

Judgment of 16th January 2006, [SK 30/05](#)
**POSSIBILITY OF DISMISSING AN “EVIDENTLY GROUNDLESS”
 CASSATION IN THE ABSENCE OF PARTIES’ PARTICIPATION
 AND WITHOUT A REASONING**

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
Possibility of the Supreme Court’s dismissing an “evidently groundless” cassation in a criminal case at a sitting, in the circumstances of the non-participation of parties and without a written reasoning for the judgment being provided [Criminal Procedure Code 1997: Article 535 § 2 (in the wording introduced in 2000)]	Rule of law Principle of proportionality Right to court Right to compensation for harm caused by a public authority organ Prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms [Constitution: Articles 2, 31(3), 45(1) and 77]

In Polish criminal procedure, cassation is – along with the re-opening of proceedings – a so-called extraordinary appellate measure against court decisions. The cassation procedure is used to appeal against court decisions that are already final (have force of law). This distinguishes cassation from ordinary appellate measures (i.e. appeal and complaint) in which a court of second instance reviews the decision of a first-instance court.

The cassation procedure is limited to a review of the court decision as regards its conformity with the law. Unlike appeal courts, the Supreme Court as cassation court is neither entitled to assess the correctness of factual findings adopted as the basis of the reviewed judicial decision, nor to adjudicate on the merits of the case – i.e. verdict and sentencing. Where the Supreme Court upholds the cassation, i.e. finds the reviewed judicial decision to be incompatible with the law, it quashes this decision and either orders a re-trial by the appropriate court or discontinues the proceedings. An exception to this rule is the possibility of a defendant being acquitted in cases involving an evidently unjust criminal conviction. Where the Supreme Court fails to find non-conformity with the law, it dismisses the cassation.

In principle, a cassation is considered with the participation of the parties thereto (Article 535 § 1 of the Criminal Procedure Code), with the judgment concluding such consideration being accompanied by a written reasoning (i.e. a justification).

The provision effectively challenged in the present case, i.e. Article 535 § 2 of the Criminal Procedure Code (in its wording determined by the Amendment Act 2000 entering into force on 1st September 2000), envisages an exception to the aforementioned rule where the Supreme Court finds a cassation “evidently groundless”. Firstly, the Supreme Court may in such cases deliver the judgment dismissing cassation

at a sitting not participated in by the parties, save in cases whereby cassation is lodged by the Prosecutor General or Commissioner for Citizens' Rights. Secondly, where an "evidently groundless" cassation is dismissed there is no attendant requirement that a written reasoning be provided.

The judgment of the Constitutional Tribunal summarised herein was delivered in response to a constitutional complaint lodged by Tomasz D., whose case was finally decided on the basis of the challenged provision. The constitutional complaint was supported by the Commissioner for Citizens' Rights, who gave notice of his participation in the case (under Article 51 of the Constitutional Tribunal Act 1997). Furthermore, on the basis of § 11(2) of the Constitutional Tribunal's Rules of Procedure, read in conjunction with Article 19 of the Constitutional Tribunal Act, the President of the Tribunal asked the Helsinki Foundation for Human Rights to submit its opinion on the discussed case.

The main allegation concerned the infringement, by Article 535 § 2 of the Criminal Procedure Code, of constitutional guarantees of the right to court (Article 45(1) of the Constitution), read in conjunction with the principle of proportionality (Article 31(3)) and the rule of law clause (Article 2). Furthermore, the constitutional right to compensation for harm caused by a public authority organ (Article 77(1)), and the prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms (Article 77(2)) have also been indicated.

RULING

I

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

II

The Tribunal ruled that the loss of binding force of the challenged provision shall be delayed for 12 months following the day on which this judgment was published in the Journal of Laws. Nevertheless, as regards the upholding of the constitutional complaint, this delay does not preclude realisation of the complainants' rights as envisaged in Article 190(4) of the Constitution, in the individual case representing the factual background to the present proceedings before the Tribunal.

PRINCIPAL REASONS FOR THE RULING

1. The Constitution offers no guarantee of a person's right to have a case heard at three instances (cf. Article 176(1)). The constitutional right to court (Article 45(1)) does not encompass a "right to cassation", as cassation constitutes an additional, non-essential procedure whereby judicial decisions of a second-instance court may be appealed against. However, where the legislator established the institution of cassation, the principles of procedural justice and correct legislation, stemming from Article 2 of the Constitution, must be respected. By that token, the constitutional standard of a fair trial is applicable, not only to proceedings at the first and second instances, but also to such extraordinary proceedings.

2. The rule of law principle (Article 2 of the Constitution) may not constitute an autonomous basis of review in proceedings initiated by virtue of a constitutional complaint. Nonetheless, in the present case, this principle and, in particular, the protection of individuals' trust in the State stemming therefrom, should be taken into account when the ideal of a fair trial is reconstructed.
3. The principle of trust arising from Article 2 of the Constitution signifies that an individual has the right to expect from the authorities clarity, transparency and respect for principles guaranteeing the protection of human rights.
4. The constitutional right to a fair hearing of a case before a court (Article 45(1)) is not subject to any limitations, in contradistinction to the right that such a hearing be public (Article 45(2)). The essence of procedural justice lies in: the possibility of being heard; the disclosing of motives underpinning a decision (even where the latter may not be the subject of further appeal) to an extent enabling the given court's manner of reasoning to be verified; and the assuring of participants as to the predictability of proceedings, through an appropriate level of coherence and internal logic of the mechanisms they are subjected to.
5. As the decisive component of the right to a fair trial, the providing of a reasoning for a judicial decision fulfils several significant functions: it enforces self-control on the part of the court, which must demonstrate that its decision is substantively and formally correct and corresponds to the requirements of justice; it documents arguments in favour of the adopted decision; it is the basis of review by organs of higher instance; it encourages individual acceptance of the judicial decision; it consolidates the feeling of public confidence in and democratic control over the administration of justice; and it strengthens legal security.
6. The fact that the Supreme Court occupies a specific position within the system of organs and bodies affording the protection of the law, in particular as regards the final nature of its decisions (i.e. the lack of any possibility of their being appealed against) does not signify that a reasoning justifying decisions of that Court is superfluous. Rather, several arguments speak in favour of such reasoning being afforded. In the first place, such reasoning has significant influence on the development of practice and legal standards. Secondly, judicial decisions of the Supreme Court may constitute the basis for complaints lodged with the European Court of Human Rights, Human Rights Committee, or – in the event of an unconstitutional legal basis – the Constitutional Tribunal. Thirdly, the legitimising function of a court reasoning is significant both individually (*vis-à-vis* parties to the proceedings) and generally (*vis-à-vis* public opinion). Where court decisions are communicated along with attendant reasoning, the approval thereof is facilitated and a contribution made to the building of public trust in the judicial power. Fourthly, in a situation in which ca. 80% of all cassations in criminal cases are evidently groundless, each casuistic indication of the reasons for such groundlessness is in the justice system's own interest, since it may lead to the setting of a standard of relevance to the understanding of evident instances of groundless cassation.
7. The prohibition on the formulation of unclear and imprecise provisions, as stemming from the rule of law principle (Article 2 of the Constitution), does not preclude use by the legislator of ambiguous (imprecisely-defined) expressions. Nor is it decisive in respect of the unconstitutionality of a situation wherein the precise specification of such

terms falls within the purview of courts. The constructing of a legal norm through the use of ambiguous terms often constitutes the sole reasonable solution. However, as the meaning of such terms in particular situations may not be determined arbitrarily, there is a need for particular procedural guarantees that ensure transparency in the way that specific content is in practice conferred upon an ambiguous expression by an organ applying the law, as well as providing for the possibility of such a practice being reviewed. This applies, for example, as regards the accessibility of judicial reasoning to concerned persons by virtue of the public nature of proceedings, or the disclosure of motives underpinning a decision.

8. The use of the expression “evidently groundless cassation” by the legislator does not of itself surpass the limits of regulatory discretion determined therefor by Article 2 of the Constitution. Objections are raised, however, by the low level of the procedural requirements attendant upon the use of this expression. What is involved here is the cumulation at a single trial of three factors excluding the court’s obligations as regards the provision of information (i.e. the informational obligation of the court). These are: secrecy of the proceedings; the use of the ambiguous term “evident groundlessness” by the legislator; and the absence of an obligation that a reasoning be provided.
9. Standards of human-rights protection laid down by the Constitution of the Republic of Poland are at times higher than international standards, in particular those envisaged by the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. In consequence, a lowering of the standard of protection that does not infringe the said Convention may nevertheless result in non-conformity with the Constitution.
10. The immediate loss of binding force of Article 535 § 2 of the Criminal Procedure Code, as a special provision (*lex specialis*), would lead to the application of the general rule (*lex generalis*), as expressed in Article 535 § 1 of the Criminal Procedure Code (consideration of a cassation against a judgment at a hearing and a cassation against a procedural decision – at a sitting in which parties may participate). However, it is not impermissible to apply less rigorous guarantees in the event of an evidently groundless cassation. The unconstitutionality found in the present case stems from the cumulation of limitations (cf. point 8 above). Therefore, the intervention on the part of the legislator is necessary and requires that an appropriate timeframe therefor be envisaged. Until such time as the said intervention takes place, an alleviation of the unconstitutional situation through appropriate shaping of Supreme Court practice may be expected.
11. The need for a comprehensive study of the significant circumstances applying in a case under consideration by the Constitutional Tribunal may justify referral by the President thereof to social organisations, under § 11(2) of the Constitutional Tribunal’s Rules of Procedure. The participation of such organisations in proceedings before the Tribunal – in a capacity that may be termed *amicus curiae* – encourages dialogue, openness and public communication in the settling of constitutional disputes. The social organisation neither enjoys the rights, nor is subject to the obligations, attached by the law to the position of participant in proceedings (cf. Article 52(1) of the Constitutional Tribunal Act). Its role is limited to the expressing of an opinion on the case, in connection with information acquired in the course of its engagement in its statutory activity.

**Provisions of the Constitution, the Constitutional Tribunal Act
and the Constitutional Tribunal's Rules of Procedure**

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. 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. 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. 176. 1. Court proceedings shall have at least two instances.

Art. 190. [...] 4. A judgment of the Constitutional Tribunal on the non-conformity with 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.

CT Act

Art. 19. 1. The Tribunal shall, in the course of proceedings, examine all relevant circumstances in order to comprehend the case in every respect.

2. The Tribunal shall not be bound by motions as to evidence submitted by participants in the proceedings and may, ex officio, admit evidence which it considers relevant to the examination of the case.

Art. 51. 1. The Tribunal shall inform the Commissioner for Citizens' Rights about the institution of proceedings. Provisions of Article 33 shall apply accordingly.

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. 52. 1. The participants in the proceedings before the Tribunal shall be: the person making the complaint, the organ which promulgated the challenged normative act and the Public Prosecutor-General; the Commissioner of the Citizens' Rights shall also be the participant in the proceedings when he/she has given notice of his/her participation therein.

**Appendix to the Resolution of the General Assembly of Judges of the Constitutional Tribunal of 22nd October 1997 –
Constitutional Tribunal's Rules of Procedure**

§ 11. [...] 2. The President of the Tribunal or the judicial panel may also ask other organs or organisations to express a position on issues which may be significant for the consideration of a pending case.