Decision

dated 22 November 1995 (K. 19/95)

The Constitutional Tribunal sitting with the bench composed of Chairman Andrzej Zoll, and Judges: Zdzisław Czeszejko-Sochacki, Tomasz Dybowski, Lech Garlicki, Stefan J. Jaworski, Krzysztof Kolasiński, Wojciech Łączkowski, Ferdynand Rymarz, Jadwiga Skórzewska-Łosiak, Wojciech Sokolewicz, Janusz Trzciński, Błażej Wierzbowski (Reporting Judge)

held

1) article 1, section 3 of the State-owned Enterprise Commercialization and Privatization Act dated 21 July 1995 contravenes article 1 of the Constitutional Act dated 17 October 1992 on the Mutual Relationships between the Legislative and Executive Branches of the Republic of Poland and on Local Self government (Journal of Laws, Number 84, Item 426 as amended in 1995, Number 38, Item 184) **and with article 1 of the constitutional provisions upheld by article 77 of the Constitutional Act, cited above, by making conditional, in a manner inconsistent with the democratic rule of law and with the separation of powers, the exercise of powers by the executive branch on Parliamentary consent given in a resolution on a petition of the Council of Ministers, thereby causing uncertainty as to the legal situation of companies established as a result of commercialization of a state enterprise in order to be privatized and persons who under the law have the right to acquire, free of charge, the stock of a company owned by the Treasury;**

2) article 1, section 3 of the State-owned Enterprise Commercialization and Privatization Act dated 21 July 1995 conforms with article 52, section 1 of the above mentioned Constitutional Act dated 17 October 1992;

3) article 33, section 3 and article 39, section 3 of the State-owned Enterprise Commercialization and Privatization Act dated 21 July 1995 contravene article 1 of the constitutional provisions upheld by article 77 of the above mentioned Constitutional Act dated 17 October 1992 by providing, in a manner inconsistent with the rule of law, the form of a regulation referred to in article 54, section 1 of the same Constitutional Act for individual acts issued by the Council of Ministers;

4) article 55, sections 1 and 3 of the State-owned Enterprise Commercialization and Privatization Act dated 21 July 1995 conform with article 1 and article 52, section 1 of the Constitutional Act dated 17 October 1992 as well as with article 1 of constitutional provisions upheld by article 77 of the same Constitutional Law.

Reasoning

(...)

III

1. The petition's applicant has raised doubts concerning the constitutionality of the provisions contained in article 1, section 3, article 33, section 3, article 39, section 3 and article 55, sections 1 and 3 of the State-owned Enterprise Commercialization and Privatization Act dated 21 July 1995. As a model for examination of their constitutionality chosen were article 1 and article 52, section 1 of the Small Constitution and article 1 of constitutional provisions upheld by article 77 of the Small Constitution. The arguments presented in the petition and expressed in written opinions by the participants of the proceeding allow confirmation of serious differences concerning the interpretation of both disputed provisions

and provisions considered to be a model for examination of constitutionality. These differences are particularly visible when it comes to understanding disputed article 1, section 3 of the Act dated 21 July 1995. Without a closer analysis of the content of this provision, views are being expressed on the legal character of Sejm's resolution referred to in this provision. The subject of the resolution issued by the Sejm – on a petition of the Council of Ministers – was consent for privatization of the alcohol, oil, gas and military sectors, as well as banks and insurance institutions, telecommunication and energy networks, marine and river ports, airports, hard and brown coal mining companies. Discrepancies concern mostly classification of the above resolution in a category of the general and abstract acts (the view of the Speaker of the Sejm) or another category (the view of the petition's applicant and, less decisively, of the Prosecutor General). From the arguments presented by the Petition's applicant and the Speaker of the Sejm, an initial assumption can be reconstructed that in all situations where article 1, section 3 of the Act dated 21 July 1995 applies, both the petition of the Council of Ministers and the resolution that follows have the same legal status. This initial assumption constitutes a point of reference for presented legal arguments and for taking a stand on the constitutionality of the provision the suit was brought against. Therefore this initial assumption should be verified and an answer should be given to a basic question of whether the legal character of Sejm's resolution is crucial for the constitutionality of this provision. (...)

2. In a governmental draft on commercialization and privatization law there was no equivalent of article 1, section 3. The challenged provision found its way to the Sejm's resolution as a result of efforts of the Extraordinary Commission for draft statutes on commercialization and privatization of state enterprises and on the results of a vote on minority petitions at the 53rd session of the Sejm *(Diariusz Sejmowy* – a report from the 53rd session of Sejm on 29 June 1995, p. 27ff.). From the very beginning this provision was a subject of controversy. In a discussion of the project the objection was raised that it violated the principle of division of competencies between the legislative and executive powers. Discussion on the petition submitted by the Head of State [President] of the Republic of Poland to reconsider the State-owned Enterprise Commercialization and Privatization Act in respect to article 1 thereof, despite the fact it was contained in the president's petitioii and was taken into account in arguments presented in the petition, has not made it the subject of deep legal considerations as the discussion focused on the political aspects of the law and its possible repercussions. Undoubtedly, this was the reason why article 1, section 3 may cause interpretation problems regardless of the method of interpretation – whether it be linguistic or system interpretation, or the analysis of the purpose of the legislation, as it was duly observed by the petition's applicant. It is worth mentioning here, that arguments referring to the difficulty in interpretation are not per se crucial for the assessment of conformity with article 1 of constitutional provisions, particularly when such difficulties could be overcome.

Difficulty in linguistic interpretation stems mostly from the fact that the disputed provision contains colloquial or business language. There is no doubt that the subject of privatization is property, organized on purpose as an enterprise in the meaning of article 551 of the Civil Code. An enterprise can be managed by a state enterprise or a company (joint-stock or limited) established as a result of commercialization of a state enterprise. It is worth mentioning here that the Constitutional Tribunal shares the interpretation presented in the proceeding by the representative of the Sejm as to the subjective scope of article 1, section 3 of the Act dated 21 July 1995 and agrees with his argumentation. On many occasions the Constitutional Tribunal. when interpreting disputed provisions, assumed their constitutionality. The same assumption should be adopted when construing examined provisions in the process of preventive review of a statute. Hence, it has to be said that proper

implementation of the provisions of the Act dated 21 July 1995 (article 68) does not mean that in reference to privatization of a communal enterprise (e.g. an enterprise providing heating) the Sejm's consent is required in a resolution issued on a petition of the Council of Ministers. Appropriate application of the law on privatization of communal enterprises should take into account the constitutional guarantees for local self government contained in Chapter 5 of the Small Constitution.

Privatization itself is not a one-time action but a continuous process which is supposed to lead to such change of property relationships that will manifest itself in the transfer of property and other property rights to other non-state subjects. Article 1, section 2 of the Act dated 21 July 1995 – just like article 1 of the Act dated 13 July 1990 (Journal of Laws, Number 51, Item 298 as amended) indicated legal ways leading to it. Hence article 1, section 3 of the Act dated 21 July 1995 should be understood in such a way, that it refers to the contained in article 1, section 2 on disposition of property organized purposely as an enterprise, in the meaning of article 551 of the Civil Code, which can be described in colloquial and economic language as a part of the state spirits, oil, gas and arms monopoly as well as banking, insurance institutions, telecommunication and energy networks, sea and river ports and hard and brown coal mining companies. Therefore the participants in the proceeding are right to point out that, in practice, a delimitation of the subject matter of the disputed provision should not be difficult. Particularly convincing is the argument produced by the Prosecutor General that the kind of activity is subject to a mandatory entry into the register of state enterprises (paragraph 3, section 1, sub-section 3 of the Council of Ministers resolution of 30 November 1981 on keeping the state enterprise register – Journal of Laws, Number 31, Item 171).

The petition's applicant was right to reject such an interpretation of the disputed provision, according to which parliamentary consent on privatization should be a requirement for legal effect of a declaration of will (an offer to dispose of made by a body that established an enterprise or an authorized body of a company as such reasoning finds no justification in the analysis of Chapter IV and V of the law. The case is not about the problem of efficacy but of validity of legal actions taken in the process of privatization. There is no doubt that disposing of Treasury property or a property belonging to other state-owned legal persons should be consistent with the law providing special procedure and special principles for disposal of such property. The elements of state property as described in article 1, section 2 of the Act dated 21 July 1995 are objects or assets excluded from trade *(res extra commercium)* so long as they are not admitted to trade by the proper authority and by proper procedure. In this context the act of non-compliance with the requirement of obtaining Sejm's consent on privatization as provided in the disputed provision would amount to nullity of legal actions provided in article 1, section 2 (disposing of stock or shares, sale of an enterprise, using the enterprise as a contribution to a company, giving an enterprise for use for a fee). This is a clear conclusion from a juxtaposition of the Act dated 21 July 1995 with the content of article 58, paragraph I of the Civil Code (an action contrary to the law... is invalid). The consent referred to in the challenged provision should precede the privatization itself. But privatization starts with disposing of the Treasury stock in a company (Part IV of the Law – indirect privatization) or with the organ that established the enterprise by issuing a regulation on a direct privatization (article 41, section 2). An offering to dispose of stock owned by the Treasury a well as issuing by the organ which created the enterprise of a regulation on privatization is not possible without prior Sejm consent given in a resolution on a petition from the Council of Ministers. The legal character of a petition and of the resolution cannot, however, be predetermined. The Council of Ministers may apply to the Sejm both for consent to dispose of the stock of a Treasury-owned company established as a result of

commercialization and for the purpose of privatization of all property as stated in article 1, section 3 of the Act dated 21 July 1995.

There is no need to determine the legal character of a resolution in a proceeding having as its subject the examination of constitutionality of the particular provision of the Act dated 21 July 1995. This provision should be interpreted in such a way that it excludes the application of Part IV and V of the law to the property described therein for an unlimited period of time. This means that the representatives of the Treasury will not be able to exercise all of the rights connected with Treasury-owned stock of companies created as a result of commercialization, and executive authorities who established enterprises are not going to be able to issue orders on direct privatization without Sejm's consent. The property described in article 1, section 3 of the Act dated 21 July 1995 shall constitute closed assets which means that in connection with it no actions provided for in article 1, section 2 of this law can be taken.

To assess the constitutionality of article 1, section 3 of the Act dated 21 July 1995 of importance is not only the possibility to make positive decisions under this provision, but also the possibility to refrain from action. Within this scope both the Sejm and the Council of Ministers have wide powers to inhibit the process of privatization, however, it is not difficult to see how important the position of the Council of Ministers is as without its petition the Sejm may not adopt a respective resolution. Changing a legal situation resulting from article 1, section 3 is possible only in a statute.

3. Doubts expressed by the Petition's applicant as to conformity of article 1, section 3 of the Act dated 21 July 1995 with the Constitution focus on its conformity with article 1 of the Small Constitution and the principle of separation of powers expressed in this provision. Article 1 of the Small Constitution reads that state organs within a legislative branch are the Sejm and the Senate of the Republic of Poland, within executive branch are the President of the Republic of Poland and the Council of Ministers, and independent courts within the judicial power.

In its judgment of 9 November 1993 (K. 11/93, Constitutional Tribunal's Collection of Decisions 1993, Part II, p. 358) the Constitutional Tribunal has decided that this provision established *expressis verbis* a separation of powers but in the course of its further consideration it called a principle established in article 1 of the Small Constitution the separation of powers. As to this principle the Tribunal has stated that as its result „the legislative, executive and judicial powers are separated and, furthermore, there has to be a balance between them and they have to cooperate. The meaning of this principle is not limited just to organizational matters. The purpose of the separation of powers is among others the protection of human rights by making an abuse of power impossible by any organ wielding such power".

The Tribunal elaborated on this in its judgment of 21 November 1994 (K. 6/94) when it brought its attention to – the subject matter of the case – the essential difference in the relations between the judicial power and any other branch of government (it is the essence of justice to be meted out exclusively by courts of law with other powers no being able to interfere or participate). When comes to relations between the three powers mentioned in article 1 of the Small Constitution, the Constitutional Tribunal has stated that the „requirement of separation of powers means *inter alia* that each of the three powers should have a substantive competence reflecting their character, and what is more, each of the three powers should maintain certain minimum of exclusive competence constituting its essence. Against such background the Constitutional Tribunal has stated that within relations between legislative and executive powers it is „a typical situation – both in presidential and

parliamentary systems – that competencies cross or overlap reaching even the areas embodying the *essence* of legislation (e.g. delegated legislation – article 23 of the Small Constitution) or executive function.

The Constitutional Tribunal has maintained the above views and made them a point of reference for further considerations indispensable for deciding the case. The case has revealed, however, specific problems which show its complexity. These problems are as follows:

1) the subject matter is a broad and deep interference with the executive powers;

2) the interference is reserved for one organ of the legislative branch only – the Sejm;

3) the interference is characteristically tied to the initiative of only one executive organ – the Council of Ministers. No initiative means that the law cannot be applied; 4) the interference affects also other executive organs, other than those mentioned in article 1 of the Small Constitution: the organ that created the enterprise and organs exercising the rights of Treasury as the owner of stock of companies created as a result of commercialization;

5) for the assessment of the constitutionality of this provision of great importance is not only the scope of possible interference but also the lack of action on behalf of the organs it refers to;

6) the interference is supposed to cover such areas where the rights of the public authority *(imperium)* are tightly connected with the Treasury or other organs acting as an owner *(dominium*);

7) the interference affects the political system, defining the place of individuals and large groups in the social structure created as a result of this process;

The above comparison of problems typical of this case indicates that to resolve the problem of the constitutionality of the provisions in question it is not enough to *assess* the arguments quoted by the Petition's applicant and other counter-arguments presented by the participants in the proceeding, but it is necessary to invoke the content of article 1 of the Small Constitution which was clearly suggested by the Petition's applicant.

4. The principle which may be derived – not without some difficulty – from article 1 of the Small Constitution has raised a theoretical dispute concerning terminology. This principle was described as the separation of powers (see A. Pułło: *Podział władzy. Aktualne problemy w doktrynie, prawie i współczesnej dyskusji konstytucyjnej w Polsce,* [Separation of Powers. Current Issues in Theory, Law and in Constitutional Discussion in Poland], *Przegląd Sejmowy,* Number 3, 1993, p. 19). „In the Republic of Poland the supreme power is vested in the Nation". Such a notion is increasingly in use in literature on the subject (it is rather consequently applied by P. Sarnecki, in: *Komentarz do Konstytucji Rzeczypospolitej Polskiej,* [A Glossary to the Constitution of the Republic of Poland], ed. L. Garlicki, Wydawnictwo Sejmowe, Warsaw 1995 – a glossary to article 1 of the Small Constitution). But the petition's applicant has used different terminology, calling the principle established in article 1 of the Small Constitution the principle of separation of powers. These discrepancies and terminology problems undoubtedly reflect different approaches to legal understanding of the principle expressed in article 1 of the Small Constitution. When only its political aspects are being considered then it may become the only criterion for assessing the Constitution and of the political system established therein, allowing determination of whether a given political system is democratic or not. Such an approach to this principle may prove very useful in legal comparative research and terminological aspects are of little importance here. If, however, the political content of that principle is overlooked, than it can be analyzed on legal grounds,

using as a point of departure two different methodological assumptions. One of them involves analyzing the purpose the principle expressed in article 1 of the Small Constitution. Here it is assumed that the principle expressed in article 1 of the Small Constitution is not breached, if ordinary statutes do not violate „the essential scope" of a given power With such an approach it is possible to allow the legislative body a certain leeway in shaping competence relationships at the „fringes" of different powers where by the nature of regulated matters competencies cross or even overlap. The other methodological approach construes the principle expressed in article 1 of the Small Constitution in a dogmatic, almost mechanical way where article 1 of the Small Constitution is interpreted as the separation of powers between separate branches which, under no circumstances, cannot be crossed by ordinary (non-constitutional) statutes. With such an approach most appropriate are terms such as „division" or „separation" to reflect the legal content of article 1 of the Small Constitution. The terminology used by the Applicant of the petition and the detailed considerations contained in it are closest to such an understanding of the Small Constitution. The hitherto jurisdiction of the Constitutional Tribunal clearly indicates that the Tribunal has opted for such an understanding of article 1 of the Small Constitution which above all is focused on its purpose. This view is upheld by the Constitutional Tribunal in the present case. Further analysis of this case must concentrate on the assessment of such an atypical situation, where one of the organs of the legislative branch intends to bestow competence upon an executive authority. The separation of powers itself is rather voluminous and should not be construed in a dogmatic, historical way without consideration for its function and its relation with other constitutional principles. Particularly worth stressing are mutual relations of the separation of powers with the principle of the supreme power of the people and the rule of law (compare: W. Sokolewicz: *Podział władz – idea polityczna czy zasada prawna? Z dylematów współczesnego ustrojodawcy* [Separation of Powers – Political Idea or Legal Principle? A Dilemma of Contemporary Political System Making], *Prawo w okresie przemian ustrojowych,* (Law in a time of changes of the political system), pub. Scholar, Warsaw 1995, p. 18). As it is pointed out in literature „nowhere, not even in the Polish Constitution, is the separation of powers fully adopted. On the contrary, it is limited to a smaller or larger degree (P. Sarnecki: op. cit, thesis 5). Another view is that „the legislative branch can be granted certain wider powers affecting the executive branch (review, accountability, etc.); hence the dependence of the executive power on the legislative power may be profound indeed (ibid., thesis 14). As to the relation between the executive and legislative branches there is a view that „the separation of powers requires, in its functional aspect, an exact determination of competence of the executive power within the scope of passing statutes and of the legislative power within the scope of the executive domain. (A. Pułło, „Glossary to Constitutional Tribunal judgment of 21 November 1944," *Przegląd Sejmowy,* Number 1, 1995, p. 273).

In this judgment the Constitutional Tribunal has acknowledged the theoretical interpretation presented above concerning the separation of powers, and in particular the notion, dominant at this time, that article 1 of the Small Constitution does not indicate the absolute limit between the statutory rights of different branches mentioned in this provision. A review of the German constitutional court is worth mentioning here. According to it, a violation of the separation of powers takes place only when parliamentary interference goes into the very essence of the executive power.(„Erst wenn zugunsten des Parlaments ein Einbruch in den Kernbereich der Exekutive erfolgt, in das Gewaltenteilungsprinzip verletzt," *Entscheidungen des Bundesverfassungerichts,* Band IX, 1959, p. 280).

Of importance for an interpretation of article 1 of the Small Constitution is also the content of the preamble to the Small Constitution where the lawmaker clearly indicates that the Constitutional Act has been passed in order to „improve the functioning of central state

authorities." Entrusting the organs mentioned in the Small Constitution with competencies which do not by the nature of a given branch belong to them should not *a priori* be considered unconstitutional, and consideration of its constitutionality may not overlook the purpose of the Constitutional Act.

However, it is impossible to share without reservation the view expressed by the Applicant of the petition who, in absence of a counterpart in the Small Constitution of article ?0, section 1 of the Constitution of the People's Republic of Poland of 1952 defining the place of the Sejm in the political system, would like to draw far reaching conclusions, the subject of further considerations. Accurate is the view that not repeating in the Small Constitution the former article 20, section 3 of the Constitution of the People's Republic of Poland of 195? establishing Sejm's competence to adopt resolutions on fundamental directions of state policy; does not mean that the Sejm is completely stripped of any competence to affect state policy. (W. Sokolewicz, *Rozdzielone, lecz czy równe? Legislatywa i egzekutywa w Małej Konstytucji 1992 roku,* [Separate, but are they equal? Legislative and Executive Branches in the Small Constitution of 1992], *Przegląd Sejmowy,* Number 1, 1993, p. 23.)

6. The questioned provision of article 1, section 3 of 21 July 1995 cannot be accepted as serving the purpose of improving the functioning of central state authorities. The reason for it is that it creates a situation where the process of property transfer in its advanced phase, that is after commercialization, could be brought to a stop. The justification of the parliamentary consent to privatization was supposed to be a means of „social review" and that „in matters of grave social and economic importance, decisions should be made in public, in the spotlight and not in the subdued silence of cabinets." (from the speech of the MP Reporting Judge in a discussion of the Extraordinary Committee Report concerning the PR President's petition to reconsider the law on commercialization and privatization of state enterprises, *Diariusz Sejmowy,* 56 parliamentary session on 21 July 1995, p. 8). Therefore the *ratio legis* was not the need to improve the functioning of central state authorities. It had purely political motivation and may be, at best, understood as an expression of Sejm's role and the role of parliamentary debate in the process of social review. Invoking such *ratio legis* cannot be an effective argument in the attempt to prove the constitutionality of the provision in question. The Constitutional Tribunal is of the opinion that the solution adopted in the provision in the disputed provision of article 1, section 3 of the Act dated 21 July 1995 serves the purpose of realization of the supremacy of the people and does not contradict article 2 of the constitutional provisions. It has to be mentioned here that the principle of supremacy of the peoples should not be simplified. The interpretation of article 2 of the constitutional provisions has to be affected by the omission in the Small Constitution and provisions of former article 20 of the Constitution of People's Republic of Poland of 1952 defining the role of the Sejm in the system of state organs. It makes us to see differently the institution of representation in the political system which began to take shape following 1 January 1990 as a result of constitutional amendments, rather than in a political system which in light of these changes can be viewed only as historical reference point in construing constitutional and statutory norms. Hence, when construing article 2 of the constitutional provisions one cannot elevate only paragraph 2 and subordinate to it the provisions of paragraph 1 which reads that in the Republic of Poland the supreme power is vested in the people. The way particular organs are established and authorities elected (universal election or another way) does not mean that non-elective authorities should be viewed as „weaker" as the principle of supremacy of the People does not provide the legitimization for their power.

It has not been demonstrated, however, that the solution contained in article 1, section 3 of the Act dated 21 July 1995 conforms with the principle of democratic rule of law as stated in article 1 of the constitutional provisions. Above all, attention has to be drawn to the fact

that the process of property transformations as determined by the law refers to legal persons. Also, legal persons under the rule of law have to be protected by the law.

The above refers also to state legal persons, however, there is no doubt that in this case, due to the special set of state rights in relation to these persons (the *imperium* is strongly tied here with the *dominium* – see the Constitutional Tribunal judgment of 4 April 1995 in case K. 10/94 – Constitutional Tribunal's Collection of Decisions, 1995, part I, p. 113), protection from interference by state authorities is significantly smaller that in reference to individuals and other legal entities. Such protection is dictated not only by interests of a state legal entity but most of all by interests of entities entering into legal relationships with them (users, parties to agreements). In reference to state enterprises a special category of contracting party constitute their employees. Changes in their legal status as an employer in the process of transformation from a state enterprise into a company (commercialization) entailed substantial changes of employees' legal status, as their right to participate in management of the enterprise is now different. Such change is a normal and necessary consequence of system changes introduced in Poland. Nevertheless, it is very important to the legislative body that in these transformations the interests of employees', as well as of farmers and fishermen who provided the enterprise with raw materials, are taken into account by giving them the right to acquire Treasury owned stock in these enterprises without fee (part IV, chapter 2 of the law). Hence, using the criterion of purpose, the legislative body made a distinction between commercialization for the purpose of privatization and commercialization for a different purpose with different procedures to be used in each case (article 3, section 2), also different competencies of the authorities conducting commercialization, and above all, by introducing additional limitations on the legal capacity of a company established as a result of commercialization for an „other" purpose (article 4, section 2, sub-section 3 of the Act dated 21 July 1995). Such a company can be privatized only upon application of the procedure provided for in article 9, section 4 of the Act dated 21 July 1995. Therefore the legislative body has created two distinctively different categories of a company established as a result of commercialization. It creates a diversity of situations for the hitherto existing contracting parties of commercialized enterprises. The differences emerge at the very moment of commercialization. The requirement to obtain parliamentary consent for privatization, provided for in article 1, section 3 of the Act dated 21 July 1995, introduces a tremendous element of uncertainty to the situation of companies established as a result of commercialization and the situation of their contracting parties. Such a company cannot satisfy the purpose it was created for and its contracting parties shall not have the right to obtain stock as provided for in Part IV, Chapter 2 free of claim. There is no room here for expectations, nevertheless it is irreconcilable with the democratic rule of law that a process regulated by law which, if uninterrupted, is supposed to lead to the emergence of rights for persons who have lost their rights in previous phases of the same process, could be halted for an unspecified period of time for extralegal reasons and without determination of the substantive law justifying halting such process by central state authorities.

Also, of importance is the circumstance which emerged clearly during the hearing, namely that commercialization is preceded in practice by negotiations with the enterprise's employees and with their self government, and the purpose of future commercialization is undoubtedly an important element in these negotiations. Dependence of privatization of a company, commercialized for the purpose of privatization, on parliamentary consent makes negotiations by the executive organs prior to the commercialization of a state enterprise senseless.

7. The above considerations undoubtedly allow the statement that the disputed article 1, section 3 of the Act dated 12 July 1995 contradicts article 1 of the constitutional provisions as

it creates uncertainty of legal situation for companies established as a result of commercialization of state enterprises with privatization as its purpose, and for persons authorized by the law to acquire at no fee Treasury-owned stock.

Also it is impossible to consider as consistent with article 1 of the constitutional provisions such situation where fulfilling by administrative authorities of their legally prescribed duties depends on the positive outcome of the procedure provided for in article 1, section 3 of the Act dated 21 July 1995 (the Council of Ministers submits a petition and the Sejm expresses its consent in a resolution for appropriate actions as presented in the petition). Under the rule of law it is a commonly accepted standard that competencies of state organs are supposed to be provided for in a statute (in practice, theory and constitutional jurisdiction often concessions are made, with extensive reservations, to establishing competencies in a regulation instead of a statute).

When examining the conformity of article 1, section 3 of the Act dated 21 July 1995 with article 1 of the Small Constitution, one cannot omit the argument presented by the Applicant of the petition to justify the allegation of nonconformity of the examined provision with article 52, section 1 of the Small Constitution (the allegation itself shall be considered in point 9 of the hereby reasoning). As to the fundamental relationship between the Council of Ministers and the Sejm, a reliable touchstone by which to review legality is first and foremost article 1 of the Small Constitution. It cannot be construed, however, without taking into account of the content of article 52, section 1 of this same document. In this provision the creators of the political system made a distinction between state policy decisions reserved in the Constitution or statue for the President or other state administration or local authority, and decisions that have not been reserved for these organs. Therefore, reserving certain decisions in the Constitutional Act or any other statute for „state policy matters" amounts to a constitutional ban on interference with the thus reserved sphere for authorities mentioned in article 52, section 1 in an ordinary statute. In reference to decisions reserved to the Constitutional Act such a ban is absolute. In reference to decisions reserved for „other statutes" an encroachment of the lawmaker in this sphere requires statutory delegation. Article 1, section 3 of the Act dated 21 July 1995 concerns decisions reserved for the Council of Ministers in other provisions of the law, it also refers to decisions provided for in article 6 of the Act dated 5 February 1993 on property transformation in some state enterprises of particular importance for the national economy (Journal of Laws, Number 16, Item 69 as amended) and decisions reserved to other organs of public administration in article 866 of the Act dated 31 January 1989 – Bank Law (Journal of Laws, 1992, Number 72, Item 359 as amended). One could consider whether the provision in question as issued later is able to repeal earlier statutory provisions. Within this scope the directive *lex posterior generalis non derogat legi anteriori speciali* applies. Such was the interpretation of the transitional and final provisions of the Act dated 21 February 1993 presented by the Deputy Minister for Property Transformations.

In the examination of whether article 1, section 3 of the Act dated 21 July 1995 conforms with article 1 of the Small Constitution, while taking into account the content of article 52, section 1 of the Small Constitution one has to consider that it is also covered by the preamble of the Small Constitution according to which Constitutional Act has been established to improve the functioning of central state authorities. Article I, section 3 of the Act dated 21 July 1995 makes it impossible for the Council of Ministers and other central authorities to make effective decisions without parliamentary consent, and furthermore, allows the Sejm to effectively stay the execution of those decisions which have been made in the previous stages of property transformations for an unlimited period of time, with the assumption that the property shall be privatized (e.g. commercialization of a state bank).

Then, in the circumstances of this case the argument presented by the Petition's applicant is warranted and effective and clearly rooted in legal reasoning *by reductio ad absurdum* (an absurd situation has been created where a parliamentary resolution is more important than the law (statute) as the effectiveness of a law was made dependent on a resolution (consent) of the Sejm). In assessing the conformity of article 1, section 3 of the Act dated 21 July 1995 with the Constitution, one cannot overlook the close relationship between article 1 of the constitutional provisions and article 1 of the Small Constitution. Separation of these provisions for the purpose would be pointless and artificial. A comparison of the arrangement of power molded by an ordinary statute with these two provisions leaves no doubt that article 1, section 3 of the Act dated 21 July 1995 contravenes the Constitution. It also violates the separation of powers pronounced by article 1 of the Small Constitution. The answer to a fundamental question of whether article 1, section 3 of the Act dated 21 July 1995 contains provisions constituting unacceptable interference by the legislative branch with the essence of the executive branch is in the affirmative. Such answer is justified by both dogmatic and teleological approaches to the legal content of article 1 of the Small Constitution, with the difference that the first methodological approach does not require deeper analysis to obtain an affirmative answer, when in the second one only the analysis of the provision in question, including the position of the procedure it has established for obtaining parliamentary consent for privatization, allows justification of doubts concerning constitutional limits of acceptable interference by the legislative power within the sphere of competencies assigned to the executive branch. It should be stressed as a side note that the above provision reveals with great clarity the complexity of the constitutional separation of powers when it refers to the relations between the legislative and executive powers, and the lawmaker's attempts to make a „competence shift" in favor of one of the legislative bodies.

8. In his conclusion the President has formulated the question of whether parliamentary consent provided for in article 1, section 3 of the law on commercialization and privatization... expressed in the form of a resolution passed on a petition of the Council of Ministers constitutes a state policy decision in the meaning of article 52, section 1 of the Small Constitution. Should this consent be treated in such a way then, in the President's opinion, the exclusive competence of the Council of Ministers and the constitutional separation of powers were violated. The conclusion that the President built upon the content of article 52, section 1, where it has been stated that „the Council of Ministers makes decisions in all matters of state policy not reserved by statute or other law to the President or any other organ of administration or self government."

It should be noted that the content of article 52, section 1 of the Small Constitution as quoted above by the President has been taken into account in the examination of whether article 1, section 3 of the Act dated 21 July 1995 conforms with the separation of powers expressed in article 1 of the Small Constitution. There are no grounds, however, for accepting as warranted the thesis presented by the Petition's applicant that the principle of the exclusive competence of the Council of Ministers, resulting, in his opinion, from article 52, section 1 of the Small Constitution has been breached.

This provision does not define the character of relationships between the Council of Ministers and the Sejm as suggested by the Petition's applicant in matters of making political decisions. This is because article 52, section 1 of the Small Constitution has not determined the exclusive competence of the Council of Ministers in a way that Sejm's right to make decisions in matters of state policy would be excluded.

The provision invoked by the President is found in Chapter 4 of the Small Constitution titled: the Council of Ministers of the Republic of Poland (Government) and its meaning should be read above all in connection with other provisions of this chapter From this point of

view. article 52 is a continuation of article 51 which opened the whole chapter and set forth the functions of the Council of Ministers stating that „1. the Council of Ministers determines internal and foreign policy of the Republic of Poland. 2. The Council of Ministers directs all government authorities." A comparison of both articles clearly indicates that article 52 sets forth competencies for the realization of functions indicated in article 51.

The presumption of competence enjoyed by the Council of Ministers „in all matters of state policy" refers obviously to inter-relations within the executive branch and not to the Sejm. Taking article 52 out of its logical and system connection with article 51 and making it a principle setting forth relations between the legislative and executive branches would lead to conclusions contradictory – even if the objection expressed in point 6 of the present reasoning had been taken into account – with the principle expressed in article 2, section 2 of the constitutional provisions that „The Peoples exercise their power through their representatives elected to the Sejm and the Senate." It is true that power manifests itself in decisions *par excellence* political.

It would be justified, however, to invoke article 51 of the Small Constitution for the purpose of determining the notion of executive power; from the point of view of the separation of powers into legislative, executive and judiciary branches as set forth in article 1 of the Small Constitution. The actual provision of article 52, section 1 of the Small Constitution cannot serve as a point of reference for review of the constitutionality of article 1, section 3 of the Act dated 21 July 1995 dedicated mostly to regulation of relations between the Sejm and the Council of Ministers and the Sejm and other organs of public administration.

9. Article 55, section 1 of the law on commercialization and privatization submitted to the President for signature reads. that „the Sejm, on a petition from the Council of Ministers, adopts resolutions on the issuance and value of privatization bonds to be used as payment for:

1) purchase of shareholder's rights resulting from transformation of state enterprises,

2) purchase of a participation title in financial institutions (joint investment associations) owning stock as a result of transformation of state enterprises,

3) purchase of enterprises or organized parts of state-owned enterprises."

In this petition the President has expressed his doubts concerning the constitutionality of authorizing the Sejm to passing resolutions on issuance and value of privatization bonds. According to the President, decisions of this kind of taxing state expenditures should, under article 20 of the Small Constitution, be placed only in a budget law. Furthermore, should this resolution be deemed a disposition of Treasury property then it does not constitute a competence of the Sejm as it does not carry out any functions as Treasury authority. It is the President's opinion that such issues should, as a rule, be regulated in a law (statute) and their details by the Council of Ministers when authorized by statute.

To overcome the above doubts one has to consider the legal character of Parliamentary resolutions. The fundamental question here is whether the Sejm, in a system based on a separation of powers, may pass statutes in a different form than a statue.

10. In Poland, under the Constitution of 1952 it was possible to make a distinction between two kinds of normative resolutions of the Sejm. One of them was directly authorized by the Constitution and used by the Sejm to set fundamental directions of state policy, adopt national social and economic plans and pass its own bylaws. In jurisprudence these acts were treated as similar or even equal to laws (statutes) in the hierarchy of the legal system (See J. Repel: *Kontrola zgodności ustaw z Konstytucją,* (w:) *Postępowanie ustawodawcze w polskim prawie konstytucyjnym* [Control of constitutionality of statutes, in: Legislative process in the

Polish constitutional law], ed. J. Trzciński, pub. Wydawnictwo Sejmowe, Warsaw, 1994, p. 300).

Other resolutions were issued on the basis of statutes for the purpose of their implementation and could not contradict them.

The departure from the principle of unity of power, following the amendment of the Constitution on 7 April 1989, resulted in a necessity to take a different look at the legislative acts the Sejm was authorized to pass. In its judgment of 19 June 1992 the Constitutional Tribunal has stated that „delegation of a state organ to enter the sphere of personal rights may take place only in an act equal to a statute... In statutory subject matter the Sejm may not choose freely between a statute and a resolution, as the latter has a lower rank...” (Case U. 6/92, Constitutional Tribunal’s Collection of Decisions in 1992, pp. 204-205).

The entry into force of the Constitutional Act dated 17 October 1992 and adopting the separation of powers in article 1, according to which the Sejm is a part of the legislative branch, has positively created a new legal situation. On the basis of a general competence norm the Sejm may (with the proscribed participation of other organs) issue universally binding norms only in the form of statute. Its resolutions should always have an express statutory delegation. Article 14 of the Small Constitution constitutes such a basis for the Sejm to issue its bylaws. Such an interpretation of the separation of powers is justified also by, as cited earlier, the constitutional practice of other states adopting this principle.

This does not solve, however, the problem of whether the Sejm may authorize itself in a law to issue a resolution as an executive act to such a law

The Small Constitution does not have a provision to determine generally the system of the sources of law in the Republic of Poland. Therefore, it is not possible to unequivocally exclude a resolution as an executive act to a law (statute) from the catalogue of these sources, particularly since the current law provides such resolutions: article 35 of the Act dated 29 April 1985 on the Constitutional Tribunal, article 27 of the Act dated 26 March 1982 on the Tribunal of State. In both instances resolutions refer to state organs other than the Sejm and undoubtedly contain binding legal norms, subject to criticism in literature. Also, there is no doubt that these resolutions may not impose duties on the citizen nor limit their rights.

11. What remains is the issue of unconstitutionality of a specific provision authorizing the Sejm to issue resolutions, as raised by the President. According to the Petition’s applicant such unconstitutionality occurs here because taxing state expenditures should be regulated, under article 20 of the Small Constitution, in a budget only.

A suggestion made in the petition that the matter of privatization bonds is reserved to budget regulation is unwarranted. It has to be stated that article 55, section 1 of the law creates a means of payment of a limited scope when comes both to its subject matter and the addressees of the exemptions. It may only serve as a payment for values referred to in this provision and only when the Treasury acts both as the seller and the creditor.

The bonds issued shall be, under article 55, section 2, assigned equally and free of allegation to all citizen, residents of Poland. These citizens due to limitations in exemptions shall be able to acquire for it unspecified portions of state property. So the result of the issuance and „donation” of the bonds to the citizen can only be a transfer free of charge of industrial property referred to in article 55, section 1, sub-section 3 of the law or of rights incorporated in securities referred to in article 55, section 1, sub-sections 1 and 2 of the law However, it is not going to direct a stream of cash to citizens or create any financial claim for them. But a state budget is a financial plan whose essence is to accumulate and spend

financial resources. Beyond its scope rests the sphere of property management referred to in article 55, section 1 of the law.

The Petition's applicant has also indicated alternative grounds for unconstitutionality of article 55 of the law as it stated that a resolution referred to in this provision may contain the right to dispose of Treasury property. Should such a concept be accepted then, according to the Petition's applicant, there is no reason for the Sejm to act as Treasury authority.

The assessment of constitutionality of this provision, when the last notion is accepted, should be preceded with an extensive analysis of the essence and function of privatization bonds. As indicated above, a privatization bond is a particular variation of a thing. Its distinctive feature, differentiating it from other things, is its function as a means of payment. But its function to disclaim financial obligations is limited both in terms of its subjects and its scope. Bonds do not create for the citizen either a right or an obligation to purchase particular property. The issuance and allocation of bonds is then a claimless form of transferring a certain purchasing power to the citizen. Only in this sense they are granted rights. The law itself does not provide for an obligation to issue privatization bonds or a parallel right for a citizen. It only creates the possibility that such right is established, a possibility that does not necessarily has to be taken advantage of. The law defines only the principles and the way of distribution of privatization bonds, should they be issued.

In conclusion, one has to say that the Act dated 21 July 1995 itself did not establish any rights for the citizen and only states that such a right may be granted. It also defines a legislative form in which the citizen may be granted the rights referred to in article 55, section 1 which should be adopted by Sejm's resolution on petition from the Council of Ministers. Adopting such form does not violate the Constitution should the legal character of privatization bonds be taken into account. As a side note, it is worth mentioning that a counterpart of the provision in question is contained in article 25, section 1 of the law currently in force, and its constitutionality has not been questioned.

As far as its content is concerned, the resolution referred to in article 55, section 1 of the Act dated 21 July 1995 is substantially different from the one referred to in article 1, section 3 of the same law. The resolution on emission and value of privatization bonds concerns that portion of the privatization that does not depend heavily on the earlier stages of the property transformation in the national economy. Here, the Sejm has not encroached on the essence of executive power. Adaptations of the law and parliamentary competencies to the present constitutional solutions makes the constitutionality of article 55, section 1 highly doubtful. However, it is worth mentioning that in the adopted solution balance has been maintained between the Council of Ministers and the Sejm, and the aim of improving the functioning of the central state authorities speaks in favor the solution adopted in article 55, section 1 of the Act dated 21 July 1995. This allows the overcoming of doubts concerning the constitutionality of this provision.

12. The petition has also expressed doubt as to the constitutionality of the delegation granted to the Council of Ministers to limit or ban disposal of bonds. The answer to the question of whether this provision was issued in violation of the Constitution depends on another answer: whether the lawmaker has overstepped the boundaries of legality of a statutory delegation. First of all, it has to be said that the Petition's applicant makes a wrong assumption that citizens have a subjective right whose content may be limited by a regulation. It is visible from the above analysis that indeed no rights resulted for the citizen, or even an expectation of them from article 55. Such a right shall commence its existence only after the Sejm has passed the appropriate resolution. Therefore the delegation contained in article 55, section 3 should be viewed as a delegation to shape certain elements of the future right. So the

only possible allegation against article 55, section 3 could be the one of transgressing the limits of legality of delegation but not of limiting civil right.

Regulations are issued on the basis of laws (statutes) and for the pur pose of their implementation. There is an agreement in the theory that with no constitutional limitations such a character of regulations determines and limits their content on three levels.

First, in a statutory delegation to create administrative law a delegation to amend a law (statute) may not be granted. Secondly, a statutory delegation may not further delegate the right to interfere in matters reserved to statutory regulation. Thirdly, the scope of statutory delegation cannot be such that executive norms issued on their basis determine statutory rules. If a statutory delegation does not exceed the above limits it cannot be deemed unconstitutional.

Analysis of article 55, section 3 leads to the conclusion that the delegation it contains does not exceed the above mentioned boundaries of legality provided for a statutory delegation. Even if these boundaries have not been clearly drawn, it should not lead to the unconstitutionality of the provision in question.

Such delimitation of the scope of statutory delegation leaves the Council of Ministers with broad discretion as to how to apply it. This can inspire certain apprehension whether the delegation shall be used fairly. But the constitutionality cannot be effectively questioned at such an early stage of creating statutory norms. But the legality of the regulation itself shall be subject to review and constitutionality if there is a doubt whether it was issued not only in an authorized way but also whether its purpose was to implement the law. This is because the legality of an act is assessed not only by the fact of being issued by proper delegation but also in order to implement the law.

13. Then the Constitutional Tribunal considered allegations against article 33, section 3 and article 39, section 3 of the reviewed law The Tribunal has decided that the content of these provision is a delegation for the Council of Ministers to issue acts, as to their substance, regulate a concrete subject matter and are individually addressed. Such interpretation was also presented by the representative of the Sejm. This is a correct interpretation. The consent referred to in article 33, section 3 of the Act dated 21 July 1995 concerns only one company whose Treasury-owned stock was to be disposed of in a way different from provided by the law. The concrete and individual character of this regulation is clear in the cited provision particularly when compared with a regulation referred to in article 33, section 3 of the Act dated 21 July 1995. Also, there is no doubt as to the individual and concrete character of the consent granted by the Council of Ministers for an indirect privatization of specific state enterprise which does not satisfy the requirements set forth in the law (article 39, section 3 of the Act dated 21 July 1995).

The individual and concrete character of „regulations” issued under article 33, section 3 and article 39, section 3 does not permit accusing these provisions with overt generality and violation of constitutional requirements of validity of statutory delegations to issue executive acts by executive authorities as these requirements refer to normative acts.

At the same time the Tribunal considered whether it is constitutionally permissible to use a form of a „regulation” to define such an act of the Council of Ministers which is lacking a normative but concrete and individual character The Constitutional Tribunal is of the opinion that there are no constitutional grounds for attributing regulations with a scope so wide. A representative of the Sejm also spoke on this matter, indicating that the reason for passing the provisions in question was to include the solutions contained in a draft of the Constitution of the Republic of Poland presently under discussion. The notion of regulation of

the Council of Ministers *de lege lata fundamentali* should be construed in view of article 54, section 1 of the Small Constitution, and the conclusion of this article has borrowed from a former article 41 section 8 of the Constitution. If so direct reference was made to a provision existing for so long in Polish constitutional law, then it is possible to talk of taking over a notion already known to a regulation (See A. Gwiżdż, *Akty wykonawcze. Zarys problematyki* (w:) *Prawo, źródła prawa i gwarancje jego zgodności z ustawą zasadniczą w projektach Konstytucji RP* [Executive orders, Outline of Problems, in: Law, Sources of Law and Guarantees of Its Constitutionality in Drafts of the Constitution of the Republic of Poland, eds. K. Działocha and A. Preisner, Wrocław 1995, p. 74]. The decision that the new constitutional provision provides grounds for diversion from this petition would be possible only if it resulted from its amended content. It has to be stressed here that a unified understanding of the notion of a regulation was not revised in the period of 1989-92, what allows the assumption that the democratic lawmaker has taken it over and reaffirmed in its unchanged form.

And that form has assumed that a regulation can only by an act of a normative character and determined its specific, material and formal requirements for its wording, issuance and publication. In the theory of constitutional law a view, accepted by the Constitutional Tribunal, was expressed that „A regulation is – like a law (statute) – a general act and not concrete and individual. It constitutes a source of law." (S. Rozmaryn, *Ustawa w PRL*, Warsaw 1964, p. 204). Against such background a rich Constitutional Tribunal jurisdiction has evolved according to which article 54 of the Small Constitution should be treated as concerning solely the legislative competencies of the Council of Ministers, and the notion of regulation contained therein as constitutionally reserved for normative acts of specific character, having particularly close relationship (serving to) with a law and subject to specific forms of review. Such a concept of a regulation – so closely related to the principle of exclusiveness of a law – therefore directly tied with guarantees of individual rights and freedoms, serves the realization of the idea of a democratic rule of law as sanctioned in article 1 of the constitutional provisions which has been pointed to by the representative of the Petition's applicant in the hearing as a pattern by which to review the constitutionality of article 33, section 3 and article 39, section 3 of the Act dated 21 July 1995, should the assumption that these provisions cover concrete and individual acts turn out to be true. This concept does not contain granting an individual character to a regulation. It is not justified by article 54 of the Small Constitution, also by the nonconformity in the system of sources of law and accepting individual acts which, on one hand, are not recognized by the Constitutional Tribunal (decision of 20 March 1995, U. 10/94, Constitutional Tribunal's Collection of Decisions 1995. part I, pp. 105-107) and on the other hand, there are no clear and fully formed procedures for judicial review – therefore it violates the general principles of the rule of law provided for in article 1 of the constitutional provisions. The power of the Council of Ministers to issue concrete and individual acts – at least within the scope provided by law, results from a general constitutional obligation imposed upon the Council of Ministers to ensure the execution of statutes exists outside of legislative competencies under article 54 of the Small Constitution and may not exceed them (...).