

Judgment of 27th October 2004, [SK 1/04](#)
**RESTRICTING THE POSSIBILITY TO RE-OPEN CIVIL PROCEEDINGS
 FOLLOWING A CONSTITUTIONAL TRIBUNAL JUDGMENT**

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| Type of proceedings: Constitutional complaint Initiator: A natural person | Composition of Tribunal: 5-judge panel | Dissenting opinions: 0 |
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| Legal provisions under review | Basis of review |
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| Restricting the possibility to re-open civil proceedings, following the Constitutional Tribunal's finding that the legal basis for a judicial decision did not conform to the Constitution, to cases concluded by a judicial decision on their merits [Civil Procedure Code 1964: Article 401 ¹ (inserted in 1997), read in conjunction with Article 399] | Principle of equality Right to court Right to re-open proceedings concluded by a judicial decision issued on the basis of a provision which does not conform to the Constitution [Constitution: Articles 32(1), 45(1), 77(2) and 190(4)] |

When the Constitutional Tribunal delivers a judgment in which it finds that a particular legal norm does not conform to the Constitution, this does not result, *ex lege*, in the invalidity of any final court, or administrative, decision issued on the basis of this norm. However, the existence of such a Tribunal judgment enables the latter decisions to be challenged, which generally takes place at the initiative of the concerned person. Article 190(4) of the Constitution represents the constitutional basis for correcting decisions based on legal norms which do not conform to the Constitution. Detailed provisions are contained in statutes regulating proceedings before courts and administrative organs – inter alia in the Civil Procedure Code.

According to Article 401¹ of the Code (inserted by an amendment in 1997) it is possible to demand the re-opening of civil proceedings concluded by a judgment where the Constitutional Tribunal ruled that the normative act upon which this judgment was based does not conform to the Constitution or another act of superior rank. This provision remains in conjunction with Article 339, establishing the principles according to which proceedings may be re-opened in cases envisaged by further provisions of the Code, provided that the judicial decision concluding the proceedings is a “judgment”.

Within civil proceedings, the term “judgment” is reserved for judicial decisions on the merits of a case, concluding the proceedings. The provisions of the Code concerning judgments, including Articles 399 and 401¹, are applied “appropriately” to judicial decisions on the merits of a case bearing other names (such as an “order to pay” – cf. Article 353², or a “decision” on the merits taken within the procedure on non-contentious matters – cf. Articles 13 § 2, 516 and 524). Court decisions and commentators assume that civil proceedings concluded by a judicial decision other than a decision on the merits of a case, referred to as “procedural decisions” (e.g. a decision to discontinue proceedings (Article 355) or refusing to admit a cassation for consideration (Article 393)), may not be re-opened. Such an interpretation meant that proceedings

were incapable of being re-opened either by reason of a procedural irregularity therein or by reason that the normative basis for the court's procedural decision was, in a subsequent Constitutional Tribunal judgment, found not to conform to the Constitution.

Mr. Józef Ż., who lodged the constitutional complaint in the present case, experienced adverse consequences as a result of this interpretation.

The complainant was a party to civil proceedings concerning the abolition of a co-ownership right. He lodged a cassation (an appellate measure, considered by the Supreme Court, against judicial decisions issued at second instance) against a second instance judicial decision, fulfilling all formal requirements operative at that time. On 1st July 2000, whilst the complainant still awaited the Supreme Court's judicial decision, the Civil Procedure Code Amendment Act 2000 entered into force. This statute, aimed at limiting cassation to cases having greater importance, and simultaneously shortening the waiting period for cassations to be considered, introduced a procedure for preliminary selection of cassation complaints, sometimes referred to as "pre-trial assessment". The Supreme Court is entitled to refuse to admit a cassation for consideration on the basis of evaluative criteria, such as the absence of a "significant legal issue" within the case or the "obvious groundlessness" of the cassation. The Supreme Court's jurisprudence (based upon an interpretation of transitional provisions of the aforementioned amending Act 2000) indicated that "pre-trial assessment" was also applicable to cassations which, although previously lodged, had not been considered prior to the entry into force of the amending Act. In a procedural decision of 12th October 2001, the Supreme Court refused to consider the complainant's cassation.

Two judgments of the Constitutional Tribunal pronounced in 2003 (cases numbered [SK 37/01](#) and [SK 12/03](#)) made it clear that the absence of an inter-temporary regulation excluding the application of "pre-trial assessment" to cassations lodged before 1st July 2000 fails to conform to the principle of trust in the State and its laws, as stemming from Article 2 of the Constitution. The Constitutional Tribunal's judgments are universally binding (Article 190(1) of the Constitution) and constitute the basis for the possible correction of acts applying a legal norm which does not conform to the Constitution (Article 190(4)).

Accordingly, Mr. Józef Ż. appeared before the Supreme Court to re-open proceedings concerning the preliminary selection of his cassation, in respect of which a final negative decision had been given in a procedural decision of 12th October 2001. However, the Supreme Court rejected his complaint concerning the re-opening of proceedings; Articles 399 and 401¹ of the Code (discussed above) represented the basis for this procedural decision and were challenged by the complainant in the present case as failing to conform to the Constitution.

In considering the present constitutional complaint, the Constitutional Tribunal referred to its judgment of 2nd March 2004 ([SK 53/03](#)). The fact that, in that case, the Tribunal ruled that Article 401¹ of the Code conformed to the Constitution did not prevent the pronouncement of a contrary judgment in the present case (cf. point I.2 of the ruling and points 5 and 6 of the principal reasons for the ruling).

RULING

I

1. Article 399 of the Civil Procedure Code conforms to Articles 32(1), 45(1), 77(2) and 190(4) of the Constitution.

2. Article 401¹ of the Civil Procedure Code does not conform to Article 190(4), read in conjunction with Articles 32(1), 45(1) and 77(2), of the Constitution.

II

1. The Tribunal ruled that the loss of binding force of Article 401¹ of the Civil Procedure Code shall be delayed for 12 months following the day on which this judgment was published in the Journal of Laws.

2. Delaying the loss of binding force of a provision which does not conform to the Constitution, in a judgment upholding a constitutional complaint, does not prevent the challenging of judicial decisions taken in the complainant's case in relation to which the constitutional complaint was lodged.

PRINCIPAL REASONS FOR THE RULING

1. Article 190(4) of the Constitution expresses the constitutional legislator's will that a case finally (validly) decided on the basis of a provision subsequently found by the Constitutional Tribunal not to conform to the Constitution, would be resolved in accordance with constitutional values and principles. In the new legal state, created by the Tribunal's judicial decision, the possibility to reconsider a case is understood as a constitutional right of the person concerned. This right expresses an aspect of the constitutional right to court (Articles 45(1) and 77(2)), although it does not exclusively concern cases resolved within court proceedings.
2. Pursuant to the principles of legal certainty and protection of trust in the State and its laws, as stemming from the principle of the rule of law (Article 2 of the Constitution), any application of law based upon a legal norm which does not conform to the Constitution, does not, *ex lege*, lose its legal effectiveness in consequence of the Tribunal's judicial decision. Article 190(4) furthermore envisages the possibility to remedy any such application, by way of a procedure which should be regulated within ordinary statutes.
3. The term "re-opening of proceedings" in Article 190(4) of the Constitution is an autonomous constitutional concept which is not as technical in nature as the concept of re-opening proceedings in consequence of certain procedural irregularities therein, as contained in ordinary statutes regulating specific procedures.
4. The constitutional right to "re-open proceedings" (Article 190(4)) does not signify a guarantee that the exercise of this right will result in the pronouncement of a judicial decision diametrically opposed to the previous decision (pronounced on the basis of a provision which did not conform to the Constitution), nor a judicial decision which conforms to the expectations of the person demanding the re-opening of proceedings.

5. Whilst undertaking constitutional review, the Constitutional Tribunal takes into account such content of a legal norm expressed in the reviewed provision as was universally accepted in the process of its application. It is not the Tribunal's task to ascertain whether or not such a practical interpretation is correct. The Tribunal must, however, decide whether or not the legal norm, understood in such a way, conforms to the Constitution (Article 188 of the Constitution).
6. In its judgment of 2nd March 2004 ([SK 53/03](#)), in which it was found that Articles 399 and 401¹ of the Code conform to the Constitution, the Constitutional Tribunal assumed that, as regards the complainants in that case, the source of the failure to conform with the Constitution was not the challenged regulation *per se*, but rather the erroneous interpretation of Article 401¹ § 1, according to which this provision constitutes the sole and exclusive basis permitting a court to remedy the situation described in Article 190(4) of the Constitution. Simultaneously, the Tribunal expressed a reservation that, if such an understanding of Article 401¹ § 1 became universally accepted and established in judicial practice, the Tribunal may be forced to re-analyse the meaning of Article 401¹ of the Code and assess whether the interpretation of this provision, failing to conform to the Constitution, had become so enduring and established that it would become necessary to rule that the provision itself does not conform to the Constitution. It follows from the foregoing analysis of the Supreme Court's jurisprudence that the interpretation of Article 401¹ § 1, read in conjunction with Article 399, of the Code, challenged in the present case constitutes a universally accepted and established practice. Furthermore, the fact that the Civil Law Codification Commission undertook legislative activities aiming at amending this provision may be evidence that the content of Article 401¹ of the Code represents the source of the jurisprudential practice failing to conform to Article 190(4) of the Constitution.
7. The content of Article 401¹ of the Code in the aforementioned meaning also constitutes an infringement of the constitutional principle of equality (Article 32(1) of the Constitution). This provision differs in its treatment of, on the one hand, persons whose constitutional rights have been infringed by a norm which was found not to conform to the Constitution, where such a norm formed the basis of a judgment (i.e. a judicial decision on the merits) in a civil case and, on the other hand, persons whose rights were also infringed in civil proceedings, where the norm failing to conform to the Constitution was the basis for a procedural decision concluding the proceedings without having decided on the merits of the case. Such differentiation is not justified from the perspective of Article 190(4) of the Constitution.
8. [Delaying the loss of binding force](#) of Article 401¹ of the Code (point II.1 of the ruling) signifies that, despite its failure to conform to the Constitution, this provision remains binding for the time being and the judgment shall have only prospective effects. The Constitutional Tribunal's authorisation to adopt such a decision (Article 190(3) of the Constitution) signifies the constitutional legislator's consent for the existence of a state that does not meet the strictly construed standards of constitutionality during the adjournment period. The Tribunal's decision is justified in the present case, since the immediate effect of the finding that Article 401¹ of the Code does not conform to the Constitution would enable the re-opening of an inestimable number of proceedings, which could lead to severe disruption of the administration of justice.

9. Nevertheless, the restriction arising from the delay in loss of binding force of the provision which does not conform to the Constitution does not affect the legal situation of a complainant who initiated constitutional review of this provision by lodging a constitutional complaint (point II.2 of the ruling). The essence of a **constitutional complaint**, constituting a means of specific review of the constitutionality of norms, requires that, as a consequence of the Constitutional Tribunal upholding the complaint, the final decision which led to infringement of the complainant's rights and freedoms is corrected. A judgment of the Tribunal which contains a decision favourable to the complainant should, therefore, find its continuation in further proceedings that should lead to a re-assessment of the complainant's situation by way of applying the relevant procedural measure (conclusion from Articles 79(1) and 190(4) of the Constitution). Nevertheless, the complainant's right to demand re-opening of proceedings does not determine the final outcome of these proceedings (cf. point 4 above).
10. Article 399 of the Code contains norms dealing with each re-opening of proceedings within the civil procedure and not merely the re-opening of proceedings in relation to the remedy envisaged by Article 190(4) of the Constitution. Although Article 399 of the Code also constituted an element of reasoning in the practice which led to an unconstitutional interpretation of Article 401¹ of the Code, it was not a decisive element. The principal meaning of Article 399 of the Code concerns the re-opening of proceedings in consequence of procedural irregularities therein, autonomously regulated at the level of the Code and not the remedy envisaged by Article 190(4) of the Constitution. Accordingly, a ruling that the reviewed provision did not conform to the Constitution would exceed the need of eliminating the direct obstruction of constitutionality.

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. 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. 77. [...] 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

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. 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(1).

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.