

Judgment of 8<sup>th</sup> March 2004, [SK 23/03](#)  
**RESTRICTING THE POSSIBILITY FOR MINORITY SHAREHOLDERS  
 TO CHALLENGE COMPANY'S RESOLUTIONS**

<b>Type of proceedings:</b> <b>Constitutional complaint</b> <b>Initiator:</b> A natural person	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Restricting, to shareholders holding at least 1% of the votes in a public company, the right to challenge a general meeting of shareholders resolution which, whilst conforming to the law and the company's constitution, is against good commercial practice and the company's best interests, or is intended to harm a shareholder  [Provisions of the Commercial Code 1934 (in force until the end of 2000): Article 414 § 2 (inserted in 1997)]	Rule of law Principles of social justice Principle of proportionality Principle of equality Right to court  [Constitution: Articles 2, 31(3), 32, 45(1), 77(2)]

One of the characteristics of joint stock companies is the dominance of majority shareholders over other shareholders as regards decisions on the company's affairs. Such dominance is expressed in the adoption of general meeting of shareholders resolutions by a majority of votes. Nevertheless, legislation offers some protection against the unfettered freedom of the majority by granting "smaller" shareholders, *inter alia*, the right to challenge in court a resolution adopted by the majority (one of the so-called minority rights).

One such protective instrument was Article 414 § 1 of the Commercial Code 1934 (replaced by the Commercial Companies Code 2000), permitting a shareholder to challenge a general meeting resolution which, whilst conforming to law and the company's constitution, is against good commercial practice and the company's best interests, or is intended to harm a shareholder.

On 21<sup>st</sup> August 1997, the Parliament adopted the Public Trading of Securities Act – which simultaneously amended Article 414 of the Commercial Code by inserting § 2. This provision limited a right envisaged in § 1, as regards shareholders within public companies (i.e. joint stock companies having made at least one issue of shares for public trading; cf. Article 4 point 9 of the Public Trading of Securities Act 1997). Shareholders within such companies who did not hold shares entitling them to at least 1% of the votes at the general meeting were deprived of the right to bring a court action challenging the aforementioned resolutions.

The complainant in the case summarised herein was a minority shareholder within a public company. His action to annul a particular general meeting resolution was dismissed by a court on the basis of Article 414 § 2 of the Commercial Code. This judgment was upheld by the second instance court.

The constitutional complaint alleged that Article 414 § 2 of the Commercial Code failed to conform to the constitutional principles of: the rule of law and social justice (Article 2), proportionality (Article

31(3)) and equality (Article 32) as well as to the constitutional guarantees of: the right to court (Article 45(1) and Article 77(2)) and the protection of ownership (Article 21 and Article 64(2)).

## RULING

**The challenged provision does not conform to Articles 2, 32, 45(1) and 77(2), read in conjunction with Article 31(3), of the Constitution.**

*The Tribunal discontinued proceedings as regards whether the challenged provision conforms to:*

*1) Article 21(2) of the Constitution – pursuant to Article 39(1) point 2 and Article 39(2) of the Constitutional Tribunal Act, given the withdrawal of the complaint;*

*2) Article 21(1) and Article 64(2) of the Constitution – pursuant to Article 39(1) point 1 and Article 39(2) of the Constitutional Tribunal Act, given the superfluity of adjudication.*

## PRINCIPAL REASONS FOR THE RULING

1. According to the transitional norm introduced by the Commercial Companies Code 2000 (Article 619), the right to challenge a resolution adopted whilst the Commercial Code's 1934 provisions remained operative is still governed by the provisions of the latter Code, including Article 414 § 2. The complainant alleges that this provision constituted the basis for a violation of his rights, thereby justifying review of the constitutionality of this provision, despite the fact that the Commercial Code's provisions have been repealed (Article 39(3) of the Constitutional Tribunal Act).
2. Within the constitutional complaint procedure, only those provisions of the Constitution which grant rights and freedoms to individuals may constitute the basis for reviewing a legal norm (conclusion derived from Article 79(1) of the Constitution). Article 2 (the principle of the democratic State governed by the rule of law and principles of social justice), Article 31(3) (the principle of proportionality) and Article 32 of the Constitution (the principle of equality) do not constitute sources of rights and freedoms. Accordingly, they may constitute the basis of a constitutional complaint only in conjunction with other constitutional provisions, from which rights and freedoms may be derived.
3. One of the components of the right to court (Article 45(1) of the Constitution) is the possibility to initiate judicial proceedings. This is confirmed by Article 77(2) of the Constitution, which prohibits barring recourse to the courts in order to vindicate infringed rights and freedoms.
4. Initially, Article 414 § 1 of the Commercial Code created a right to challenge a general meeting of shareholders resolution contrary to good commercial practice and the company's best interests, or intended to harm a shareholder. Insertion of the challenged § 2 served only to deprive a particular group of shareholders of this right. Accordingly, it is contrary to Article 45(1) and Article 77(2) of the Constitution.
5. The principle of proportionality (Article 31(3) of the Constitution) is useful in assessing conformity with the Constitution of a limitation placed on one right by virtue of

the necessity to protect another right. It allows an evaluation of whether or not the legislator achieved the necessary balance between two constitutionally-protected values.

6. The right to challenge a resolution of the company's organs is intended to eliminate resolutions adopted, *inter alia*, with the intention of harming a shareholder. The effectiveness of the activities of public companies is not, however, a value capable of providing justification for depriving minority shareholders of the right to court, nor are the values indicated in Article 31(3) of the Constitution or other constitutional values. Accordingly, introduction of discussed restriction falls outside the framework determined by Article 31(3) of the Constitution.
7. The constitutional principle of equality before the law (Article 32(1)) presupposes that all legal entities characterised to an equal degree by a relevant feature shall be treated equally, i.e. without favourable or discriminatory differentiation. This principle does not, however, prescribe an absolute prohibition on differentiating the legal position of similar subjects, which is sometimes unavoidable. Such differentiation must, however, have constitutional justification. It is crucial to define the significant reason requiring the differential treatment of a given group of subjects.
8. The legislator's argument in favour of the differentiation considered herein was that the position of shareholders differs, according to the value of shares held. Such a criterion is, however, incapable of amounting to constitutional justification for statutory differentiation of the right to court, especially since removing the right for minority shareholders to challenge a resolution adopted against good commercial practice deprived them of the only effective instrument with which to oppose the will of the majority acting against the interests of the minority. Furthermore, no other relevant legal criteria exist to justify such differential treatment on the basis of the principle of equality.
9. One of the principles of a democratic legal order is the possibility for judicial review of legal acts, from the perspective of their conformity with good customs and the principles of morality. It is impermissible for the legislator to accept the functioning in commerce of acts resulting in the vexation of minority shareholders or maliciously prejudicing the company's interests. For these reasons, the content of Article 414 § 2 of the Commercial Code also amounts to an infringement of the rule of law principle (Article 2 of the Constitution).
10. The weaker position of minority shareholders expresses the natural distribution of powers within the capital company (as opposed to partnerships). Accordingly, the challenged provision does not infringe the principles of social justice (Article 2 of the Constitution), since protection of the "poor" against the "rich" is irrelevant in this respect.
11. Given the finding that the challenged provision infringes the legal guarantee of the right to court, a review of its conformity with provisions protecting ownership (Article 21(1) and Article 64(2) of the Constitution) would be superfluous, thereby justifying the discontinuation of the proceedings in this scope (Article 39(1) point 1 of the Constitutional Tribunal Act).

## Provisions of the Constitution and the Constitutional Tribunal Act

### 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. 21.** 1. The Republic of Poland shall protect ownership and the right of succession.  
2. Expropriation may be allowed solely for public purposes and for just compensation.

**Art. 31.** 1. Freedom of the person shall receive legal protection.  
2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.  
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. 64.** [...] 2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

**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.

### 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.