

Judgment of 17th May 2004, [SK 32/03](#)
CASSATION IN CRIMINAL CASES

Type of proceedings: Constitutional complaint Initiators: Natural persons	Composition of Tribunal: 5-judge panel	Dissenting opinions: 0
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Legal provisions under review	Basis of review
Limitation of admissibility of cassation in favour of defendant to the situation where he is convicted to a period of imprisonment without conditional suspension of that sentence <small>[Criminal Procedure Code 1997: Article 523 § 2 (in the wording introduced in 2000)]</small>	Rule of law Principle of proportionality Principle of equality Right to defence in criminal proceedings Right to court <small>[Constitution: Articles 2, 31(3), 32, 42(2) and 45(1)]</small>

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. 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 reviewing the appealed court decision only insofar as to ensure its conformity with the law. Unlike appellate courts, the cassation court (this being solely the Supreme Court at the time this judgment was delivered) is neither entitled to assess the correctness of factual findings adopted as the basis of the reviewed judgment, nor to adjudicate on the merits of the case – i.e. verdict and sentencing. Where the cassation court finds the reviewed decision to be incompatible with the law, it quashes this decision and either orders a retrial by the appropriate court or discontinues the proceedings. An exception to this rule is the possibility to acquit a defendant in cases where a criminal conviction was obviously unjust.

In accordance with Article 523 § 1 of the Criminal Procedure Code a cassation may be brought either for reasons enumerated in Article 439 (the so-called absolute grounds for appeal, concerning manifest breaches of substantive or procedural law, such as sentencing to a punishment unknown in the law or wrongful composition of the court) or for reason of any “other flagrant breach of the law, where this may have had a significant influence on the substance of the court decision”. A cassation may not be brought solely on the basis that the sentence was inadequate.

From the perspective of the scope of the right to bring a cassation, the entitled subjects may be divided into two categories. The first category comprises the Prosecutor General and the Commissioner for Citizens’ Rights, who may bring a cassation against any final court decision (i.e. both judgments and orders) concluding the proceedings (Article 521 of the Criminal Procedure Code). The second category comprises the parties to

proceedings concluded with a final judgment, in particular the prosecution and the defendant (Articles 519 and 520 § 1 of the Criminal Procedure Code).

Only final judgments of appellate courts may be challenged by way of cassation brought by the parties to criminal proceedings (which is sometimes referred to as “ordinary cassation” or “cassation by the parties”). In accordance with the provision challenged in this case – Article 523 § 2 of the Criminal Procedure Code (in the wording adopted by an amending Act of 20th July 2000) – a cassation in favour of the defendant may be only brought where he has been sentenced to imprisonment without conditional suspension of the execution of this sentence. No such limitation applies, however, where the cassation is based on the absolute grounds for appeal, as contained in Article 439 of the Criminal Procedure Code, mentioned above.

In the proceedings summarised herein, two constitutional complaints were filed and subsequently joined for examination. The first complainant was sentenced to a fine, whilst the second complainant was sentenced to imprisonment with conditional suspension of this sentence, together with a fine and a court order requiring him to apologise to the victim of his crime. Both complainants had attempted to have the final judgments delivered in their cases by appellate courts quashed by way of cassation but, in both cases, the Supreme Court dismissed the cassations without consideration, on the basis that cassation was inadmissible pursuant to Article 523 § 2 of the Criminal Procedure Code, since the defendants had not received unconditional prison sentences.

In the present proceedings before the Constitutional Tribunal, the complainants challenged the conformity of the aforementioned provision with several provisions of the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Constitutional Tribunal narrowed the basis of review to the constitutional provisions cited in the table above.

RULING

The challenged provision conforms to Article 32(1) and Article 45(1), read in conjunction with Article 2 of the Constitution, and is not inconsistent with Article 42(2), read in conjunction with Article 31(3), of the Constitution.

The Tribunal discontinued proceedings in relation to the remaining challenges, pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act, given that it would be inadmissible to pronounce judgment on this question.

PRINCIPAL REASONS FOR THE RULING

1. Article 176(1) of the Constitution guarantees minimum standards in respect of court procedure. In accordance with this provision, proceedings with one stage of appellate review provide for adequate control of court decisions delivered by first instance courts.
2. Cassation is an extraordinary appellate measure, what is apparent from its location in the

Criminal Procedure Code. In criminal proceedings, which have been structured on the basis of a two-stage procedure (i.e. court decision at first instance, followed by the possibility of an appeal), cassation plays the role of a “safety valve”. It complements the two-stage procedure by allowing the possibility to eliminate the most serious judicial errors contained in final court decisions.

3. Permitting cassation as an extraordinary appellate measure in criminal proceedings is an exception from the principle of the stability of court decisions. Such stability guarantees legal certainty and security. The ability to contest final court decisions may, however, be necessary for the realisation of other constitutional norms and values.
4. A limitation resembling that provided for by the challenged provision was unknown to the Criminal Procedure Code prior to its amendment by the 2000 Act. It follows from the materials documenting the legislative process that amendment of the cassation provisions was a pragmatic move prompted by the volume of cassation appeals brought before the Supreme Court, in most cases unfounded and ignoring the statutory grounds for cassation.
5. Having deciding to go beyond the minimum standard guaranteed by Article 176(1) of the Constitution and allowing for a “cassation path”, construed as access to the Supreme Court in order to appeal against a final decision, the legislator may no longer act with unfettered discretion. This is true regardless of whether cassation has been modelled as an appellate measure instituting proceedings before a higher court or as an extraordinary appellate measure, as is the case in Polish criminal procedure. In this respect the legislator is bound by other constitutional provisions. Assessment of the criterion limiting the right to cassation should be carried out, in particular, from the perspective of the principle of equality (Article 32(1) of the Constitution).
6. The constitutional principle of equality before the law imposes an obligation to treat alike those addressees of a given norm who are in an identical, or similar, legally relevant position. This entails a prohibition against both negative and positive discrimination.
7. The challenged provision, allowing a defendant to base an “ordinary cassation” on a claim that the judgment in his case infringes the law in a manner other than in a manner specified in Article 439, when the court has sentenced him to a punishment which is most severe and most intrusive on his freedom, does not infringe the constitutional principle of equality before the law. Sentencing a defendant to unconditional imprisonment constitutes a direct interference with a value that has an extraordinary quality – his freedom. Article 523 § 2, as challenged by the complainants, does not entirely preclude the possibility to bring a cassation in favour of a defendant against an unlawful judgment where the illegality is not of the type enumerated in Article 439 of the Criminal Procedure Code and he has not been sentenced to unconditional imprisonment. In such a situation, the defendant may petition one of the subjects entitled to bring an extraordinary cassation (i.e. the Prosecutor General or the Commissioner for Citizens’ Rights).
8. The constitutional guarantee of the right to a defence in criminal proceedings “at all stages of the proceedings” concerns the stages envisaged by the legislator. This guarantee

does not, however, compel the legislator to enact extraordinary procedures for the review of final court decisions, such as cassation in criminal procedure.

9. For the reasons mentioned in paragraph 8 above, the challenged provision is not substantively linked with Article 42(2) of the Constitution. Accordingly, Article 31(3) of the Constitution, to which the complainants refer in relation to the constitutional guarantee of the right to a defence, also does not constitute an adequate basis of review.
10. The substance of the principle enshrined in Article 45(1) of the Constitution (i.e. the right to court) 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 settlement of a given case by a court).
11. The complainants' allegations of the non-conformity of the challenged norm with Article 45(1) of the Constitution are applicable only to that element of the right to court which relates to the requirement to mould proceedings in such a way as to ensure fair access to appellate measures, including cassation. This requirement may not, in turn, be assessed independently from the requirement to treat equally those subjects who are in an identical, or similar, legally relevant position. The ascertainment that the legislator's differentiation of access to cassation is justified (cf. paragraph 7 above) on the grounds of Article 32(1) leads to the conclusion that this Article conforms to Article 45(1) of the Constitution.
12. The complainants did not clearly indicate which of the principles characterising the Republic of Poland as a democratic State governed by the rule of law and implementing the principles of social justice (Article 2 of the Constitution) were infringed as a result of the limitations on ordinary cassation imposed by Article 523 § 2 of the Criminal Procedure Code. It must, therefore, be assumed that the complainants' assertions as regards the non-conformity of Article 523 § 2 with Article 2 of the Constitution are viewed as an obvious consequence of an infringement of the other constitutional provisions indicated as the bases of review. This, in turn, means that the allegation of non-conformity of the challenged provision with Article 2 of the Constitution would only arise where it was found that this provision infringed at least one of the other bases of review cited in these proceedings.
13. The complainants have not satisfied the requirement, stemming from Article 47(1) point 3 of the Constitutional Tribunal Act 1997, to provide detailed grounds for the claims that the challenged provision does not conform to Articles 31(1) and 32(2) of the Constitution. It is, therefore, inadmissible to pronounce judgment in respect of these claims and the proceedings shall be discontinued pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act.
14. This Article also constitutes the legal basis for discontinuing proceedings in respect of the claim that the challenged provision infringes Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In light of Article 79(1) of

the Constitution, the mechanism of constitutional complaint is solely a mean of protecting constitutional rights and freedoms and, therefore, the conformity of a statute with international agreements may not be challenged by virtue of this procedure.

Provisions of the Constitution, the Constitutional Tribunal Act and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms

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. 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. 42. [...] 2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.

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. 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. 176. 1. Court proceedings shall have at least two stages.
2. The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute.

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.

Art. 47. 1. The complaint shall, apart from the requirements referring to the procedural letters, include the following:
[...]
3) grounds of the complaint including precise description of the facts of the case.

European Convention

Art. 6. 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b) to have adequate time and facilities for the preparation of his defense;
- c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.