

Judgment of 16th November 2004, P 19/03
**RESTRICTIONS ON THE FREEDOM TO CHOOSE A LEGAL
 REPRESENTATIVE IN CIVIL PROCEEDINGS**

Type of proceedings: Question of law referred by a court Initiator: Regional Court for Poznań, Civil Department (no. 1)	Composition of Tribunal: 5-judge panel	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Restricted class of persons who may be appointed as legal representative in civil proceedings by a party to such proceedings [Civil Procedure Code 1964: Article 87 § 1]	Principle of proportionality Principle of equality Right to court Right of petition [Constitution: Articles 31(3), 32(1), 45(1) and 63]

In civil proceedings before the Poznań Regional Court, the mentally-handicapped plaintiff asked her cousin, who exercised factual custody of the plaintiff, to act as her legal representative. This appointment of representative was ineffective in light of Article 87 § 1 of the Civil Procedure Code, which states that “the following persons may be appointed as a legal representative: an advocate or legal advisor; a patent attorney in industrial property cases; a co-participant in the litigation; parents; spouse; siblings or relatives in the descending line; and persons related to the party by adoption”.

The Regional Court doubted whether this provision conformed to the Constitution, insofar as it restricts a natural person’s ability to appoint their factual custodian as legal representative. Accordingly, the court referred a question of law to the Constitutional Tribunal concerning the conformity of this provision with the following provisions of the Constitution: Article 32 (principle of equality); Article 45(1) (right to court), read in conjunction with Article 31(1) (principle of proportionality in limiting constitutional rights and freedoms); and Article 63 (right to submit petitions, proposals and complaints).

When referring the aforementioned question, the Poznań Regional Court expressed the view, in particular, that the right to have court proceedings properly shaped in accordance with the requirements of justice, as one of the aspects of the constitutional right to court, is primarily realised by ensuring equality between the rights of the parties. This requires the creation of appropriate procedural guarantees, including the ability act through a legal representative. The court considered that, when one of the parties to proceedings lacks any of the close relatives enumerated in Article 87 § 1 of the Civil Procedure Code and, for financial reasons, is unable to afford to hire a professional legal representative, no such equality before the law exists.

Article 87 of the Civil Procedure Code, indicated as the legal provision under constitutional review, consists of six paragraphs (§). Whilst the Tribunal ruled on the constitutionality of the first paragraph (§ 1), proceedings regarding the remaining paragraphs were discontinued for the reasons summarised below (points 10 and 11 of the principal reasons for the ruling).

RULING

Article 87 § 1 of the Civil Procedure Code conforms to Articles 32(1), 45(1), read in conjunction with Article 31(1), of the Constitution and is not inconsistent with Article 63 of the Constitution.

The Tribunal discontinued the proceedings insofar as they concerned the review of conformity of Article 87 § 2-6 of the Civil Procedure Code with Articles 31(3), 32(1), 45(1) and 63 of the Constitution, pursuant to Articles 39(1) point 1 and 39(2) of the Constitutional Tribunal Act – given the inadmissibility to pronounce judgment on this question.

PRINCIPAL REASONS FOR THE RULING

1. The Constitutional Tribunal is not authorised to adjudicate on the legislator's "failure to act" concerning the failure to issue a normative act, even where the obligation to issue a specific normative act stems from constitutional norms. Nevertheless, a distinction must be drawn between the legislator's failure to act, construed as above, and the situation where the constitutional review concerns an operative normative act from the perspective of whether it lacks provisions whose absence may cause the act to raise doubts of a constitutional nature. The question of law referred in the present case concerns the latter situation.
2. The constitutional principle of equality (Article 32(1)) demands identical treatment of all addressees of a legal norm remaining in the same legally relevant situation and, concomitantly, requires the existence of a justified criterion upon which to base any differentiation in the treatment of similar entities. Such differentiation must, firstly, be relevant in nature (i.e. it must remain directly connected with the aim and principal content of the provisions containing the reviewed norm and serve to realise this aim and content). Secondly, it must be proportionate in nature (i.e. the importance of the problem to be remedied by differentiating the situation of the norm's addressees must remain proportionate to the importance of interests that will be infringed in consequence of the unequal treatment of similar entities). Thirdly, it must remain connected with constitutional norms justifying unequal treatment of similar entities.
3. The principle of equality requires, when delimiting the class of persons who may be appointed as legal representative, that all interested persons in the same, or similar, legally relevant situation have a real possibility to appoint a legal representative in accordance with the same principles.
4. Since the appointment of a legal representative for the purpose of litigation (a legal institution distinct from appointment of a legal representative on the basis of general principles) demands specific qualifications of the representative, it is not objectionable from the perspective of the principle of equality that not every natural person exercising factual custody of a mentally or physically handicapped person may be appointed as a legal representative, according to the reviewed Article 87 § 1 of the Civil Procedure Code. No infringement of the principle of equality takes place in this respect. Both the content of Article 87 § 1 and other Civil Procedure Code provisions, concerning the class of persons who may be appointed as legal representative, point towards a rule in civil proceedings that the choice of representative should be made from amongst professional persons. In the first place, the reviewed provision men-

tions advocates and legal advisors (i.e. persons undertaking a profession consisting in the provision of legal assistance). The second category of potential representatives comprises the following persons: “a co-participant in the litigation, parents, spouse, siblings or relatives in the descending line and persons related to the party by adoption”. In this second case, the legislator assumes that the aforementioned persons are familiar with the nature and course of the party’s interests and are also concerned – for emotional or proprietary reasons – in the successful settlement of these interests. Using the criterion of proximity, the legislator was compelled to restrict the groups of persons included therein, based on a far-reaching and simplifying assumption that the party’s nearest relatives and spouse are most familiar with the nature of their interests and have the strongest emotional ties to the party.

5. The allegation that the “incompleteness” of the specified class of potential legal representatives is incompatible with the principle of equality would be justified if the omission of a person, exercising factual custody of the party, from the class of non-professional persons from which the party may choose their representative, deprived the party of the possibility to appoint a legal representative. However, this is not the case, since the 1964 Code secures for impecunious persons the possibility to take advantage of assistance provided by a representative being an advocate or legal advisor (cf. Article 117, read in conjunction with Article 113, of the Civil Procedure Code). Mentally or physically handicapped persons who are willing to prepare and submit a written application in such a case may enlist the practical assistance of other persons and, in particular, their factual custodian.
6. The differences between the statutory designation of, on the one hand, categories of persons who may act as representatives in administrative proceedings (before organs of public administration) and, on the other hand, those who may act in civil proceedings (before a court) are closely linked with the dissimilarity and specificity of each of these procedures. To the extent that it is not possible to compare the situation between persons entitled to appoint a representative in civil proceedings and administrative proceedings, Article 32(1) of the Constitution is not an adequate basis of review.
7. The constitutional right to court (Article 45(1)) comprises in particular: the right of access to a court (i.e. the right to institute proceedings before a court as an independent, impartial and unbiased organ); the right to have court procedures shaped in accordance with the requirements of justice and transparency; and the right to a court judgment (i.e. the right to obtain a binding court settlement of a given case).
8. The restriction of the class of persons that a party may appoint as their legal representative does not deprive that party of appropriate representation before the court (cf. points 4 and 5). Accordingly, this does not amount to an infringement of the aspect of the constitutional right to court indicated by the court referring the question of law, i.e. the requirement to have court procedures shaped in accordance with the requirement of justice, in the sense of ensuring equality between the parties. To the extent discussed in the present case, this restriction does not infringe the requirements mentioned in Article 31(3) of the Constitution, since it remains proportionate to the goal attributed to non-professional representatives of parties to civil proceedings, from the perspective of their principal’s interests and the reliability and objectivity of the proceedings.

9. The right specified in Article 63 of the Constitution (the so-called right of petition) does not encompass initiating court proceedings. As the wording of this provision clearly indicates, it concerns petitions, proposals and complaints submitted to organs of public authority and to social organisations and institutions (in connection with the performance of their prescribed duties within the field of public administration). Accordingly, the challenged provision of the Civil Procedure Code has no substantive connection with this basis of review.
10. Pursuant to Article 193 of the Constitution, it is a prerequisite for effective initiation of proceedings before the Constitutional Tribunal, within the procedure for **specific review** as pursued in the present case, that a connection exists between the Tribunal's answer to the question of law referred and the case pending before the court. The decision in a particular case, considered by the court referring a question of law to the Tribunal, must be dependent upon the answer to the referred question. This relationship is not specified as strictly in relation to the referral of a question of law by a court as within the procedure for constitutional complaint (Article 79(1) of the Constitution). In the latter case, the Constitution requires an indication of a normative act, on the basis of which a final decision was issued. Within the procedure for the referral of a question of law by a court (Article 193), it is possible to refer to any provision which the court considers or intends to consider in the process of interpreting and applying the law, i.e. in search of a norm for an individual decision in the case. Nevertheless, the Constitutional Tribunal's answer to the referred question of law should always relate to the doubts expressed by the referring court in connection with the specific proceedings, on the basis of which the court decided to refer this question.
11. For the aforementioned reason Article 87 § 1 of the Civil Procedure Code is the only permissible subject of review in the present case. With respect to § 2-6 of this provision, which were also the source of constitutional doubts raised by the referring court, proceedings shall be discontinued on the basis of Articles 39(1) point 1 and 39(2) of the Constitutional Tribunal Act, given the inadmissibility of adjudication.

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

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. 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.

Art. 63. Everyone shall have the right to submit petitions, proposals and complaints in the public interest, in his own interest or in the interests of another person – with his consent – to organs of public authority, as well as to organizations and social institutions in connection with the performance of their prescribed duties within the field of public administration. The procedures for considering petitions, proposals and complaints shall be specified by statute.

Art. 79. 1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

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.

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 useless 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.