

## Judgment

dated 24 February 1999 (SK 4/98)

The Constitutional Tribunal sitting with the bench composed of the Chairman Janusz Trzcíński, Zdzisław Czeszejko-Sochacki (Reporting Judge), Stefan J. Jaworski, Wiesław Johann, Krzysztof Kolasiński and after reviewing a constitutional complaint at a hearing on 24 February 1999:

(...)

held

**article 14, section 3a of the Act dated 19 October 1991 on Managing the State Treasury's Agricultural Realty (Journal of Laws, 1995, Number 57, Item 299, amended: Number 101, Item 504; 1996, Number 59, Item 268, Number 106, Item 496, Number 156, Item 775; 1997, Number 79 Item 484, Number 54, Item 349) conforms with articles 2 and 32 of the Constitution of the Republic of Poland.**

**Moreover, the Constitutional Tribunal, having acknowledged that the issuance of a decision in the matter of the conformity between article 14, section 3b of the Act cited above would be impermissible,**

has resolved

**pursuant to article 39, section 1, sub-section 1 of the Constitutional Tribunal Act dated 1 August 1997 (Journal of Laws, Number 102, Item 643) to discontinue the proceedings in this area.**

Reasoning

(...)

III

(...)

1. The complainant purchased receivables from another company which was acquired by the State Treasury's Agricultural Property Agency (AWRSP). In this manner the complainant became the Agency's creditor. Concurrently, the complainant participated in the verbal tender announced by the Agency to sell realty comprising the Commercial Agricultural Farm in Tylicz of the State Treasury's Agricultural Realty Fund, thereby becoming a candidate to be a buyer of two plots. The agreement was not executed, however, because the complainant filed a declaration to cancel (set-off) the receivables, which the Agency did not acknowledge by referring to article 505, sub-section 1 of the Civil Code in conjunction with article 14 section 3a) of the Act dated 19 October 1991.

On the grounds of the grievance against article 14, section 3a), the Provincial Court [Voivodship Court] in Rzeszów threw out in its judgment dated 11 March 1996 (file number IC 659/95) the complainant's suit against the State Treasury's Agricultural Property Agency (AWRSP) – Regional Branch in Rzeszów to obligate the Agency to execute an agreement of sale for the plots mentioned above. During the proceedings the Provincial Court established that the relevant provisions envisage the repayment of the receivables against the price for the agricultural realty purchased from AWRSP by way of cancellation (setting off). Concurrently, the Provincial Court took into consideration that two types of cancellation should be distinguished, i.e. contractual and statutory and that cancellation is sometimes excluded or limited. Statutory cancellation is based on article 499 of the Civil Code and it requires, *inter alia*, the existence of two identical in kind receivables in terms of the subject thereof between

the same parties. It is then imperative for both receivables to be due and in principle they must be subject to grievance. In the end, the cancellation, in other words, the amortization of the receivable, is legally permissible, provided that it is not excluded by the power of the provisions of the Civil Code or particular provisions. Article 505 of the Civil Code stipulates that receivables which are not subject to attachment cannot *inter alia* be cancelled. According to the Provincial Court, the definition of receivables not subject to attachment should be deduced from articles 829-1084 of the Civil Code. They are, therefore, receivables with respect to which exclusions or limitations were instituted on execution, following from the provisions of the Civil Proceedings Code as well as particular provisions. For instance, one may enumerate the receivables of a cooperative stemming from article 27 paragraph 5 of Cooperative Law, the receivables of natural persons embodied in a savings deposit according to article 29 of the Banking Law. In a similar manner the Provincial Court made reference to the limitation of execution, and thus the exclusion of attachment following from article 14, section 3a of the Act dated 19 October 1991 on Managing the State Treasury's Agricultural Realty. Insofar as – as the provision cited above stipulates – the execution of receivables due against AWRSP by virtue of an acquired liability may be conducted only against property and the benefits derived therefrom, transferred to the Agency after the liquidation of the enterprise which drew down the liability, thus the things and the receivables constituting the property of some other enterprise which was also acquired by the Agency cannot be attached. Consequently, the Provincial Court acknowledged that in light of article 505, sub-section 1 of the Civil Code, the receivables due to the complainant from the debtor, whose obligations were assumed by the Agency, cannot be amortized by cancellation (setting off) against the receivables due to the Agency from the complainant by virtue of the price established by the parties during the tender.

The Court of Appeals in Rzeszów, in throwing out the appeal lodged by the complainant against the judgment of the Provincial Court which threw out the complainant's suit (decision dated 25 July 1996 – file number I A cr 171 /96), acknowledged the opinion of the Court of first instance to be accurate that article 505 paragraph 1 of the Civil Code impaired the complainant's ability to avail itself of the institution of the statutory right to cancellation at the time when the issue was being decided. Moreover, the Court of Appeals asserted that at present, the opportunity to cancel the complainant's receivables with the debt stemming from the purchase of realty from the defendant was excluded outright by article 14, section 3b) of the Act dated 19 October 1991, which was appended [to the former] by the Act dated 25 April 1996 Amending the Act on Managing the State Treasury's Agricultural Realty (Journal of Laws, Number 59, Item 268) and which is in force as of 10 May 1996 and which stipulates that „unless there be some other agreement the debtor may not cancel its debt with the receivables due to it from the Agency if that debt originated by virtue of the purchase, lease or rent of property acquired by the Agency as a result of the liquidation of some other enterprise besides the one which drew down the liability constituting the basis of the debtor's receivables.”

The Supreme Court also concurred with the opinions of both instances in its judgment dated 19 June 1997, file number III CKN 113/97, whereby it through out the complainant's appeal.

2. In the case under consideration it is incontestable that the provisions set forth in article 14, section 3a) of the Act dated 19 October 1991 on Managing the State Treasury's Agricultural Realty impaired the complainant's ability to avail itself of the statutory right to cancel (set- off) receivables. For this article stipulates that the „execution of receivables due against AWRSP by virtue of an acquired liability may be conducted only against property and the benefits derived therefrom, transferred to the Agency after the liquidation of the

enterprise which drew down the liability.” The complainant has alleged that this provision contravenes the Constitution. In its opinion this provision contravenes article 32 of the Constitution, and that indirectly it also violates article 2. Concretely, the unconstitutionality of the challenged provision is founded, first and foremost, on the fact that it places the state legal person – the Agency – in a privileged position with respect to its creditors. Such a regulation, in the opinion of the complainant, impairs the Agency's creditor from canceling with effect according to the course prescribed by the provisions in articles 498-504 of the Civil Code. The violation of equality and the prohibition against discrimination in economic life are also supposed to be indubitable since a non-state business entity, some other one besides the Agency, is liable for its obligations with all of its assets. It is also difficult to speak of social justice if a non-state entity cannot execute its undisputed receivables from a state legal person on account of the privileged position held by that legal person in civil law relationships.

3. In conjunction with the foregoing allegations the Constitutional Tribunal first considered whether the challenged provision leads to the Agency's unjustified privileged status with respect to its creditors in such a way *inter alia* that it impairs non-state entities from executing their undisputed receivables from a state legal person.

The Constitutional Tribunal recalled that according to the binding provisions of the Act dated 19 October 1991 on Managing the State Treasury's Agricultural Realty, the Agency assumes the legal situation of the prior debtor and its situation as the new debtor with respect to creditors is the same as the prior debtor's situation. The Agency is obliged to pay the receivables with the assets of the state-owned farms it has wound up and acquired. The creditors may therefore pursue their undisputed receivables from the Agency from the assets of the enterprise which drew down the obligation. The scope of liability for debts and the creditor rights associated with that obligation to pursue their claims do not change and are the same as if the state-owned farms continued to exist. In curtailing the execution of receivables to the property and the benefits obtained therefrom which are derived from a wound up enterprise, the challenged provision has not deprived creditors from the ability to apply compulsion upon the Agency in order to execute the benefit due to it. The complainant's allegation that a „non-state entity cannot execute its undisputed receivables from a state legal person” is therefore unfounded. The complainant could just not cancel the receivables from the assets of some other enterprise besides the one which drew down the obligation. The complainant did not demonstrate, in turn, that article 14, section 3a) of the Act dated 19 October 1991 totally impairs the satisfaction of its claims and that in conjunction with its validity the complainant is not able to conduct the execution of debt with effect. The case materials show that the complainant did not even make an attempt to avail itself of the path for the execution of receivables even though they were asserted by a legally binding judgment; it restricted itself solely to the attempt of making payment with these receivables by way of cancellation.

The Constitutional Tribunal acknowledged that article 14, section 3a) not only does not impair a non-state legal person from executing its indisputable receivables from the Agency but also does not give the Agency a privileged status with respect to its creditors. This provision, as the Prosecutor General rightly noted, refers only to the obligations assumed by the Agency; it does not pertain to the obligation of the Agency which arose after the acquisition of the property. In turn, the facilitation of execution of receivables from all of the Agency's assets which the complainant is suggesting – would cause the creditors, and not the Agency, to have a privileged status, having the ability to conduct execution against all of the assets held by the Agency and not only against the property remaining after the wound-up state-owned farms. Finally, winding up an enterprise and the acquisition of its property by the Agency cannot cause the creditors' capabilities of execution to be more favorable than before

the enterprise was wound up. The challenged provision does not therefore deteriorate the legal situation of the creditors of wound up state-owned farms in comparison with the situation in place at the time when the obligation came into being. In this circumstance, according to the Constitutional Tribunal, it is not possible to speak about nonconformity between article 14, section 3a) of the Act dated 19 October 1991 on Managing the State Treasury's Agricultural Realty with article 2 of the Constitution of the Republic of Poland.

4. The second allegation concerned the nonconformity between the challenged provision and the principle of equality expressed in article 32 of the Constitution of the Republic of Poland. In this issue the Prosecutor General took the stance that according to the established jurisprudence it is not possible to assess the challenged provision with respect to its conformity with article 32 of the Constitution since the constitutional norm expressed in this provision refers directly to the legal situation of citizens and not legal persons.

In analyzing this allegation lodged by the complainant, it is primarily necessary to draw attention to the fact that although both article 62, section 2 of the previously binding constitutional provisions and article 32 of the Constitution express the principle of equality, the content of the regulations is not identical.

According to the reading of article 67, section 2 of the constitutional provisions the „Citizens of the Republic of Poland have equal rights regardless of gender, birth, education, profession, nationality, race, religion and social origin and status.” In turn, the reading of the two sections in article 32 of the Constitution of the Republic of Poland is as follows: „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.” In comparing these two provisions the Constitutional Tribunal asserted that although article 67, section 2 was not literally repeated in the Constitution of the Republic of Poland, nevertheless we find the model of constitutionality embodied therein in article 32 (judgment dated 12 May 1998, U.17/97, Collection of the Constitutional Tribunal's decisions, ZU, Number 3 (18)/98, p. 206). In the context of this concrete case this assertion primarily concerned the subject matter scope of equality, for whose scope the difference in the reading of the two provisions is not of significant importance. Even though the reading of article 32 appears to suggest that the subjective matter scope of this principle has been captured more broadly, one must nevertheless remember that under the previously binding constitutional provisions equality also encompassed the prohibition against discrimination and the Constitutional Tribunal has pointed out on multiple occasions that the criteria enumerated in article 67, section 2 are merely exemplary in nature (decision dated 9 March 1988, Pile number U. 7/87, Collection of the Constitutional Tribunal's decisions, 1988, p. 14 just like later decisions).

The impact of the new reading of equality in article 32 on the scope of entities should be treated differently. For while article 67, section 2 defined this scope using the word „citizens,” article 32 of the Constitution of the Republic of Poland has utilized two terms „all” (everyone] and „no one” for this purpose. It is also for this reason that the Constitutional Tribunal could assert in reference to the allegation of nonconformity between the provisions of the Act on the Financial Restructuring of Enterprises and Banks and on Amending Some Acts and the principle expressed in article 67, section 2 of the previously binding constitutional provisions that it is not possible to evaluate these provisions from the point of view of the equality of citizens; for this principle only applies to the evaluation of the equality of entities which are citizens, i.e. natural persons (decision dated 27 June 1995, K. 4/94, Collection of the Constitutional Tribunal's decisions, 1995, Part I, Item 16, p. 181). In the meantime the provisions challenged in that case by the Commissioner for Citizens' Rights concerned the legal situation of a debtor who is always a legal person, a bank – which is also a legal person

and other creditors. The creditors of a state-owned enterprise, as a rule, will be other economic entities among which natural persons may also appear. In conjunction with this the Constitutional Tribunal took the stance at that time that the evaluation of equality of all the participants in bank reconciliatory proceedings may only be effected on the grounds of article 1 of the constitutional provisions, establishing the democratic rule of law and social justice (ibid., p.181). The new articulation of equality in article 32 of the Constitution of the Republic of Poland has meant that the repetition of that stance in the case currently under consideration would at least be debatable. Since the creator of the system utilizes various terms to indicate the scope of entities for individual constitutional freedoms, rights and duties, such as „the person” [human, man] (article 31, section 1), „everyone” (article 3 I, section 2, article 38, article 41, article 42, sections 2 and 3, article 45, article 47, article 51, section 3, article 52, sections 1 and 2), „all” (article 32, section 1), „no one” (article 32, section 2, article 39, article 40), „Polish citizen” (article 52, section 4, article 62), „citizen” (article 67, article 68, section 2), „foreigner” [alien] (article 56), „parents” (article 48, section 1, article 70, section 3), „family” (article 71, section 1), „mother” (article 71, section 2), „child” (article 72, section 2), „consumers, customers, hirers or lessees” (article 76), it is necessary to assume that it has ascribed various meanings to these terms, respective of the essence of the freedoms and rights to which they refer. For according to the universally accepted rules of interpretation „various terms should not be ascribed the same meaning without justified reasons” (J. Wróblewski, *Rozumienie prawa i jego wykładnia* [Comprehending the Law and Its Interpretation], Ossolineum 1990, p. 79.).

Terms like „all persons” (in actual usage „body of persons” – *Słownik języka polskiego* [Dictionary of the Polish Language], Warsaw 1984, Volume III, p. 776), „no one” („no human, no person” – op. cit. Volume II, p. 379) and „everyone” (in actual usage „every individual human” – op. cit., Volume I, p. 906) indubitably have the widest scope from among the terms used by the creator of the system to refer to the scope of entities holding constitutional freedoms, rights and duties. According to the Constitutional Tribunal sitting with its current bench, since the creator of the system used the terms „all persons” and „no one” in the Constitution of the Republic of Poland in reference to the scope of entities with equality and since it did not use any of the other terms used in the body of the Constitution (for instance „citizen,” „human” [man]), one cannot claim, as was done under the auspices of article 67, section 2 of the constitutional principles that this principle only applies to citizens today. One should rather assume that the scope of entities bound by equality has been extended in article 32 to include the „body of persons,” it thereby encompasses natural and legal persons.

The insertion of the provision expressing the principle of equality in chapter II of the Constitution, entitled „The Freedoms, Rights and Obligations of Persons and Citizens” cannot have decisive significance. For since the provision of the Constitution does not give rise to doubt from a linguistic point of view, *argumentum a rubrica* (the argument referring to the systematic structure of the fundamental statute) should abate. In addition, the opinion has been expressed in the doctrine on the provisions of the Constitution of the Republic of Poland that the term „every” for instance in the context of article 79, section I, also situated in chapter II thereof and stipulating that „everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal...” should be understood broadly, which will allow e.g. for the further course of action on a constitutional complaint submitted not only by a natural person but also by a legal person.

The issue of the scope of entities bound by the principle of equality expressed in article 32 assumes particular importance when making decisions on constitutional complaints. On one hand, the term „everyone” used in article 79, section 1 does not give rise to doubt in the

sense that it encompasses not only natural persons but also legal persons. If now, on the other hand, one were to assume that the entities utilizing the legitimacy to initiate proceedings as the result of a constitutional complaint should be treated differently in the area of equality then such comprehension of the principle under discussion could give rise to grave doubts. Such is the case in the matter under consideration.

The collection of the Constitutional Tribunal's hitherto decisions, molded on the grounds of article 67, section 1 of the constitutional principles retains an indubitable value in terms of the comprehension of equality; it cannot, however, be mechanically transposed to the grounds of the Constitution, and especially to the interpretation of article 32 therein. The inclusion of the principle, and thus without the literal repetition, of the hitherto model of constitutionality in the relevant provisions of the new Constitution of the Republic of Poland allows the bodies applying the law to avail themselves of the accomplishments of the said jurisprudence; it cannot, however, signify its complete nor its „literal” assumption regardless of the obvious consequences following from the difference in the linguistic formulation of this model. We are dealing with the latter situation in the case of „the principle of equality” and its current articulation in article 32 of the Constitution of the Republic of Poland. The creator of the system has retained the same model („principle of equality”), but it has given it a different linguistic shape, which must entail certain consequences in relation to that part of the jurisprudence which was directly linked to its previous articulation. The manner of linguistic expression (specification) of the scope of entities bound by the principle of equality is of decisive importance here. In contrast to the specification in the previous constitutional provisions („citizens”) the current terms („every one” and „no one”) do not limit in any way whatsoever the circle of entities vested with the right to equal treatment by the public authorities, and thus by the lawmaker. The Constitutional Tribunal therefore perceives the opportunity to evaluate the provision challenged by the complainant from the equality point of view if one takes into consideration the way in which it was expressed in article 32 of the Constitution.

According to the complainant there is no doubt that article 14, section 3a) of the Act dated 19 October 1991 violated equality and the prohibition against discrimination mentioned by article 32 of the Constitution since with respect to the Agency it is possible to conduct execution of receivables due from the Agency by virtue of the obligation it has assumed only from the property and the benefits obtained therefrom, transferred to the Agency from the wound up enterprise which drew down the obligation since the complainant, as a non-state economic entity, is responsible for its obligations with all of its assets.

In connection with this allegation the Constitutional Tribunal recalled that in light of its jurisprudence which retain their currency under the present reading of the provisions of the Constitution, the principle of equality is based on the fact that „all entities of the law (addressees of legal norms) featuring a given essential trait (relevant) to an equal degree are supposed to be treated equally. And thus according to the same measure, without variegation, that would be discriminatory or favorable.”

It is therefore necessary to establish whether it is possible to demonstrate the existence of a common, essential factual or legal trait justifying the equal treatment of the Agency and other entities of law (decision dated 28 November 1995, file number K. 17/95, Collection of the Constitutional Tribunal's decisions, 1995, Part II, p. 182. This determination must be made on the basis of the purpose and the general content of the provisions in which the norms under review are incorporated, thus it will frequently be relative in nature. This does not imply the duty of the lawmaker to treat each one of these addressees identically in every situation (decision dated 18 March 1997, file number K. 15/96, Collection of the Constitutional

Tribunal's decisions, ZU Number 1/1997, p. 68). With this in mind it is necessary to assert in the case under consideration that:

- we are dealing with entities which have an essential legal trait in common since both the Agency and the complainant are legal persons;

- concurrently, article 14, section 3a) differentiates the legal situation between the Agency and other legal persons, including private legal persons by introducing the limitation on the ability to conduct the execution of certain receivables from all of the Agency's assets.

If then the norm under review treats addressees differently and who are characterized by a common essential trait, then we are dealing with a deviation from the principle of equality. At the same time, the Constitutional Tribunal drew attention to the fact that this is not always tantamount to the existence of discrimination or privileged status. It is still necessary to evaluate the criterion on the basis of which this differentiation was brought about. „Equality is also the justification for choosing one and not another criterion for variegating entities of the law” (file number K.17/95, op. cit., p.183 and the decisions cited previously).

In considering the complainant's allegations the Constitutional Tribunal emphasized that every deviation from the order of treating similar entities equally must also have its basis in suitably persuasive arguments.

First, these arguments must be relevant, and thus they must retain the direct connection between the purpose and the basic content of the provisions in which the norm under review is incorporated and they must serve the realization of this purpose and these contents. In other words, the differentiation introduced must be rationally substantiated. Such differentiation cannot be effected according to an arbitrarily established criterion (decision dated 12 December 1994, file number K. 3/94, Collection of the Constitutional Tribunal's decisions, 1994, Part II, p.141). In the case under consideration the differentiation introduced was founded on the assumption that the winding up of an enterprise and the acquisition of its property by the Agency cannot cause the abilities of its creditors to conduct execution to be more favorable than they were before the enterprise was wound up.

Second, these arguments must be proportional, and thus the weight of the interest to be served by the differentiation of the situation of the addressees of the norm must retain the appropriate proportion to the weight of the interests which will be violated as a result of treating similar entities unequally.

The Constitutional Tribunal believes that the lawmaker, in establishing the provision under grievance, had in mind both the protection of the interest of the creditors and the Agency. For the former were not stripped of the opportunity to pursue their claims, but only restricted from the statutory cancellation of receivables. In turn, the Agency obtained the opportunity to discharge its statutory tasks.

Third, these arguments must retain some relationship to the other constitutional values principles or norms, justifying the different treatment of similar entities (e.g. decision dated 23 October 1995, file number K. 4/95, Collection of the Constitutional Tribunal's decisions, 1995, Part II, p. 93). One of these constitutional principles is social justice (formerly article 1 of the constitutional provisions, currently article 2 of the Constitution of the Republic of Poland). On many occasions the Constitutional Tribunal has drawn attention to the relationship between equality and social justice. Both principles overlap one another to a great degree. In particular, justice commands the equal treatment of those entities of law which are characterized by a given essential trait. The differentiation of entities of law is permissible on the grounds of equality if it conforms with social justice (e.g. decision dated 3 September 1996, file number 10/96, Collection of the Constitutional Tribunal's decisions, Number

4/1996, pp. 280-281; judgment in the matter of K. 37/97, Collection of the Constitutional Tribunal's decisions, ZU, Number 3(18)/98, p. 200). In light of the arguments presented above, permitting the execution of the receivables due from the Agency by virtue of the obligation it assumed only from the property and the benefits obtained therefrom, transferred to the Agency after the wound up enterprise which drew down the obligation differentiates entities of law but conforms to the principle of social justice, as has been shown above in point 3.

Moreover, in reference to the applicant's process letter dated 22 June 1998, expanding the subject of the grievance to include article 14, section 3b) of the statute cited above, the Constitutional Tribunal resolved to discontinue the proceedings in this area. The grounds thereof was the fact that the courts making their decisions in this case founded their judgments on article 14, section 3a) and not section 3b) of the said provision. In these conditions the issuance of a decision about a legal provision which did not constitute the grounds of a final decision would be impermissible and for this reason the Constitutional Tribunal resolved to discontinue the proceedings in this area according to the principle embodied in article 39, section 1, sub-section 1 of the Constitutional Tribunal Act.

(...)