

Judgment of 26th March 2002, [SK 2/01](#)
**DEMOLITION ORDERS IN CASES OF UNLAWFUL
CONSTRUCTION WORK**

Type of proceedings: Constitutional complaint Initiator: A natural person	Composition of Tribunal: Plenary session	Dissenting opinions: 0
---	--	----------------------------------

Legal provisions under review	Basis of review
Obligatory issuing by the public authorities of a demolition order in respect of a building in case of the so-called unlawful construction work [Construction Act 1994: Article 48]	Principle of proportionality Protection of ownership [Constitution: Articles 31(3) and 64(2)]

Article 48 of the Construction Act 1994 obliges the relevant public authorities to issue a demolition order in respect of a building which is under construction, or has been completed, without the necessary planning permission or notification, or where such construction was completed in spite of the objections of the relevant authorities. In principle, the authorities are obliged to order demolition in all cases of unlawful construction work. An exception to this rule is contained in Article 49 of the 1994 Act, which allows for construction work to be declared lawful following the expiration of a five-year period from the date of completion of the construction work.

In an earlier judgment of 12th January 1999 (P 2/98), following a referral from the Supreme Administrative Court, the Constitutional Tribunal had already confirmed that Article 48 of the Construction Act 1994 conforms to Article 2 (principle of the rule of law and social justice), Article 32(1) (principle of equality) and Articles 21(1) and 64(3) (protection of ownership) of the Constitution.

In the present case, Article 48 was challenged by means of a constitutional complaint. The complainants (a married couple) prematurely extended the hotel run by them on the basis of planning permission which, at that time, was not a final decision and was, in fact, later quashed. In consequence, the relevant public authority ordered the demolition of the new construction. The legality of this administrative act was confirmed by a final judgment of the Supreme Administrative Court.

The applicants based their claim on constitutional provisions other than those referred to in case no. P 2/98 (mentioned above): they claimed that Article 48 of the Construction Act was incompatible with Article 64(2) (principle of equality in relation to the protection of ownership), read in conjunction with Article 31(3) (principle of proportionality), of the Constitution.

In the course of the proceedings before the Constitutional Tribunal the applicants also asserted a violation of Article 10 of the Constitution (principle of the separation of powers).

RULING

Article 48 of the Construction Act 1994 conforms to Article 64(2), read in conjunction with Article 31(3), of the Constitution.

The Tribunal decided not to proceed with consideration of the alleged violation of Article 10 of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. Those who breach the law must expect that the lawful state of affairs – depending on the actual situation and the manner of the breach – will be restored; this will be the very minimum consequence of such unlawful actions. It is not a violation of the principle of proportionality (as enshrined in Article 31(3) of the Constitution) to deprive the perpetrator of an unlawful act from any benefits arising from such an act.
2. The term “public order” in Article 31(3) of the Constitution is directed towards ensuring the proper functioning of social life. It is not directly and exclusively linked to the State but rather – in a wider sense than the notion of public security – to the protection of the individual’s rights and freedoms from daily interference.
3. The concept of public order, as contained in the aforementioned legal provision, presumes, in particular, the maintenance of an orderly system of architectural and urban planning, requiring citizens to comply with appropriate requirements for the use of buildings. This is also of essential importance for the rights and freedoms of others. For this reason there can be no exceptions to the rule that persons responsible for a building project must have planning permission prior to construction. This permission is granted by the relevant authorities after examining whether the legal requirements have been met (Articles 32-38 of the Construction Act 1994).
4. Article 48 of the Construction Act 1994 prescribes that any unlawful construction must be demolished. This duty promotes the effective implementation of the requirement to have permission before beginning construction. For this reason, a demolition order is a legitimate measure of the authorities to implement values which are described in Article 31(3) of the Constitution (public order, protection of the environment and protection of the rights and freedoms of others) and which are to be safeguarded through this requirement.
5. The demolition order in question has a restitutionary, as opposed to punitive, character. It cannot be understood as amounting to an additional punishment (i.e. in addition to sanctions provided for by the criminal law, such as Article 90 of the Construction Act 1994).
6. Article 49 of the Construction Act 1994 restricts the applicability of Article 48 by setting up a temporal limitation on the applicability of this article for a period of five years from the date on which the construction was completed, similar to the institution recognised in private and public law. The different treatment of subjects according to the time elapsed since construction may not be challenged in the light of the principle of equality of the subjects of legal relationships.

7. The constitutional provisions in existence prior to the entry into force of the current Constitution lacked provisions which expressly prohibited excessive interference with an individual's rights and freedoms. For this reason, the Constitutional Tribunal had to rely on the general principle of the rule of law as the source of such a prohibition. Today, the principle of proportionality is contained independently and to its full extent in Article 31(3) of the Constitution and there is no longer the need to refer to the rule of law principle (as contained in Article 2 of the Constitution).
8. The Constitutional Tribunal's judgment of 12th January 1999 (P 2/98) was given in consequence of a question of law referred to it by the Supreme Administrative Court, whereas the present judgment is the result of a constitutional complaint. Although Article 48 of the Construction Act 1994 formed the subject of the challenge in both cases, the constitutional bases of review were different. Since, therefore, the cases are neither subjectively nor objectively identical, there is no justification to assume the existence of a procedural impediment on the basis of the principle of *res iudicata*.
9. Unlike the Constitutional Tribunal's ruling, the reasons for the ruling are not universally binding. However, certain individual sections of the reasoning which are closely linked to the ruling and which clearly express the most important grounds thereof (i.e. *ratio decidendi*) may be viewed as the interpretation of the ruling.
10. The Commissioner for Citizens' Rights may decide to intervene (i.e. give notice of participation) in proceedings involving a constitutional complaint (cf. Article 27 point 8 and Article 51(2) of the Constitutional Tribunal Act) and, if he decides to do so, is empowered to take actions in support of the constitutional complaint. In particular, this includes formulating legal arguments arising from the applicant's allegations and putting forward new legal arguments which support these allegations.
11. A constitutional complaint may only be considered if it is submitted within a period of three months following delivery of a legally valid judgment or any other final decision (cf. Article 46(1) of the Constitutional Tribunal Act). Within this period, all elements of the constitutional complaint which are essential (cf. Article 47(1) of the Constitutional Tribunal Act) and which officially determine the limits of adjudication of the Constitutional Tribunal (cf. Article 66 of the Constitutional Tribunal Act) must be submitted.

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. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 21. 1. The Republic of Poland shall protect ownership and the right of succession.

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.

Art. 64. 1. Everyone shall have the right to ownership, other property rights and the right of succession.

2. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession.

3. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

CT Act

Art. 27. The participants in the proceedings before the Tribunal shall be: [...] 8) the Commissioner for Citizens' Rights where he/she has given notice of his/her participation in the proceedings in relation to complaints concerning constitutional infringements.

Art. 46. 1. Constitutional claim, further referred to as the "claim" can be submitted after trying all legal means, if such means is allowed, within 3 months from delivering the legally valid decision to the plaintiff, the final decision or other final judgment.

Art. 47. 1. The complaint shall, apart from the requirements referring to the procedural letters, include the following:

- 1) a precise identification of the statute or another normative act on the basis of which a court or another organ of public administration has given ultimate decision in respect of freedoms or rights or obligations determined in the Constitution and which is challenged by the person making the complaint for the confirmation of non-conformity to the Constitution,
- 2) indication as to which constitutional freedoms and rights and in what manner have, according to the person making the complaint, been infringed,
- 3) grounds of the complaint including precise description of the facts of the case.

Art. 51. [...] 2. The Commissioner for Citizens' Rights may, within the period of 60 days from the receipt of information, give notice of his/her participation in the proceedings.

Art. 66. The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint.