Judgement of 28th November 2007, K 39/07

PROCEDURE FOR DEROGATION OF JUDICIAL IMMUNITY

(OTK ZU 2007, No. 10A, item 129)

Type of proceedings: Abstract review Initiator: First President of the Supreme Court	Composition of Tribunal: Plenary session	Dissenting opinions: 6

Legal provisions under review	**Basis of review**
Obligation of a disciplinary court to consider a motion regarding the derogation of a judicial immunity within 24 hours [Act of 27th July 2001 – The Law on the organisation of common courts: Article 80a § 1, Article 80b § 1 as well as Article 80c]	Judicial immunity Right to court [Constitution: Article 181, Article 45]
Exclusion of a judge's participation from a court sitting, at which a public prosecutor's motion requesting permission for the detention of the judge is being considered [Act of 27th July 2001 – The Law on the organisation of common courts: Article 80b § 3]	Right to defence [Constitution: Article 42 paragraph 2]
Exclusion of a judge's participation from a court sitting, at which a public prosecutor's motion for a temporary arrest of the judge is being considered [Act of 27th July 2001 – The Law on the organisation of common courts: Article 80c, read in conjunction with Article 80b § 3]	Right to defence [Constitution: Article 42 paragraph 2]
A public prosecutor's power to limit a judge's access to records enclosed to a motion requesting the derogation of immunity [Act of 27th July 2001 – The Law on the organisation of common courts: Article 80 § 2f and 2g]	Judicial immunity Right to court Right to defence [Constitution: Article 181, read in conjunction with Article 45, Article 42 paragraph 2]
Lack of stay of the enforcement of: a resolution allowing for holding a judge criminally responsible for crimes or an intentional offence punishable by deprivation of liberty of least 8 years; a resolution allowing for a detention of judge in the event of initiation of proceedings in a case concerning a crime or an intentional offence punishable by deprivation of liberty of at least 8 years; as well as a resolution allowing for a temporary arrest of a judge, where a decision allowing for holding the judge criminally responsible has been taken, despite a lodged complaint. [Act of 27th July 2001 – The law on the organisation of common courts: Article 80a § 3, Article 80b § 4 second sentence, Article 80c, read in conjunction with Article 80a § 3, Article 80b § 4 second sentence]	Principle of two-instance court proceedings Judicial immunity [Constitution: Article 181, read in conjunction with Article 176]
Violation of procedure for the adoption of a statute [Act of 29th June 2007 on the amendment of the Act – The Law on the organisation of common courts, and on the amendment of some other legal acts: Article 1 point 29 and 30]	Principle of a state ruled by law Principle of legality [Constitution: Article 2, read in conjunction with Article 7]

Formal immunity, vested in the judges, constitutes an essential guarantee of the principle of judicial independence. Pursuant to Article 181 of the Constitution, a judge shall not, without prior consent granted by a competent court, be held criminally responsible nor deprived of liberty. Furthermore, a judge shall neither be detained nor arrested, except for cases when he has been apprehended in the commission of an offence, and where his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

Amendments introduced to the Act – The Law on the organisation of common courts, regarding the procedure for derogation of the immunity of the judge, were challenged by the First President of the Supreme Court. The applicant presented allegations of both substantive and procedural nature.

Within the substantive allegations, the applicant challenged, *inter alia*, the introduction of summary and simplified (by way of limitation of some procedural guarantees) procedures for consideration of a motion requesting the derogation of judicial immunity in cases concerning crimes and intentional offences punishable by deprivation of liberty of at least 8 years (the so-called Zbonikowski's amendment) and the limitation upon a judge's access to records of proceedings for derogation of immunity (the so-called immunity proceedings), where the motion for the derogation concerns the judge.

In turn, with regard to provisions of the Act of 29th June 2007 on the amendment of the Act – The Law on the organisation of common courts, and on the amendment of some other legal acts, the applicant formulated allegations of procedural nature, arising from reservations as regards the failure to seek the opinion of the Supreme Court on the amendments, in case where such an opinion is required in light of provisions of acts on the Supreme Court.

The decision was adopted by the majority of votes. The following judges presented dissenting opinions: Marek Cieślak, Maria Gintowt-Jankowicz, Mirosław Granat, Wojciech Hermeliński, Teresa Liszcz as well as Janusz Niemcewicz.

RULING

1. Article 80 § 2f and 2g of the Act of 27th July 2001 – The Law on the organisation of common courts, insofar as it precludes a court's control over the exclusion, issued by a public prosecutor, of the access to records of proceedings by a judge subject to derogation of immunity, does not conform to Article 42 paragraph 2, Article 45 paragraph 1, read in conjunction with Article 181 of the Constitution.

2. Article 80a § 1 as well as Article 80b § 1 and 3 of the above-indicated Act do not conform to Article 45 paragraph 1, read in conjunction with 181 of the Constitution.

3. Article 80a § 3 as well as Article 80b § 4 second sentence of the above-indicated Act do not conform to Article 176 paragraph 1, read in conjunction with 181 of the Constitution.

4. Article 1 point 29 of the Act of 29th June 2007 on the amendment of the Act – The Law on the organisation of common courts, and on the amendment of some other legal acts, insofar as it adds § 2d-2h to Article 80 of the Act of 27th July 2001 – The Law on the organisation of common courts, conforms to Article 2, read in conjunction with Article 7 of the Constitution.

5. Article 1 point 30 of the Act of 29th June 2007, referred to in point 4 of the Ruling, does not conform to Article 2, read in conjunction with Article 7 and Article 186 paragraph 1 of the Constitution, on the grounds that it had been adopted with violation of the procedure envisaged for the adoption thereof.

PRINCIPAL REASONS FOR THE RULING

1. When undertaking a review of the constitutionality, the Constitutional Tribunal examines both the content of the challenged regulation (substantive criterion of review), competencies (competency criterion of review) as well as observance of an appropriate procedure, as envisaged by legal provisions, for the adoption or ratification thereof (procedural criterion of review). In case of a substantive review, the adjudication upon the constitutionality of a statute consists in a comparison of the challenged statutory norm with the content of a norm indicated as the basis of review. In turn, in case of a review regarding the procedure, the examination of the constitutionality consists in the assessment of conformity of a procedure for the adoption of the challenged provisions against the requirements laid down in provisions regulating the legislative procedure.

2. In case of substantive review, allegations have to be specified in the application initiating proceedings, while in case of the examination based on formal or competency criteria the Tribunal undertakes an *ex officio* review, irrespective of the content of the application. This stems from the content of Article 188 of the Constitution, which specifies the competencies of the Constitution Tribunal.

3. The finding of unconstitutionality of a procedure for the adoption of challenged provisions does not always signify that it is superfluous to examine the provisions against the substantive basis of review. This issue should be considered in a multi-faceted manner, taking into account the following: type of review (preventative, subsequent), content of the application (indication by the applicant of an allegation concerning the adoption procedure), effects of the judgement (see point 4) as well as the possibility of a more effective influence on the legislation.

4. The main effect of a judgement finding unconstitutionality, existing regardless of whether the review of the constitutionality has been undertaken based on a substantive or a procedural criterion, is the elimination of the challenged regulation from the legal order. However, whereas the finding of unconstitutionality on the grounds of a faulty procedure for the adoption of a statute results in the statute's failure to come into force (this is the version of the statute which was supposed to be altered by way of the ineffective, apparent amendment that remains effective), then the finding of unconstitutionality of a statute on the grounds of the content thereof results in the repeal of the statute as of the day of promulgation of the Tribunal's judgement in the appropriate official gazette.

5. The realisation of the advisory competence in the course of legislative proceedings is not unlimited. The role of subjects in which the right to express an opinion has been vested is limited to taking a stance that will inform the legislator of their point of view. The expression of an opinion on a given matter by authorised organs may not be rec-

ognised as the possibility of imposition of any solutions on the Sejm or as the right to veto any decisions of the Parliament.

6. The assessment of whether the obligation to seek an opinion of appropriate organs has been fulfilled has to be undertaken against the background of particular legislative work. It is possible, however, to enumerate more general criteria that the Constitutional Tribunal should take into consideration, that is: the nature of the amendments introduced, the width and depth thereof, as well as the general nature of the matter regulated and the scope of the regulatory freedom of the legislator.

7. There is no necessity to once again seek an opinion of appropriate subjects, where the amendments to a draft have been based on the same assumptions as the original version thereof. In particular, a necessity to seek an opinion does not exist where the amendments concern the same object of a regulation, and where the advisory organ had already been able to present its stance in its first opinion. Any potential changes to a bill, based on assumptions contained in the draft, constitute the essence of legislative proceedings; the choice of the depth of interference into the solutions put forward in the draft rests with the legislator. However, where amendments to a bill encompass issues that had not at all been included in the original draft, then such a normative novelty has to receive an opinion of authorised subjects, whose participation is obligatory by virtue of Article 2, read in conjunction with Article 7 as well as Article 186, read in conjunction with Article 7 of the Constitution.

8. The nature of the matter regulated by way of a statute along with the scope of the legislator's regulatory freedom connected therewith are of significance in the determination of whether, in a given instance, the obligation to seek an opinion in the course of legislative work has been violated. The Constitution does not define the boundaries of the regulatory freedom in a uniform manner. Some matters, by their very nature (in particular, social and economic ones), are left within the discretion of the legislator. In turn, the admissibility of passing regulations relating to personal and political rights of a person and citizen depends on the fulfilment of specific requirements envisaged in the Constitution. The indicated narrower scope of the legislator's regulatory freedom also applies to institutions that guarantee the aforementioned rights, e.g. the judicial immunity, which protects the broadly understood right to court by way of ensuring the independence of courts and judges.

9. When assessing the fulfilment of the obligation to seek an opinion in the course of legislative proceedings, the nature of the advisory authority of authorised bodies (statutory or constitutional) is also of fundamental significance. Failure to seek an opinion of the organ whose authorisation to take a stance stems from the Constitution amounts to the disregard of a constitutional duty. Qualitatively, it constitutes a more serious infringement of the adoption procedure than the failure to seek an opinion of organs whose competence in this regard stems from ordinary legislation.

10. The Constitution stipulates that the Supreme Court undertakes activities within the administration of justice (Article 175 paragraph 1) as well as within the exercise of supervision over other courts (Article 183), whereas its advisory competence in the course of legislative proceedings stems solely from provisions of an ordinary statute.

11. From the mere fact that, according to the Constitution, the National Council of the Judiciary, the Commissioner for Citizens' Rights as well as the National Council of Radio Broadcasting and Television safeguard particular values it does not stem that the organs have been vested with the advisory competence within the legislative procedure. However, the National Council of the Judiciary, unlike the Commissioner for Citizens' Rights or the National Council of Radio Broadcasting and Television, has the capacity to initiate abstract reviews of the constitutionality (Article 186 paragraph 2 of the Constitution). Accordingly, the organ may influence the removal from the sources of law of acts that threaten the values protected by it. Taking into consideration the structure of Article 186 of the Constitution it has to be acknowledged that the notion "safeguard", as used in Article 186 paragraph 1, also encompasses safeguarding against threats to the independence of courts and judges rooted in the legal system itself. Since the National Council of the Judiciary has been vested the right to initiate proceedings concerning the review of the constitutionality, it should all the more provide its opinion on appropriate statutes. To recapitulate, the advisory authorisation of the National Council of the Judiciary stems from a constitutional regulation.

12. The most significant manner in which the National Council of the Judiciary, being a collective organ, expresses its statement is by way of a resolution. Such resolution may only be adopted upon the fulfilment of certain formal requirements on a duly convened sitting. Therefore, a random assembly of a certain number of members of the organ, summoned in an informal manner, may not adopt a resolution. For the realisation of the advisory competence of the National Council of the Judiciary it is necessary to set an appropriate date for the assembly of the organ and for the adoption of a resolution as well as for taking a stance on an opinion expressed by the legislator in the course of legislative proceedings.

13. Formal immunity of judges is a mechanism that serves to ensure the proper and stable functioning of the administration of justice, protecting courts and judges against influences. Immunity is also characterised by a subjective aspect, in that it protects a given person. Yet, the latter effect is of secondary nature when set beside the primary aim of immunity, that is, ensuring the independence of courts and judges.

14. International regulations emphasise that not only the actual, but also the apparent dependence of courts (judges) in their jurisprudential practice on factors other than the requirements of the law may constitute an infringement of the standards of the independence of courts and judges. It stems from the jurisprudence of the European Court of Human Rights that immunity protects guardians of the administration of justice against the influence from political groups, provocation, retaliation or external pressure. In fact, immunity serves to ensure the stabilisation of adjudication by way of limiting the possibility of the exertion of influence on the content thereof by factors from outside the administration of justice. The mechanism constitutes a guarantee of the separateness of the judiciary from other powers. Furthermore, its goal is to protect the integrity of judges exposed to a revenge on the part of persons who had been judged contrary to their expectations.

15. The significance of judicial immunity is particularly profound in countries where democracy and mechanisms for the separation of powers have not yet been consolidated. Independence of judges and courts may exist without the need for the institution of immunity in countries of mature democracy, already-fixed understanding of the sepa-

ration of powers and high legal and political culture, as these factors minimise the political risk of abusing the possibility of a judge's removal from office owing to the content of judgements delivered by them.

16. The situation in which the derogation of immunity is excessively available leads to a "chilling effect", whereby the very fact of filing a motion requesting the derogation of immunity of a judge results in the lowering of the judge's reputation. And in spite of the fact that the groundlessness of such a motion has been proven in the course of follow-up proceedings and the judge has regained its power to adjudicate, their good reputation and readiness to exhibit independence and firmness have been affected. The jurisprudence of the European Court of Human Rights confirms that the very emergence of the "chilling effect" is often regarded as a sufficient prerequisite for the negative assessment of a national law.

17. The regulation of Article 42 of the Constitution, whereby criminal responsibility is paralleled with the right to defence "at all stages of proceedings", is applicable to all repressive proceedings: penal (irrespective of their stage) as well as other proceedings (quasi-penal: e.g. disciplinary or preparatory proceedings), and not only to criminal proceedings *strico sensu*. The right to defence before criminal proceedings, within the constitutional meaning, is enjoyed in "all proceedings", including incidental and preparatory ones, provided that they are connected with the encroachment into the sphere of constitutional freedoms and rights (Article 31 of the Constitution). Immunity, as a mechanism stemming from the Constitution, guarantees a certain scope of independence from the interference of the state. Therefore, each encroachment into the sphere of this independence must be connected with a guarantee of the right to defence.

18. According to the jurisprudence of the European Court of Human Rights, which should be taken into account in the process of the interpretation of the Constitution, the right to defence constitutes a necessary element of all fair procedures. The scope of the right encompasses the possibility to present and defend one's own view.

19. The concept whereby it is possible to limit the right to defence at the stage of immunity proceedings on the grounds that in the future a given case will anyway be decided by a court adjudicating upon the act, the guilt and the punishment is unacceptable from the perspective of the Constitution. At any stage of penalisation, including the preliminary one, it is necessary to guarantee the right to defence that is adequate for that stage. A proper protection should also be guaranteed within immunity proceedings, since one deals not only with the rebuttal of the negative prerequisite for court proceedings, but also with putting a person under a cloud of suspicion.

20. A regulation that makes it possible for a public prosecutor to restrict – in a manner binding upon the disciplinary court – the accessibility of records of proceedings and their availability for the person subject to derogation of immunity, transforms court proceedings into inquisitorial proceedings, with the public prosecutor playing the leading role. In such an instance the disciplinary court becomes merely the enforcer of the public prosecutor's decision, and this cannot be reconciled with the idea of the independence of the court, being one of the powers, and contradicts the guarantee and the legitimising function of courts. The constitutional guarantees stemming from Article 45 and Article 181 are retained by way of the very fact that the indicated proceedings,

by virtue of the Constitution, are pending before a court, that is, an organ free from influence on the part of other powers.

21. The 24-hour period for the consideration of a case within an extraordinary procedure in immunity proceedings, as stemming from the introduced regulation, is too short due to substantive reasons. In the course of such proceedings the court is supposed to determine whether "there exists a sufficiently justified suspicion of committing a crime". For this purpose it is necessary to assess materials and the stance of the public prosecutor presented in the motion and determine whether the motion should be considered within a summary procedure. The adopted solution may result either in a superficiality of the guarantee function of the court deciding upon the immunity or in a "wary" dismissal of motions, which – from the perspective of the reliability of utilizing immunity proceedings in order to purge the judiciary – is highly inadvisable.

Provisions of the 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. 7. The organs of public authority shall function on the basis of, and within the limits of, the law.

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. 42.1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.
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.
3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a 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.
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. 175.1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts. […]

Art. 176.1. Court proceedings shall have at least two stages. […]

Art. 181. A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

Art. 183.1. The Supreme Court shall exercise supervision over common and military courts regarding judgments.
2. The Supreme Court shall also perform other activities specified in the Constitution and statutes.
3. The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Art. 186.1. The National Council of the Judiciary shall safeguard the independence of courts and judges.
2. The National Council of the Judiciary may make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.

Art. 188
The Constitutional Tribunal shall adjudicate regarding the following matters:
1) the conformity of statutes and international agreements to the Constitution;
2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
4) the conformity to the Constitution of the purposes or activities of political parties;
5) complaints concerning constitutional infringements, as specified in Article 79, para. 1.