shall come to light at the hearing, the Tribunal shall make a decision to discontinue the proceedings.
3. The regulation stated in item 1 point 3 is not applied if issuing a judgment on a normative act which lost its validity before issuing the judgment is necessary for protecting constitutional freedom and rights.