

The Constitutional Tribunal's judgments specifying the date for the end of the binding force of an unconstitutional regulation

Summary

The Constitutional Tribunal (further: the “Constitutional Tribunal” or “Tribunal”) issues a settlement in the form of a judgment which specifies the date for the end of binding force of an unconstitutional regulation other than the day on which the judgment is published in the appropriate official publication. The judgment is an accessory judgment with respect to a settlement about the unconstitutionality of a specific regulation. An analysis of the Polish Constitution allows one to state that a judgment issued by the Constitutional Tribunal is a product of a conventional act involving the subject-related settlement of a specific case within the jurisdiction of the Polish constitutional court.

Pursuant to Article 190.1 of the Polish Constitution, judgments of the Constitutional Tribunal are of universally binding application and are final. The universally binding application of a judgment of the Constitutional Tribunal means that such a judgment is binding upon all legal entities in an absolute way and without any exceptions (*erga omnes*). Specifically, no public, legislative, executive or judicial authority has any competence to take a stand contrary to the judgment of the Constitutional Tribunal understood as a subject-related settlement of a specific case within the jurisdiction of the Polish constitutional court determined under the Polish Constitution. A consequence of the universally binding application is an obligation to enforce the judgment of the Constitutional Tribunal.

The fact that judgments of the Constitutional Tribunal are final can be understood to mean that they cannot be appealed against and challenged. The fact that they cannot be appealed against means that a judgment of the Constitutional Tribunal must not be repealed, modified or otherwise verified by filing any means of appeal. The fact that they cannot be challenged means that a judgment of the Constitutional Tribunal must not be repealed, modified or otherwise verified by any public authority. In the Polish legal system, the Constitutional Tribunal has the “final word” in cases within the jurisdiction of the

Polish constitutional court under the Polish Constitution. A consequence of the fact that judgments of the Constitutional Tribunal are final is the authority of the *res judicata* and *ne bis in idem* principles.

Pursuant to Article 190.1 of the Polish Constitution, each judgment of the Constitutional Tribunal is of universally binding application and is final as soon as it is announced in the courtroom. In turn, the taking effect of a judgment of the Constitutional Tribunal, referred to in sentence 1 of Article 190.3 of the Polish Constitution, refers directly only to the legal effect which is a consequence of a judgment of the Constitutional Tribunal on the non-conformity to the Polish Constitution, to the legal system, namely elimination of an unconstitutional regulation. The expression “a judgment of the Constitutional Tribunal shall take effect from the day of its publication” means that the consequence (effect) of the judgment of the Constitutional Tribunal about the unconstitutionality of a specific regulation is its repeal (end of its binding force). If a judgment of the Constitutional Tribunal about the date for ending the binding force of an unconstitutional regulation takes effect, this means elimination of that unconstitutional regulation from the legal system on a date other than the judgment publication date.

The consequence of a judgment of the Constitutional Tribunal on the non-conformity to the Polish Constitution taking effect is also that the right is given to challenge a legally effective judgment of a court, a final administrative decision or a settlement of other matters, issued on the basis of the unconstitutional regulation under Article 190.4 of the Polish Constitution.

The description of the time effects of a judgment on non-conformity to the Polish Constitution in *ex nunc* and *ex tunc* categories is not accurate. These terms refer to changes to the law as a result of the acts of the lawmaker, and not the Constitutional Tribunal. Due to the derogatory effect, judgments of the Constitutional Tribunal usually lead to the elimination of an unconstitutional regulation from its full application in time, namely such a regulation must not be applied to legal situations that occurred in the past, present and future. The terms *ex nunc* and *ex tunc* do not, first and foremost, include the complexity of the phenomenon of constitutional review that requires balancing the colliding values protected by Constitutional norms, which requires careful consideration, in particular, of the following: the scope of the application and regulation of the unconstitutional provision, the reasons found for the unconstitutionality, Constitutional values breached by the unconstitutional regulation, other Constitutional values that may apply given the circumstances of the case, and the regulation’s belonging to a given branch of law.

The Constitutional Tribunal’s competence to determine the date for the end of the binding effect of an unconstitutional regulation other than the date on which the judgment is published in the appropriate official publication does not determine the court’s settlement concerning the determination of the legal status appropriate to assess the legal situations that occurred before the publication of the judgment of the Constitutional Tribunal. The judgment of the Constitutional Tribunal does not release the court from making its own assessments and determine the legal status appropriate to consider the case before such court.

The issuing of a judgment by the Constitutional Tribunal concerning the date for the end of the binding effect of the unconstitutional regulation leads to the effects of the judgment on the non-conformity to the Polish Constitution being spread over time. 1) Upon

its verbal announcement, the judgment is to be of universally binding application and becomes final. As a consequence, the lawmaker and courts are obligated to enforce the judgment. 2) Upon publication of the judgment in the appropriate official publication, the time limit for the end of the binding force of an unconstitutional regulation starts to run, provided that the Tribunal has decided so. The Tribunal may not only set the date for the end of the binding effect of an unconstitutional regulation, but also may make the end of the binding effect of such a regulation conditional on the expiry of a specific period of time from the date of the judgment official publication. 3) Upon expiry of the date specified in the judgment by the Constitutional Tribunal, the unconstitutional regulation will be eliminated from the legal system, unless the lawmaker changes it before.

When the judgment of the Constitutional Tribunal is published in the appropriate official publication, the judgment takes effect, unless the Tribunal specifies another date for the end of the binding force of the unconstitutional regulation. This means that the publication of the judgment of the Constitutional Tribunal in the appropriate official publication imposes legal consequences specified in the Polish Constitution with respect to the legal system and legal situation of legal entities. Publication of the judgment of the Constitutional Tribunal specifying the date for the end of the binding force of the unconstitutional regulation other than the date of publication of the judgment in the appropriate official publication neither eliminates the unconstitutional legal norm (legal provision) from the legal system nor constitutes, as a rule, the basis for re-opening proceedings, quashing the decision or any other settlement in a manner and on the principles specified in the provisions applicable to the given proceedings.

When a judgment of the Tribunal on the non-conformity to the Polish Constitution is published in the appropriate official publication, the lawmaker combines specific legal consequences and together with that action, the unconstitutional regulation is *ex lege* eliminated from the legal system (its binding force ends in a definitive way) and constitutes the basis for re-opening the proceedings, quashing the decision or any other settlement in a manner and on principles specified in the provisions applicable to the given proceedings. In turn, when a judgment of the Constitutional Tribunal is verbally announced in the courtroom, it is of universally binding application and is final.

The verbal announcement of the judgment of the Constitutional Tribunal specifying the date for the end of the binding force of the unconstitutional regulation other than the date of publication of the judgment in the official publication, like each verbal announcement of the judgment of the Constitutional Tribunal on the non-conformity to the Polish Constitution, is tantamount to the definite declaration of the unconstitutionality of the regulation being controlled and keeping it in the legal system. Hence, upon the verbal announcement of such a judgment, there is no doubt that the regulation is unconstitutional, but is retained in the legal system.

A judgment of the Constitutional Tribunal specifying the date for the end of the binding force of the unconstitutional regulation other than the date of publication of the judgment has the following legal effects upon its verbal announcement in the courtroom:

- is of universally binding application;
- is final;
- imposes the obligation of its immediate publication in the appropriate official publication;

– imposes the obligation upon the lawmaker to make appropriate legislative changes to the unconstitutional regulation.

A judgment declaring a specific regulation unconstitutional by the Constitutional Tribunal is of universally binding application and is final upon such a judgment's announcement in the courtroom, which must be taken into consideration by the courts and may even lead to a refusal to apply such a regulation in a specific case. The refusal to apply an unconstitutional regulation before the judgment of the Tribunal is published in the appropriate official publication is not, however, the only means available to the courts. They may also (and such a approach is preferred) use interpretational, inference and conflict-of-law directives available in our legal culture in order to reproduce legal norms compliant with the Polish Constitution from the provisions. The courts' competence to refuse the application of an unconstitutional regulation does not collide with the Constitutional Tribunal's competence to control whether the law is constitutional. The consequences of a court's refusal to apply a specific regulation differ from the consequences of the judgment of the Constitutional Tribunal about such a regulation's unconstitutionality.

The Constitutional Tribunal is not fully free to make use of its competence to specify the date for the end of the binding force of the unconstitutional regulation. Like every public authority, when exercising the available competences, the Constitutional Tribunal must act on the basis of and within the limits of the law. The Polish Constitution does not include provisions that would expressly limit the Constitutional Tribunal as far as specifying the date for the end of the binding force of an unconstitutional regulation is concerned. In sentence 3 of Article 190.3 of the Polish Constitution, the lawmaker has formulated the obligation to seek the opinion of the Council of Ministers when specifying the date for the end of the binding force of an unconstitutional regulation in the case of judgments with financial consequences not provided in the Budget. This does not mean, however, that the Constitutional Tribunal may specify the date for the end of the binding force of an unconstitutional regulation in each case under its consideration. Limitations in this respect result from different conditions: both legal and factual. The Constitutional Tribunal's exercising its competence to specify the date for the end of the binding force of an unconstitutional regulation other than the date of the judgment's publication depends without limitation on: the method of control (preventive or consequential), type of control (abstract or specific), subject of control (type of the controlled regulation), reasons for unconstitutionality found (whether unconstitutionality applies to the way the regulation was adopted or to its contents), and the way in which the judgment's conclusion is formulated.

Arguments given by the Constitutional Tribunal in favour of the judgment specifying the date for the end of the binding force of the unconstitutional regulation are related to:

- 1) negative consequences of the judgment taking effect upon its publication in the appropriate official publication, and/or
- 2) need to take appropriate legislative actions in order to change the legal provisions, and/or
- 3) protection of specific values, and/or
- 4) legislative work underway.

The lawmaker has provided the Constitutional Tribunal with the competence to specify the date for the end of the binding force of the unconstitutional regulation other than the date of the judgment's publication in the appropriate official publication. The material

substratum of a conventional act is the act of issuing the judgment, specifying a date for the end of the binding force of the unconstitutional regulation other than the date of the judgment's publication in the appropriate official publication by the competent panel of the Constitutional Tribunal judges in the procedure stipulated by the Polish Constitution and the statute. In particular, such a time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal specifies the date for the end of the binding force of the normative act concerned after seeking the opinion of the Council of Ministers.

The entities subject to the aforementioned competence of the Constitutional Tribunal are all legal entities within the jurisdiction of the Polish State (including the Tribunal) because, pursuant to Article 190.1 of the Polish Constitution, the Tribunal's judgments are of a universally binding application. At the same time, the universally binding application attributable to the Tribunal's judgments means that these judgments are legally binding. In the situation where the Constitutional Tribunal specifies the date for the end of the binding force of an unconstitutional regulation, the obligations set by legal norms reproduced from the applicable legal provisions are imposed.

From the point of view of the entities subject to the Constitutional Tribunal's competence (addressees of the competence norm, including the Constitutional Tribunal), performance of the conventional act, which involves issuing the judgment specifying the date for the end of the binding force of the unconstitutional regulation other than the date of the judgment's publication in the appropriate official publication, is an element within the application scope of the norm ordering a specific behaviour.

A legal norm ordering the Constitutional Tribunal to exercise its competence to issue a judgment specifying the date for the end of the binding force of the unconstitutional regulation will apply when the Tribunal decides that the specific values protected or performed by that norm in conditions C have precedence over the values protected or performed by the hierarchical compliance of the legal system.

R. Alexy's collision law adequately modified with respect to the competing values in the case of the application of the norm ordering the Constitutional Tribunal to specify the date for the end of the binding force of the unconstitutional regulation other than the date of the judgment's publication in the appropriate official publication may be presented in the following way:

If the value (goodness) G_1 takes priority over the value (goodness) G_2 under conditions C: $(G_1 \text{ P } G_2) \text{ C}$, and if the protection of the value (goodness) G_1 in conditions C is provided by the judgment specifying the date for the end of the binding force of the unconstitutional regulation other than the date of the judgment's publication in the appropriate official publication J, then a rule is valid that comprises C as operative facts and J as the judgment specifying the date for the end of the binding force of the unconstitutional regulation other than the date of the judgment's publication in the appropriate official publication: $C \rightarrow J$.

The obligation place on the lawmaker to enforce the judgment of the Constitutional Tribunal involves (i) performance of such changes to the legal system that will ensure that the legal system will be consistent and complete and legal sub-constitutional norms will perform the constitutional principles, norms and values to the highest possible extent (positive aspect), and (ii) ban the establishing of legal norms non-compliant with the Polish

Constitution, especially by banning the re-establishment of legal norms previously found by the Constitutional Tribunal to be non-compliant with the Polish Constitution (negative aspect). Such an obligation should be performed before the expiry of the time limit specified in the Constitutional Tribunal's judgment.

The lawmaker's freedom is additionally limited if the judgment of the Constitutional Tribunal specifying the date for the end of the binding force of the normative act is enforced. The lawmaker is obligated to establish a new regulation, compliant with the constitutional and international standards within a strictly specified time limit, namely within such a time limit that the new legal provisions take effect before the date of the end of the binding force of the unconstitutional regulation specified by the Constitutional Tribunal. A kind of penalty for not meeting the deadline specified by the Tribunal is the occurrence of the legal system's dysfunctionality and the possibility of instituting the procedures intended to repair the unconstitutional status and claim liability in damages for normative lawlessness.

As I have already mentioned, when a judgment of the Constitutional Tribunal on the non-conformity to the Polish Constitution is announced in the courtroom, the presumption of this regulation's constitutionality is repealed. The effect in the form of the end of the binding force is shifted in time (it occurs when the judgment is published in the official publication or on another date specified by the Tribunal), but does not apply to the repealing of the presumption of constitutionality, which is a consequence of the fact that the judgment of the Constitutional Tribunal is of universally binding application and is final. The judgment of the Constitutional Tribunal on the non-conformity to the Polish Constitution is binding for the court when it is announced in the courtroom and from that moment the court knows that a specific regulation is unconstitutional. Establishing legal status, the court must not forget that it is dealing with an unconstitutional regulation, even when it is a statutory regulation. The court is required to do so under the Constitutional norms specifying: the principles of a state ruled by law and principles of the state fulfilling the principles of social justice (Article 2), principle of legality (Article 7), the principle of the Polish Constitution primacy (Article 8.1), principle of the direct application of the Polish Constitution (Article 8.2), the right to a trial (Article 45.1), the principle that judges are subordinate to the Polish Constitution and statutes only (Article 178.1), the universally binding application and finality of judgments of the Constitutional Tribunal (Article 190.1).

A consequence of the judgment of the Constitutional Tribunal specifying the date for the end of the binding force of the unconstitutional regulation may not be the "automatism" in the form of a refusal to challenge the final settlements in all possible situations or the possibility of their being challenged in all possible situations.

Due to the repealing of the presumption of constitutionality of a given regulation, before issuing a settlement allowing for the re-opening of proceedings, quashing the decision or other settlement, the courts should weigh up the colliding Constitutional values. For that purpose, they must consider in particular: the scope of application and regulation of the unconstitutional provision, the reasons for the unconstitutionality found by the Constitutional Tribunal, the Constitutional values breached by the unconstitutional regulation, the Constitutional values underpinning the decision to keep the unconstitutional regulation in the legal system for some time, other Constitutional values that should be taken into account given the circumstances of the case, and the consequences of the unconstitutional

regulation application or the refusal to apply it. The courts should also take into consideration the difference between the situation of (i) the petitioner, who by filing a Constitutional complaint has led to the issuing of the judgment by the Constitutional Tribunal, and (ii) other entities, who are the addressees of the final settlements issued on the basis of the unconstitutional regulation.

The courts should apply similar rules with respect to the possibility of claiming compensation for damage inflicted by the lawmaker through normative lawlessness in the situation where the Constitutional Tribunal decides to keep the unconstitutional regulation in the legal system for some time.