

Decision

dated 18 March 1997 (K. 15/96)

The Constitutional Tribunal sitting in the bench composed of the Chairman Janusz Trzcíński, and Judges: Zdzisław Czeszejko-Sochacki, Lech Garlicki, Wojciech Łączkowski, Ferdynand Rymarz (Reporting Judge)

(...)

held

article 25, sections 3 and 4, articles 30, 37, 39 and 55 of the Act on 9 May 1996 on performing the mandate of the Deputy or Senator (Journal of Laws, Number 73, Item 350) conform with article 1 and article 67, section 2 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and on Local Self government (Journal of Laws, Number 84, Item 426; amended in 1995, Number 38, Item 150; Number 150, Item 729; 1996, Number 106, Item 488).

(...)

Reasoning

(...)

III

1. The subject of the law in question refers, *inter alia*, to an important constitutional matter – *incompatibilitas* – that is a ban on holding a parliamentary mandate and certain functions and positions at the same time and a ban on engaging in certain activities. This issue has been regulated in two provisions of the Constitutional Act dated 17 October 1992: article 2, section 1 establishing a ban for Deputies and Senators to engage in activities incompatible with their mandate within the scope and under sanctions provided for in the law (substantive incompatibility) and in article 8 which bans combining a parliamentary mandate with eight enumerated functions and positions.

Glossaries point out rightly that these provisions express an idea important in a democratic state, that an engagement in public functions is a service to society, offering civic and moral satisfaction and not a source of personal gain, including material gain. To be in a noble service must have bearing on all aspects of life of a given person (except the strictly private sphere): it has to accommodate the performance of public service, particularly in reference to engaging in professional activities taken up for a profit. The ban stemming from article 2, section 1 of the Constitutional Act constitutes a guarantee of the rule of law, preventing the abuse of public functions for personal and political gain (see P Sarnecki's commentary on article 2: *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, [A Commentary to the Constitution of the Republic of Poland] Warsaw 1995, pp. 2 and 5).

According to a similar view, the purpose of a ban on combining a parliamentary mandate with certain functions or activities is to create a guarantee that the Deputies are independent in carrying out their mandate, that corruption is eliminated, and thereby, the principle of separation of powers protected. Detailed (statutory) regulations of incompatibility are subject to an assessment from the point of view of satisfying general constitutional principles and values (a glossary to article 8 of the Constitutional Act dated 17 October 1992, *op.cit.*, pp.1-2).

Drawing the limits of the ban set forth in article 2, section 1 of the Constitutional Act, cited above, thus also the consequences of violating them has been, according to the

constitutional provision, conferred on a statute. One of these statutes regulating the issue is the law of 5 July 1992 on limitations on economic activity of persons performing public functions (Journal of Laws, Number 56, Item 274). The Constitutional Tribunal in providing for universally binding interpretation (resolution of 13 April 1994, W 2/94, OTK, 1994, part I, pp.188-195) has been driven by a general rule of interpretation banning extensive interpretation of provisions restrictive towards rights and freedoms of the citizen, but allowing such restrictions on the basis of other norms, principles and constitutional values.

The Tribunal stated also that of fundamental importance here is the character of a representative mandate as a voluntary public service whose essence, inter al., is the acceptance of additional duties other citizens are free of, as also expressed in the principle of article 2, section 1 of the Constitutional Act dated 17 October 1992. The purpose of this provision is to prevent public officials from engaging in situations and entanglements capable of undermining not only their personal honesty and impartiality but also the authority of constitutional state organs and weakening the confidence of both constituencies and public opinion in their proper functioning (OTK 1994, part I, Item 21, pp. 190-191).

The Tribunal's argumentation remains valid and useful in assessing the constitutionality of the Act on Performing the Mandate of a Deputy and a Senator It constitutes a partial fulfillment of the constitutional announcement in article 2, section 1 of the Constitutional Act. (...)

4. The motion submitted by a group of Deputies, subject to Tribunal's review, has questioned, first article 25, section 3 of the law on performance of their mandate by Deputies and Senators reading that Deputies and Senators who do not take advantage of an unpaid leave to engage in economic activity on their own or jointly with other persons, or whose entitlement to a pension or disability benefit has not been suspended, are not entitled to their remuneration. The petitioner's applicant claims that the provisions questioned are unconstitutional as the Constitution in Chapter 2 (to be specific the Petitioner's applicant probably means the Constitutional Act dated 17 October 1992) has not provided grounds for differentiation among the Deputies to the Sejm. According to the Petitioner's applicant it is „incomprehensible that the law differentiates the legal situation of Deputies and Senators when it comes to the payment of their remuneration and other benefits related to their mandate.” If their duties are identical, then these duties should be paralleled by identical rights.

The above view is wrong, and having invoked by the Petitioner's applicant of the Constitutional Tribunal judgment of 13 July 1993 in case P 7/92 does not reflect the full content of what the Tribunal has said. In this judgment the Tribunal has stated that according to article 62, section 2 of the constitutional provisions maintained in force and the interpretation expressed in its decisions, equality should be interpreted in such a manner that the equal should be treated equally, and the unequal – differently. Determination of whether this principle has been observed by the lawmaker requires description of the circle of addressees the proceedings refer to and pertinent elements of their factual situation. Such determination would allow to decide who is equal, or unequal toward whom (OTK, 1993, part II, Item 27, p. 270).

Directly after a sentence quoted by the Petitioner's applicant on equal treatment and doubts as to differentiating the legal situation of addressees, the Tribunal stated that „In order to determine whether the differentiation is a constitutional one should analyze the criterion (criteria) by which the differentiation has been introduced. In other words, a determination is necessary as to whether the criterion of differentiation is justified as to its substance, and whether it is just.” (ibid.).

In this proceeding the Constitutional Tribunal has fully shared the above cited method of assessing the criteria of differentiation in light of the law. However, the above principles do not require an absolute equal treatment of persons belonging to the category of Deputies or Senators, as the very fact of holding a mandate, from the point of view of the analyzed regulations is not a relative feature of the provisions on parliamentary remuneration.

The Petition's applicant does not see that the fact of holding a parliamentary mandate certainly may be relevant to their different treatment from the rest of citizens, *inter alia* within labor law or an engagement in gainful activities, and the law constitutes a regulation of this kind (see grounds of a CT judgment of 23 April 1996, K. 29/95, OTK ZU 2, 1996, Item 10, p. 109).

It does not mean, however, an imperative of equal treatment of all Deputies as situation may vary, but it is important to apply the established, rational criteria. As the Constitutional Tribunal pointed out in its judgment of 3 September 1996, K 10/96 (OTK ZU Number 3, 1996, p. 281): „Diversions from equal treatment of similar subjects must always have grounds in convincing arguments. These arguments have to, first, be relevant, meaning to be directly related to the purpose and basic content of provisions containing the norm, subject to review, and serve the realization of that purpose and that content, and, second, be proportional, therefore the magnitude of an interest for which subjects are treated unequally must be in proportion to the magnitude of interests breached by the unequal treatment of similar subjects; third, these arguments should relate to certain values, principles or constitutional norms justifying such different treatment of similar subjects.”

The Constitutional Tribunal is of the opinion that the challenged regulations satisfy the above criteria. As mentioned above, these regulations are based in the principles stemming from articles 2 and 8 of the Constitutional Act dated 17 October 1992. As far as the rationality of the adopted criteria of diversifying of the legal status of deputies is concerned, the lawmaker has recognized here the relevance of the preference for holding mandate by Deputies and Senators, which means that it constitutes for them a primary field of professional activity with simultaneous resignation of their previous professional activity, such as employment or an economic activity, or suspension of collecting their social security benefits such as pension or disability benefits. According to the lawmaker, such a preference should be balanced by providing Deputies with a relatively high and a practice remuneration attached to their mandate. But if the status of a professional Deputy has not been chosen by a given person, who for whatever reason may not want to limit his previous way of earning a living, then the lawmaker assumes there are no grounds for offering him/her remuneration due to his mandate. The Constitutional Tribunal considers such incentive for the Deputies and Senators to limit their extra-parliamentary professional and economic activity to be adequate to the public interest protected thereby and aimed at providing Deputies with material independence. It has to be pointed out here that the above intention of the lawmaker has found realization in the form of a relatively high salary level for the Deputies. It expressed the lawmaker's intention to give a parliamentary mandate a professional dimension.

The principle of treating the parliamentary salary as the main source of income for Deputies and Senators is derived from article 25, section 4. It constitutes a satisfactory guarantee that certain individual situations are taken into account, and allows for a parliamentary salary besides other, external sources of income available to a Deputy or a Senator. One may assume with much probability that in some specific circumstances a rigorous regulation excluding the compatibility of holding a mandate and previous professional activity would have forced a Deputy or a Senator to choose between his/her mandate and employment – in favor of the employment. Leaving the assessment of such individual circumstances to an internal managing body of the lawmaker, that is Sejm's or the

Senate's presidium, provides an adequate mechanism for balancing individual and public interest.

Also, the lawmaker has provided equal rights for Deputies and Senators to (other than the salary) benefits such as: social security funds (article 41), a tax-exempt parliamentary diet amounting to 30% of the parliamentary salary for reimbursement of mandate-related expenditures nationwide, regardless of their actual extent (article 42, sections 1 and 2), the right to a free public transportation, including airlines and public transportation in cities (article 43, section 1). According to the Constitutional Tribunal the allegation of unconstitutionality of article 25, sections 3 and 4 is, for the above reasons, unjustified. The regulation in question has not violated the principle of equality of citizen under law and the rule of law (article 67, section 2 and article 1 of the constitutional provisions.). It would be unjust, however, to regulate the matter in such a way that Deputies would have had the right to a salary regardless of their material and professional situation, with the discretionary power of a presidium to deprive them of this right. The regulations adopted in article 25, sections 3 and 4 do not collide with any particular provision of Chapter 2 of the Constitutional Act dated 17 October 1992. The presentation of his position by the Petition's applicant is, first of all, excessively general as it does not indicate any specific constitutional provision guaranteeing the basis for control. Therefore the Constitutional Tribunal has limited itself to saying that none of the provisions contained in Chapter 2 provides any directives concerning statutory determination of principles governing parliamentary salaries, and that none of these provisions even contains an express imperative for such a salary to be granted by the lawmaker.

As disputed articles 37, section 1 and article 39, section 1 of the law of 9 May 1996 are strictly related to the regulation contained in article 25, the lack of justification of the allegations is analogous to the above. There is a marginal issue that the petition's applicant challenged summarily, probably by omission, the regulation contained in article 37 and 39 as neither article 37, section 2 concerning the issue whether the additional salary (an equivalent of a Christmas bonus) is subject to a social security contribution, nor article 39, section 2 concerning general funeral benefits do not directly cover the essence of the matter at hand, that is they do not cover directly the issue of parliamentary salary.

5. The allegation of the unconstitutionality of articles 30 and 55 is based on an improper understanding of these provisions by the petition's applicant. Despite his contentions none of the provisions of the law deprive the Deputies and Senators „remaining in the employ of the Sejm's Bureau" of their rights or benefits „during their term as Deputies or Senators." Also, absent is the kind of inequality or nonconformity consisting of a delay of entry into force of the ban on performing the function of a Deputy at the same time as being in the employ in other institutions, e.g. in the President's Office."

A more detailed analysis of article 30, section 1 of the law leads to an unequivocal conclusion that the ban contained therein on employment of Deputies and Senators during their mandate should be applied equally to all institutions and types of employment referred to in this provision. In all cases like this one the law imposes an obligation to give a Deputy a leave from work in listed institutions and professions for the length of the mandate, extended by a further 3 months, according to the rules set forth in article 29, section 1.

According to the Constitutional Tribunal article 30 (and of the reference to article 29 contained therein) of the law on performing a mandate by a Deputy and Senator do not violate the principle of equality under law All Deputies and Senators are treated equally in these provisions. In particular, the principle of not combining a parliamentary mandate with certain functions and public offices and a ban on taking on or performing certain activities, as

developed in article 30 of the law and based on article 2, section 1 and article 8 of the Constitutional Act dated 17 October 1992, do not contravene the constitutional principles of equality under law and the democratic rule of law.

Also, the *vacatio legis* in this law has been regulated in a uniform way. When taking article 55 literally, article 30 does not apply to the Deputies and Senators holding their mandates when the law entered into force, that constitutes the present term of the Sejm, as under article 57 of the law it entered into force (its main scope) on 1 July 1996.

It transpires from the above that the regulation of article 30 in connection with article 55 of the law does not violate any rights acquired by persons presently holding parliamentary mandates or create inequality under law on the basis of the kind of employment relationships. Therefore such regulation is not inconsistent with articles 1 and 67, section 2 of the constitutional provisions maintained in force.

In making the above assessment the Tribunal has taken into account its earlier position taken in a case concerning the mandate of a council member in a township council (judgment of 23 April 1996, K. 29195), according to which, in the face of the special way the parliamentary mandate is obtained through elections, its holding should not be considered the same as a duly acquired subjective right for the whole term of the mandate. The right to hold an office, position or a mandate in public authorities is not an „acquired right” in the sense of civil, administrative or insurance law and may not be automatically applied to rights and obligations in other spheres. In consequence, the lawmaker’s freedom to interfere with the legal status of a council member during his/her term is much more extensive as it stems from the public character of this very function (OTK ZU Number 20/1996, p. 110).

6. The Constitutional Tribunal has not considered the matter of classification of farms from the point of view of article 2, section 1, in connection with article 10, sub-section 1 of the Economic Activity Act dated 23 December 1988 (Journal of Laws, Number 41, Item 324 as amended) which exceeded the motion and could potentially lead to a universal interpretation of the Act. This constitutes a separate problem which may influence the application of the provisions in question, but the solution depends on the assessment of facts by the authority applying the law, *inter alia* under article 25, sections 3 and 4 of the Act dated 9 May 1996 on Performing a Mandate by a Deputy and Senator.

(...)