

Procedural decision of 28th November 2001, [SK 5/01](#)
**INADMISSIBILITY TO REVIEW THE CONSTITUTIONALITY
OF RURAL LAND REFORM**

Type of proceedings: Constitutional complaint Initiator: A natural person	Composition of Tribunal: Plenary session	Dissenting opinions: 4
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Among the first measures taken by the new (Communist) authorities in 1944, after the entry of the Red Army into Poland as a result of war, was the enactment of the Decree of the “Polish Committee of National Liberation” (hereinafter referred to as “the PCNL”), of 6th September 1944 on the Implementation of Rural Land Reform. The declared aim of this reform was to break-up large agricultural holdings and to eliminate the “class of landlords” in order to obtain land to be allocated to “agricultural smallholders” and “landless rural dwellers”.

Although there was no constitutional basis for the existence of the PCNL or for the issuing of normative acts thereby, the Decree was effectively applied by the administration and courts of the Communist State and, even after 1989, it was treated by jurisprudence and legislation as part of Poland’s legal order. Moreover, the Decree has never been formally repealed although, in principle, its practical application was exhausted upon the conclusion of the rural land reform.

Pursuant to Article 2(1)(e) of the Decree, upon the day of its entry into force, ownership of all private agricultural land estates with an overall area exceeding a specified limit (50 or 100 hectares, depending on the region and kind of land) was transferred, by operation of law – fully and without compensation – to the State Treasury. In Resolution W 15/95 of 16th April 1996, the Constitutional Tribunal confirmed that this provision did not apply to agricultural holdings established or extended after the day on which the Decree entered into force.

Mrs H. O., who lost property in the 1940’s as a result of the rural land reform, began an unsuccessful legal battle in 1990 to regain of this property. The administrative organs and courts held that the take-over of her real estate in the 1940’s was consistent with the provisions in force at the time, in particular Article 2(1)(e) of the Decree of 6th September 1944. Since the acts of the authorities were not illegal at the time they were taken, there are no grounds today to challenge acts applying in respect of the complainant the law then in force.

Having exhausted all legal remedies available before organs of government administration and the Supreme Administrative Court, Mrs H. O. lodged a constitutional complaint against Article 2(1)(e) of the Decree on the Implementation of Rural Land Reform, claiming that it did not conform to certain provisions of the current 1997 Constitution: namely Article 2 (rule of law principle), Article 21 (principle of protecting ownership), Article 64 (right to ownership) and Article 32 (principle of equality).

The examination of the present complaint involved two general legal questions: whether the Constitutional Tribunal has the power to review the Decree on the Implementation of Rural Land Reform,

given the temporal scope of its operation and, if so, which would be the appropriate constitutional provisions for reviewing the constitutionality of this Decree? Given its negative answer to the first question, the Tribunal was not required to resolve the second question.

From the legal perspective, the issues dealt with in the present case were extremely complex and controversial, as is shown by the fact that the judgment was accompanied by dissenting opinions from four of the Constitutional Tribunal's judges. It should be stressed that these dissenting opinions do not relate to the substantive elements of the constitutional complaint but, rather, express a view on the issue of the formal admissibility of the complaint, contrary to that expressed by the majority of the Tribunal's judges. The dissenting opinions seem to suggest that a substantive review of the Decree would not lead to challenging its legal effects.

RULING

The Tribunal discontinued the proceedings – by reason of the loss of binding force of the challenged provision, pursuant to Article 39(1) point 3 of the Constitutional Tribunal Act.

PRINCIPAL REASONS FOR THE RULING

1. Within the meaning of Article 39(1) point 3 of the Constitutional Tribunal Act, the discontinuance of proceedings before the Constitutional Tribunal, on the basis that the reviewed legal provision has ceased to have binding force, may only take place when such a provision may no longer be applied to any current situation. Where a provision may still be used as the legal basis for individual decisions regarding the application of the law, it will not be treated as having lost its binding force, even where it has been formally repealed.
2. The normative content of Article 2(1)(e) of the PCNL Decree of 6th September 1944 on the Implementation of Rural Land Reform was “consumed” *ex lege* (upon the entry into force of the Decree) by the transfer of ownership of real estate properties specified therein to the State Treasury. Accordingly, even though the Decree of 6th September 1944 has not been formally repealed, this provision may no longer be applied, which means that it may no longer provide the basis for changes in ownership status (cf. the Constitutional Tribunal resolution of 16th April 1996 W 15/95, establishing a universally binding interpretation of this provision). The fact that, in their decisions, administrative organs and the Supreme Administrative Court quote this provision in their rulings does not mean that they apply it. The provision does not constitute the legal basis for taking decisions on the substance of any individual case, since the proceedings do not concern the legality of transfers of ownership of agricultural land on the basis of the Decree but, rather, the declaration of invalidity of decisions issued pursuant to the Decree where ownership of agricultural land was transferred to the State Treasury. Reference to this provision is of a derivative (secondary) nature and is used to decide whether the provision was or was not applied, in the process of transferring ownership of a particular estate, in a manner which flagrantly violated the law (in which case the decision would be invalid). In conclusion, it should be considered that Article 2(1)(e)

of the Decree on the Implementation of Rural Land Reform has ceased to have legally binding force within the meaning of Article 39(1) point 3 of the Constitutional Tribunal Act.

3. In this case, there are no grounds for applying Article 39(3) of the Constitutional Tribunal Act (i.e. a decision not to discontinue proceedings on the basis that it is necessary to give judgment in order to protect constitutional rights and freedoms). One should, in particular, bear in mind that 50 years have passed since the time that the rural land reforms were implemented and the concomitant social and economic changes during this time have become irreversible. Neither social considerations nor legal reasons allow for the restoration to the original position (*restitutio in integrum*). The mutual relationship between, on the one hand, the acts constituting the basis for the takeover of land holdings and the transfer thereof and, on the other hand, the legal instruments at the disposal of the Constitutional Tribunal for the performance of its constitutional functions, do not allow the construction of solutions which would reconcile the rights of persons who were deprived of their property with the legally acquired rights of the beneficiaries of rural land reform.
4. The question as to the legality of the functioning of the State authorities enforced upon Poland in 1944 belongs today to the sphere of historical and political evaluation. Such an evaluation may not be applied to the sphere of legal relationships established during those times. The absence of constitutional legitimacy of the PCNL, the National People's Council and the Provisional Government, together with the questionable legitimacy of the organs existing in later times, does not allow one to ignore the fact that they effectively exercised State authority and that their normative acts shaped legal relationships in various spheres of social life. The lapse of time, which from a legal perspective is not a neutral phenomenon, gave those relationships permanence and, today, they provide the basis for everyday life for the majority of Polish society.

MAIN ARGUMENTS OF THE DISSENTING OPINIONS

- judge Zdzisław Czeszejko-Sochacki:

- Objections arise primarily from the Constitutional Tribunal's failure to resolve the issue on the merits, which could have been done on the grounds already present in the procedural decision itself.
- Despite the nature of this ruling (i.e. a procedural decision rather than a judgment) and references to the debatable concept of exhaustion of legal force, the reasons given for the ruling in this case are of a substantive nature, pointing towards the constitutionality not only of Article 2(1)(e) but also of the entire Decree. The circumstances taken into account by the Tribunal when deciding that, despite the loss of binding force of Article 2(1)(e) of the Decree, Article 39(3) of the Constitutional Tribunal Act did not require the Tribunal to give judgment in order to protect constitutional rights and freedoms, actually point unequivocally towards the constitutionality of the Decree. The Tribunal took into account, therefore, arguments that are of significance for the protection of constitutional rights, stemming from a sense of justice – values such as the permanence and security of legal relationships.

- judge Lech Garlicki:

- Pursuant to Article 79(1) of the Constitution, in all cases where a legal provision which constituted the basis for a final decision exists, such a provision may be challenged by the procedure of constitutional complaint.
- In the present case, the starting point for the constitutional complaint was the judgment of the Supreme Administrative Court issued with reference to two administrative decisions. The substantive basis for these decisions was Article 2(1)(e) of the Decree of the PCNL of 6th September 1944 on the Implementation of Rural Land Reform. In the 1990's, and in earlier decades, the jurisprudence of the Supreme Court and the

Supreme Administrative Court referred to provisions of the 1944 Decree, treating them as the substantive basis for the resolution of a variety of disputes and doubts. Moreover, the decision of the Constitutional Tribunal in this case is inconsistent with the Tribunal's earlier decisions, which have on a number of occasions treated the provisions of the 1944 Decree as the subject matter of the universally binding interpretation of statutes. Only a few weeks before, the Tribunal pronounced judgment on that Decree when reviewing Article 216 of the Real Estate Management Act 1997.

- The source of this misunderstanding is the Tribunal's unjustified eradication of the difference between the one time "consumption" of a legal provision and the loss of binding force of a legal provision. It is true that a legal provision may be constructed in such a manner that it is applicable only to situations existing at the time of its enactment and is not applicable to situations, even identical ones, which arise following its enactment. This merely implies, however, that the applicability of such a provision is limited in time but, in relation to the situations with reference to which such a provision was applicable, it continues to have legal effect as the basis for the maintenance of legal consequences arising therefrom and thereby represents a barrier against attempts to legally and factually undermine the permanence of such consequences. Moreover, whenever the question arises as to whether – in relation to a particular situation from the past – the relevant provision caused the intended legal consequences, it is firstly necessary to verify whether the provision was indeed applicable to the particular factual situation, thereby effectively applying that provision. Provided, therefore, that the law allows for adjudication of past situations, it remains necessary to apply "consumed" provisions, which therefore maintain partial (residual) binding force.
- The 1944 Decree was a "one-off" act, in the sense that its application was consumed with the change of ownership relationships that existed at the time of its enactment (and at the time of its subsequent amendment). As a result of applying the Decree's provisions, various legal situations have been created and, more importantly, many disputes continue to arise.
- The object of the Constitutional Tribunal's review is not to determine whether the contents of the provision, at the time of its enactment, conformed to the Constitution, since this would require the Tribunal to apply long obsolete constitutional provisions as the basis of review, which could lead in practice to fundamental difficulties (since it is very difficult to determine, for example, which constitutional regulations, if any, might have prevailed in 1944). The object of review consists, however, is asking whether the provisions of the Constitution of 2nd April 1997, currently in force, allow the courts adjudicating current cases to apply past legal provisions.
- In the present case, the reasoning adopted in case P 4/99 ought to have been applied, according to which the lapse of time, the necessity to respect acquired rights and the irreversibility of changes that occurred in Polish rural structures lead to the conclusion that the application nowadays of the provisions of the 1944 Decree does not infringe the Constitution of 2nd April 1997.
- Even though the Tribunal considered that the provisions of the 1944 Decree no longer have any binding force, it was necessary to consider whether a judgment was necessary on the constitutionality of the Decree in order to protect constitutional rights and freedoms within the meaning of Article 39(3) of the Constitutional Tribunal Act. Paradoxically, the finding that the Decree had lost binding force compelled the Tribunal to shift to a higher level of abstraction and to support the doubtful supposition that there is no inherent correlation between implementation of the rural land reform and the protection of constitutional rights and freedoms.

- judge Andrzej Mączyński:

- The challenged Article 2(1)(e) of the Decree of the PCNL of 6th September 1944 (in conjunction with Article 2(2) of the same Decree, which was not cited in the present constitutional complaint) undoubtedly served as the substantive legal basis for decisions issued in relation to the complainant in 1996 and 1998, as well as the judgment of the Supreme Administrative Court of 2000, which was final and concluded proceedings in that case. Accordingly, this provision cannot be treated as having no binding force within the meaning of Article 39(1) point 3 of the Constitutional Tribunal Act, especially when the Constitutional Tribunal upholds (quite rightly) the position that even provisions which have been explicitly repealed maintain binding force so long as they may still be applied. The resolution (W 15/95) delivered by a plenary session of the Constitutional Tribunal not only interpreted the provision challenged in the present case but also unequivocally proclaimed that this provision has given rise to legal consequences, which still exist, that it has not been explicitly repealed and that it may still be applied to establish the legal consequences of past events.
- The assumption concerning the "exhaustion of binding force" of the challenged provision is based on the fact that the envisaged deprivation of ownership occurred by the operation of law and the fact that the re-

forms would not apply to estates exceeding the size specified in the Decree after its entry into force. Such a proposition lacks support in any legal provision and is, furthermore, highly dangerous, since it deprives the Constitutional Tribunal of the capacity to adjudicate on any provisions providing for “one-off” legal consequences by operation of law.

- The Constitutional Tribunal’s examination of whether it is necessary to review the conformity of the challenged provision with the Constitution, in order to protect constitutional rights and freedoms, could be accepted if the matter concerned only such property which, following its acquisition by the State Treasury, was subsequently assigned to natural persons under the procedure specified by the Decree, but not in relation to those real estate properties which still constitute assets of the State.

- judge Marian Zdyb:

- One cannot share the view of the Tribunal as to the loss of binding force of a normative act which gives rise to legal consequences by operation of law alone on the date of its one-off consumption.
- The hitherto jurisprudence of the Supreme Court and of the Supreme Administrative Court has clearly not supported the assumption of the loss of binding force of the challenged act and its provisions. Furthermore, the Constitutional Tribunal, by adopting two resolutions concerning the interpretation of Article 2(1)(e) of the Decree (W 3/89 and W 15/95), has acknowledged, by pronouncing its interpretation, that this provision is still in force.
- In the light of Article 39(3) of the Constitutional Tribunal Act, even pronouncing the loss of binding force of the challenged provision would not constitute grounds for discontinuing proceedings, since that provision concerns the constitutional rights of individuals. Thus, if the proceedings in the present case were to be discontinued, this would undoubtedly have to be done on the basis of reasons other than the loss of binding force, since the loss of binding force in the present case does not prevent the possibility of reviewing Article 2(1)(e), pursuant to Article 39(3) of the Constitutional Tribunal Act.
- It may be assumed that, if the Tribunal were to examine on the merits the conformity with the Constitution of the challenged provision and to find that the Decree and the organ having issued it lacked sufficient legitimacy then, taking into account the overall circumstances of the case, the basic values of the Constitution currently in force and, in particular, the significance of the problems which would be caused by challenging the consequences of the Decree, the Tribunal could nevertheless declare the consequences of the Decree to be irreversible.
- The solution adopted in this procedural decision actually leads to the indirect legitimisation both of the PCNL and the Decree on Implementation of Rural Land Reform. However, neither the PCNL nor the Decree on Implementation of Rural Land Reform adopted thereby were constitutionally legitimate. In particular, the Decree, in providing for a particular form of such expropriation, had no legal basis in the Constitution of March 1921 or the Constitution of April 1935.
- Polish citizens affected by the Decree on Implementation of Rural Land Reform and other such acts, the application of which was combined with unlawful deprivation or limitation of fundamental rights, deserve at least moral satisfaction for the harm they suffered, even if material compensation is not feasible.
- A comprehensive assessment of the questions relating to the absence of sovereignty and legality of the PCNL, as well as the effects of acts proclaimed thereby – due to their consequences and scope – should be performed with the appropriate active involvement of the contemporary democratic constitutional legislator.
- A negative assessment of laws from that period (from the perspective of axiology and legislative competencies) can rarely lead nowadays to questioning the effects of such laws, for many reasons. The Decrees issued by the PCNL functioned in the Polish legal system with the same effect as statutes. Some situations and consequences connected with application of the Decree on Implementation of Rural Land Reform have been legitimised, directly or indirectly, by subsequent legislation, whose conformity with the Constitution has not been challenged. The complexity of legal problems connected with the factual situation created by the Decree may not be resolved today without the intervention of the legislator. The fact that the effects of the Decree extend very deeply into the sphere of present ownership relationships and the sphere of acquired rights may render it impossible to challenge such effects; and the payment of compensation on such a large scale exceeds the capabilities of the State. Challenging the effects of the Decree or other acts adopted during the same period could lead to unmanageable chaos, or even threaten the stability of the legal system. The State’s inability to satisfy potential claims and to pay the corresponding amounts of compensation would cause feelings of helplessness, both on the part of the State and on the part of former owners. The question of who should be liable for damage caused by the Communist authorities also seems to be significant: this responsi-

bility extends, to a degree, to the Soviet authorities of the period. Furthermore, the actions of western States may not be fully justified, since they contributed, directly or indirectly, to the development of an environment favourable to violations of the fundamental rights of Polish citizens. Challenging the consequences of the Decree would also necessitate resolving the problem of how to compensate other social, professional groups etc., which were harmed by the Communist system. Without positive action by the legislator, the resolution of merely one aspect of compensation for past injustices would cause a spiral of claims regarding the unlawful activities undertaken by the totalitarian Communist system. Such claims could prove impossible to satisfy, given their scale, duration, and the contribution of external factors.

- Taking into account the above arguments and circumstances, two alternative solutions would be justified. The first solution would be for the Constitutional Tribunal to recognise the absence of appropriate legitimacy of the PCNL and of the Decree issued thereby, and at the same time to recognise that, as a result of important constitutional values, it is not possible to reverse the effects of that act unless the democratic legislator decided otherwise. Alternatively, it would also be permissible, for the same reasons, to discontinue proceedings in the present case on the basis of Article 39(1) point 1, however.

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. 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. 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.

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.

[...]

3. The regulation stated in item 1 point 3 is not applied if issuing a judgement on a normative act which lost its validity before issuing the judgement is necessary for protecting constitutional freedom and rights.