

Judgment

dated 1 December 1998 (K. 21/98)

The Constitutional Tribunal sitting with the bench composed of the Chairman Zdzisław Czeszejko-Sochacki and Judges: Teresa Dębowska-Romanowska, Lech Garlicki, Stefan J. Jaworski (Reporting Judge), Wiesław Johann, Krzysztof Kolasiński, Biruta Lewaszkiewicz-Petrykowska, Andrzej Mączyński, Ferdynand Rymarz, Jadwiga Skórzewska-Łosiak, Marian Zdyb

held

1. article 1, sub-section 8a of the Act dated 8 May 1998 Amending the Supreme Chamber of Control Act conforms with articles 2 and 93 of the Constitution of the Republic of Poland,

2. article 2, sub-section 6a and sub-section 7 of the Act dated 8 May 1998 Amending the Supreme Chamber of Control Act conforms with articles 2 and 10 of the Constitution of the Republic of Poland.

Reasoning

(...)

III

(...)

(...) 1. Article 25, section 2 of the Supreme Chamber of Control Act dated 23 December 1994, challenged by the Head of State [President] stipulates, according to the reading ascribed under article 1, sub-section 8a of the Act dated 8 May 1998 Amending the Supreme Chamber of Control Act, that:

„The Supreme Chamber of Control's charter [statute] ascribed to it by an ordinance of the Speaker of the Sejm at the petition of the President of the Supreme Chamber of Control shall specify the Supreme Chamber of Control's internal organization, including the registered offices of its regional offices and the scope of their territorial jurisdiction.”

According to the previous reading of article 25 of the Supreme Chamber of Control Act, the Presidium of the Sejm was the body entitled to ascribe the charter [statute] to the Supreme Chamber of Control.

As a prefatory remark the Constitutional Tribunal would like to make reference to the legal and system importance of the effects of having amended the Supreme Chamber of Control Act, in particular, to those provisions which replaced the powers formerly held by the Presidium of the Sejm to ascribe the charter [statute] to the Supreme Chamber of Control with provisions, according to which this power now belongs to the Speaker of the Sejm; it would also like to make reference to the hypothesis that the amendment made to the Supreme Chamber of Control Act was necessary as a result of the new Constitution having omitted the institution of the Presidium of the Sejm and having transmitted its tasks to the Speaker. Both the applicant and the Prosecutor General devote attention to these issues in their petition. Faced with the controversial nature of the points of view on the foregoing issues and their significance for other fragments of the reasoning underpinning this decision, the Constitutional Tribunal has deemed it to be equitable to express its opinion in the matter of the de-constitutionalization of the Presidium of the Sejm, the transmittance of the Presidium's former powers to the Speaker of the Sejm and the consequences following from this fact for ordinary legislation (i.e. the Supreme Chamber of Control Act).

At the outset then a statement must be made on the legal import of the Constitution transferring the Presidium's former powers to the Speaker of the Sejm and withdrawing from regulating the Presidium of the Sejm in the Constitution. Attention must be drawn to the fact that the very description (mention) of an institution in the Constitution does not endow it with a special nature. Thus the mention in the Constitution of the Speaker of the Sejm and the specification of his/her general powers (article 110, sections 1 and 2). „The Sejm shall elect from amongst its members a Speaker and Deputy Speakers; 2. The Speaker of the Sejm shall preside over the debates of the Sejm... as well as represent the Sejm in external matters”) only implies from the Constitutional Act perspective that all changes to the Speaker's status described above (article 110) would necessitate an amendment to the Constitution. The Speaker of the Sejm has not acquired the traits of a state body by the fact that his/her position and tasks have been described in the Constitution in spite of what the Prosecutor General has suggested, just as the Presidium of the Sejm was not a state body when its existence was regulated in the Small Constitution of 1992.

The Speaker of the Sejm is a body of the Sejm, just as the Presidium, the Convention of the Seniors and the Sejm Commissions (article 10 of the Sejm's bylaws). It is also worth paying some attention to the circumstance that the Speaker is not the only body of the Sejm enumerated by the Constitution. It also enumerates Sejm Commissions – both standing and extraordinary ones (article 110, section 3 of the Constitution) as well as investigative commissions (article 111 of the Constitution). For this reason, however, one could not deduce the conclusion that Sejm Commissions are state bodies.

The system of state bodies has been described exhaustively by the Constitution. Legislative bodies (the Sejm and the Senate), executive bodies (Head of State [President] and the Council of Ministers) and judiciary bodies (courts and tribunals) account for the major portion of this system, where one of the traits distinguishing a state body from an internal body is the ability to make authoritative decisions in the broad sense of this word, and thus the possession of a specific imperium. This trait is supposed to define a state body in the sense that it has been ascribed to it as a characteristic feature. One entity or another will not become a state body only because it has been charged with the performance of a public administrative function (public authority).

As a single-person organ of the Sejm, the Speaker is concurrently its executive organ (article 110, sections 1 and 2 of the Constitution) in the sense that he/she has assumed the powers of the hitherto executive organ of the Sejm, namely, the Presidium of the Sejm. At this point a response must be given to a doubt that appears, namely, did the amendment of the Constitution, whereby the role of the Sejm's executive organ was transmitted to its Speaker, necessarily have to induce an amendment not only in the Sejm's bylaws but also in binding legislation, whereby the powers of the Presidium of the Sejm were transferred to the Speaker of the Sejm. According to the Constitutional Tribunal, this was not necessary, albeit plausible. Neither the de-constitutionalization of the Presidium of the Sejm nor the constitutionalization of the institution of the Speaker of the Sejm may hamper the assignment, by statute, of specific tasks to an organ of the Sejm, provided that, however, these tasks fit within the formula for the operation of an organ of the Sejm (an internal organ thereof), both in terms of content and form. A good example illustrating this hypothesis may be article 5, section 4 of the Constitutional Tribunal Act dated 1 August 1997 which endows the Presidium of the Sejm with the right to present candidates to the post of a judge on the Tribunal. Only an express stipulation in the Constitution specifying which entity shall institute the charter [statute] for the Supreme Chamber of Control could adjudicate this issue unequivocally, i.e. hinder the lawmaker from adjudicating this issue differently from the Constitution (upon meeting the conditions enumerated).

In the specific case under discussion, the establishment of a charter [statute] for the Supreme Chamber of Control was and is not regulated by the provisions of the Constitution, neither under the auspices of the Small Constitution nor under the auspices of the currently binding Constitution. In this issue the Constitution solely asserts that „a statute shall specify the organization and the course of action of the Supreme Chamber of Control” (article 207); the statute currently authorizes the Speaker of the Sejm to establish the charter [statute] for the Supreme Chamber of Control. Before this statute was amended, this power belonged to the Presidium of the Sejm and it was also within the boundaries of the Constitution described in article 207. The alternative to regulating the foregoing issues with the charter [statute] would be to regulate the organization and the course of action in a statute itself.

2. In order to respond to the question of the constitutionality of selecting the proper organ to ascribe the charter [statute] to the Supreme Chamber of Control, one must ascertain the nature of the relationships between the Sejm and the Supreme Chamber of Control and one must analyze the content and the form of the act referred to as the charter [statute] of the Supreme Chamber of Control.

Contrary to the suggestion expressed by the Prosecutor General, there is no doubt that the Supreme Chamber of Control is an independent state body specified in article 202, section 1 of the Constitution as the „chief organ of state audit.” The creator of the system placed the provisions on the Supreme Chamber of Control in a separate chapter, in Chapter IX entitled „Organs of State Control and for the Defense of Rights.” This situation of the Supreme Chamber of Control inclines the doctrine of constitutional law to acknowledge that the „Supreme Chamber of Control is a distinct constitutional organ „suspended” between the Sejm and the government which has been established to review both the Council of Ministers and individual ministers as well as the individual organizational units making up the state administrative system, including moreover units which remain outside this system.” (L. Garlicki: *Polskie prawo konstytucyjne, zarys wykładu, część 2*, [Polish Constitutional Law], Lecture Outline, Part 2, Warsaw, 1998, p.139).

The relationships between these two bodies were explicitly defined in article 202, section 2 of the Constitution: the Supreme Chamber of Control, as the supreme organ of state review, reports to the Sejm. The doctrine has accepted this subordination to denote a legal system tie in which organizationally superior entities may intervene in the actions of subordinate entities in the areas defined in terms of their subject matter and by the Constitution in every one of their phases and to the extent of the assets that are freely allocated for a given situation.

Individual provisions in the Constitution fill out the content of the Supreme Chamber of Control's constitutional subordination to the Sejm, e.g. article 204 of the Constitution. According to this provision „1. The Supreme Chamber of Control shall present to the Sejm: 1) an analysis of the implementation of the State Budget and the purposes of monetary policy;

2) an opinion on exonerating the Council of Ministers; 3) information on the results of audits, conclusions and submissions specified by statute. 2. The Supreme Chamber of Control shall present an annual report on its activities to the Sejm.” As an illustration of the Supreme Chamber of Control's subordination to the Sejm, one could also cite article 205 of the Constitution (the President of the Supreme Chamber of Control shall be appointed by the Sejm...), article 206 of the Constitution (the President of the Supreme Chamber of Control shall not be held criminally responsible nor deprived of liberty without prior consent granted by the Sejm), article 226 (the Sejm shall consider the report [on the Budgetary Act] presented to it, and, after seeking the opinion of the Supreme Chamber of Control, shall pass a resolution on whether to grant or refuse to grant approval), one could also single out relevant

stipulations in the Supreme Chamber of Control Act, e.g. articles 7 and 13 (the President of the Supreme Chamber of Control manages the Supreme Chamber of Control and is accountable to the Sejm for its activity).

The Supreme Chamber of Control's subordination to the Sejm is realized not only by the Sejm's powers towards the Supreme Chamber of Control but also by the specified powers of the Sejm's organs towards the Supreme Chamber of Control, provided, however, in the latter instance, that the principle shall be preserved whereby an internal organ may not undertake any authoritative actions towards the Supreme Chamber of Control. As an example one could cite article 7, section 1, sub-section 3 of the Supreme Chamber of Control Act; it speaks of the organs of the Sejm commissioning the Supreme Chamber of Control to conduct a review. In any case the subordination described hereunder may not form the basis to violate the essence of the Supreme Chamber of Control's independence.

The constitutional provisions quoted above show that the relationship of subordination is present primarily between the Supreme Chamber of Control and the Sejm; it is demonstrated most completely in its review function. The essence of the Sejm's review function is predicated upon the fact that it appears before other organs, especially the Council of Ministers while embodying its entire political variegation. In the system dimension this implies that the Supreme Chamber of Control discharges its review tasks for the benefit, and under the oversight, of the Sejm. It would be unfounded to exclude its charter [statute] from this oversight, i.e. the act which defines the Supreme Chamber of Control's organizational structure, the types of departments, their distribution and the scope of their territorial jurisdiction.

Article 207 of the Constitution corresponds to this premise, in compliance with which a statute shall specify the Supreme Chamber of Control's organization and course of action. The lawmaker should therefore regulate, by a universally binding act, all those organizational issues which may be of significance for the legal situation of those entities which are external to the Supreme Chamber of Control. This constitutional delegation does not preclude the ability to regulate, by a legislative act, technical and organizational issues, internal in nature; in fact, this was practiced in the period between the two world wars. The resolution adopted for the Supreme Chamber of Control Act with regards to the distribution of subject matter between the statute and the charter appears to be a pragmatic adjudication which retains the proper proportions between a fairly stiff statutory regulation and a rather relaxed charter-based regulation (but one that still fits within the boundaries of the statutory delegation). As was stated previously, the resolution applied hereunder fits within the concept underlying article 207 of the Constitution, provided that, however, the charter fully meets the material requirements of an internal act as mentioned in article 93 of the Constitution.

One should also observe that article 11, section 2 of the Sejm's bylaws, according to which the „Speaker of the Sejm discharges the other tasks envisaged by the Constitution and other statutes” in addition to the ones enumerated in section 1 of this article, does not imply, contrary to the suggestion inherent in the Procurator General's stance, the Sejm's freedom to statutorily regulate the scope of the Speaker's external powers. The Speaker, for instance, may not perform those tasks, which, according to the Constitution, belong to the Polish Sejm *in pleno* as the system essence of the legislative body specified in article 10 of the Constitution.

Recapitulating this fragment of considerations the Constitutional Tribunal asserts that the charter [statute] is in essence the Supreme Chamber of Control's act established by the Speaker of the Sejm at the petition of the President of the Supreme Chamber of Control. This is an internal act governing the Supreme Chamber of Control's internal subject matter within

the boundaries outlined by the Supreme Chamber of Control Act and not shaping the legal situation of other entities and their powers.

Article 55, section 2 in the reading established in the challenged article 1, sub-section 8 letter a of the newly amended act (the charter specifies the Supreme Chamber of Control's internal organization, including the registered offices of the regional branches and their scope of territorial jurisdiction) explicitly refers to section 1 of this provision which stipulates that departments and branches are organizational units of the Supreme Chamber of Control. Thus the Supreme Chamber of Control Act itself specifies the organizational structure of this state body. As was stated previously, only pragmatic concerns decided against the statutory petrification of individual regulations on the topics outlined in article 25, section 2 and the movement of these issues to the statutory regulation. The fact that the Supreme Chamber of Control Board approves the draft charter of the Supreme Chamber of Control (article 23, section 1, sub-section 4 of the Supreme Chamber of Control Act) is not without meaning, which in combination with the constitutional norm stipulating that the Supreme Chamber of Control acts according to collective principles (article 203, section 3 of the Constitution) truly makes the Supreme Chamber of Control's charter an act of the Supreme Chamber of Control.

In ascribing a charter to the Supreme Chamber of Control the Speaker of the Sejm acts solely within the boundaries of the statutory delegation assigned to him/her by the Sejm, that is, he/she accepts the draft version of the charter thereby endowing it with a legal formula, or he/she rejects the draft version of the charter if it contravenes the law or if it exceeds the boundaries of the statutory delegation prescribed in article 25 of the Supreme Chamber of Control.

3. Another topic requiring the Constitutional Tribunal's adjudication is the issue of the form of the legal act by which the Polish Sejm may ascribe the charter to the Supreme Chamber of Control. The sources of law were divided in Chapter III of the Constitution by the constitutional lawmaker into two categories. The first one are sources of universally binding law while the second one are internal acts.

Universally binding acts are characterized by the fact that they regulate how all categories of addressees act: all the citizens, state organs, all public and private institutions and organizations (J. Boć, *op. cit.*, p. 155). Article 87 of the Constitution enumerates the following sources of universally binding law in the Republic of Poland: the Constitution, statutes, ratifies international agreements and regulations, as well as acts of local law. He draws attention to the fact that the foregoing list is nevertheless not an exhaustive one. For the sources of universally binding law enumerated above does not include a regulation with the binding force of a statute and which is issued by the Head of State [President] in the conditions prescribed by article 234 of the Constitution. The normative acts established by the international organization mentioned in article 91, section 3 of the Constitution are also missing.

In turn, article 93 of the Constitution pertains to acts of internal law. Section 1 stipulates that „resolutions of the Council of Ministers and orders of the Prime Minister shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such acts.” The subsequent sections of this article define the legal characterization of ordinances (the requirement of a statutory basis and a preclusion against treating ordinances as the grounds for a decision towards the citizens, legal persons and other entities) and they state ordinances and resolutions of review from the point of view of their conformity with the universally binding law.

The Constitutional Tribunal believes that article 93 may be interpreted in a two-fold manner. On one hand, one could acknowledge that the creator of the system – having been

guided by the systematic construction of the Constitution and the proper editing of the legal text – directly referred the entirety of article 93 only to those acts mentioned in section 1. The doctrine also permits such an interpretation (cf. S. Wronkowska: *Źródła prawa w projekcie Konstytucji Komisji Konstytucyjnej Zgromadzenia Narodowego*, [Sources of Law in the Draft Version of the Constitution from the Constitutional Commission of the National Assembly], *Przegląd legislacyjny* 4/96 (10) p. 42; and A. Bałaban, *Źródła prawa w polskiej Konstytucji z 2 kwietnia 1997 r.*, [Sources of Law in the Polish Constitution dated 2 April 1997], *Przegląd Sejmowy* 5/22/97, p. 9). One may, however, embrace a different understanding of article 93; namely, one could acknowledge that article 93 has not exhaustively listed all the internal acts which may be issued under the auspices of the Constitution of 1997, hence, the creator of the system has not closed the list of acts of internal law with respect to the form and the authorized entities. As stated above, even article 87 did not set up a closed list of acts which are sources of universally binding law, even though it would be possible to append this list only on the grounds of detailed constitutional provisions. The list of internal acts may be appended in turn both by the power of explicit constitutional provisions as well as by the power of statutory provisions which may provide a delegation to issue such acts since they respect the general rule of the organizational subordination of the addressee of the act within the system of state bodies. In the Constitutional Tribunal's opinion, only such an interpretation corresponds to the essence of the acts of internal law and the needs for the operation of the state apparatus. For insofar as the sum of constitutional provisions pertaining to the sources of universally binding law makes up the entire system based on a complete variegation of forms of lawmaking activities and entities authorized to engage in these activities (which obviously excludes having the ordinary lawmaker append constitutional provisions), the recognition that internal acts may only be issued in the forms envisaged by article 93 and only by the entities mentioned in this article would imply that the remaining organs have been deprived of the opportunity to issue any legal regulations whatsoever, even ones that only refer to the units (organs) which are subordinate to them. For this reason one must acknowledge that the system of acts of internal law has the nature of an open system, at least with respect to the entities capable of taking action – in contrast to the system of acts which are the sources of universally binding law. The acts mentioned in article 93, section 1 make up the core of this system, but there is no constitutional ban against statutory provisions authorizing other entities to issue ordinances or resolutions, or even acts named in some other fashion, but which correspond to the characteristics of an internal act (e.g. resolutions adopted by the State Election Commission which are forwarded to electoral bodies).

At the same time all these acts must fit within the model prescribed in article 93 of the Constitution. For this provision stipulates not only the grounds for the Council of Ministers to issue resolutions and for the prime minister and ministers to issue ordinances but it must also be treated as a provision that establishes a general – and absolutely binding – model of an internal act. Every such act may therefore be binding only upon the organizational units subordinate to the organ issuing the said act (article 93, section 1), every one of them must be issued solely on the grounds of a statute (article 93, section 2), every one of them is subject to review over its conformity with the universally binding law (article 93, section 3), not a single one may constitute the grounds for a decision towards citizens, legal persons or other entities (article 93, section 2). The scope of the internal act must be recognized as the fundamental element of this model; in no instance may it concern any entities that are not subordinate to the organ issuing such an act.

The starting point for specifying the power of a state body to issue internal acts must therefore be the indication of whether it is possible to speak of the subordination of the entities (organs) which are to be the addressees of these acts. In regards to the Supreme

Chamber of Control, article 202, section 2 of the Constitution has impeding importance as it indicates that the „Supreme Chamber of Control shall be subordinate to the Sejm. This draws attention to the fact that the constitutional norm mentioned here uses the linguistic phrase „reports to” in order to define the mutual relationship of the two state bodies. Article 93, section 1 of the Constitution avails itself of a similar phrase („subordinate to”) characterizing entities authorized to establish acts of internal law. The constitutional lawmaker's usage of the same concept to characterize the mutual relationship of „subordination” between state organs proves that the creator of the system assumed that the constitutional relations between the Sejm and the Supreme Chamber of Control are regulated by internal acts. Thus article 93 of the Constitution permits the Sejm, or the Speaker thereof, on the grounds of an explicit statutory delegation, to issue internal acts concerning the Supreme Chamber of Control, provided that the remaining conditions in article 93 of the Constitution are fulfilled, i.e. the requirement of a statutory basis, the order of conformity with universally binding law and the ban against treating such an act as the basis of decisions targeted at external entities. Thus, there are not constitutional impediments for a statute to entrust the power to ascribe the charter either to the Sejm as a constitutional state body, with respect to which the Supreme Chamber of Control is a subordinate body, or to the Speaker of the Sejm as an internal organ thereof. Since, in turn, article 120 of the Constitution mentions „statutes and resolutions” as the forms for the Sejm to express its will, if the lawmaker were to deem it to be founded to entrust the power of ascribing the charter of the Supreme Chamber of Control to the Sejm, then this would have to occur in the form of a resolution. If, however, the Speaker of the Sejm is vested with this delegation in accordance with a statute, then he/she may exercise this power using an ordinance fulfilling the conditions set forth in article 93 of the Constitution. For this reason the provision of the statute entrusting the Speaker of the Sejm with the power to ascribe the charter to the Supreme Chamber of Control conforms with article 93, section 1 of the Constitution as interpreted in conjunction with article 202, section 2 of the Constitution.

4. The Constitutional Tribunal also considered whether the amendment to article 21, section 1 of the Supreme Chamber of Control Act, whereby the Speaker has been awarded the right to appoint the deputy presidents of the Supreme Chamber of Control at the motion of the President of the Supreme Chamber of Control and whether the amendment to article 22, sections 2 and 6 of the same Act, whereby the Speaker has been awarded the right to appoint and dismiss the members of the Supreme Chamber of Control Board at the motion of the President of the Supreme Chamber of Control, violates the constitutional powers of the Sejm as the legislative body and the democratic rule of law.

The Sejm's creative powers with respect to the Supreme Chamber of Control are regulated in article 205 of the Constitution in this manner: the „President of the Supreme Chamber of Control shall be appointed by the Sejm, with the consent of the Senate.” The Supreme Chamber of Control Act defines the status and the ties between the President of the Supreme Chamber of Control and the Sejm, stipulating in article 13 that the President of the Supreme Chamber of Control manages the Supreme Chamber of Control and is accountable to the Sejm for its activities. The Sejm dismisses the President of the Supreme Chamber of Control if the reasons statutorily defined occur (article 17 of the Act). Before commencing the performance of duties, the President of the Supreme Chamber of Control takes an oath before the Sejm (article 15 of the Act) and takes part in its meetings (article 20, section 1 of the Act).

The Constitution does not refer to other bodies of the Supreme Chamber of Control, referring in article 207 the organization and the course of action of the Supreme Chamber of Control to the statutory regulation.

It follows from here that the creator of the system decided that in the area of creative functionality it has adequately provided for the Supreme Chamber of Control's subordination

to the Sejm and that it has exhausted the constitutional course for appointing the President of the Supreme Chamber of Control. It is therefore not necessary for the entire Sejm, acting collectively, to approve the petitions of the President of the Supreme Chamber of Control whose subject matter refers to the appointment of the internal organs of the Supreme Chamber of Control. These decisions are individual and concrete in nature, thus they cannot be treated as acts constituting sources of law. There are therefore no impediments for the ordinary lawmaker to entrust these personnel-related decisions to the Speaker of the Sejm, which is a natural consequence of the Speaker's participation, which has already been accepted in the Supreme Chamber of Control Act, in creating the executive bodies thereof. Thus, in keeping with the hitherto binding standard in article 21, section 2 of the Supreme Chamber of Control Act, the Speaker of the Sejm shall express consent in the matter of the President of the Supreme Chamber of Control, appointing or dismissing the General Director of the Supreme Chamber of Control. The way in which other Supreme Chamber of Control organs are organized, aside from the President, is an element of the overall organization of the Supreme Chamber of Control. Article 207 of the Constitution refers to this statutory regulation. The specification of this manner, also from the point of view of the entity carrying out this activity, fits within the statutory subject matter pertaining to the organization and the course of action of the Supreme Chamber of Control. It should be observed then that to date the creative powers of an internal body of the Sejm (its Presidium in this instance) have been retained in some statutes pertaining to public institutions. This refers to the appointment and dismissal of the chairman, his/her deputies, the secretary and members of the Work Protection Council (article 6, section 2 of the State Work Inspection Act – Journal of Laws, 1985, Number 54, Item 276 with subsequent amendments), or the appointment of a Sejm representative to the CBOS Board (article 8, section 1, sub-section 1 of the Act dated 20 February 1997 on the Foundation-Public Opinion Polling Center – Journal of Laws, Number 30, Item 163). The Constitutional Tribunal believes that entrusting the Speaker of the Sejm with the powers to appoint and to dismiss the vicepresidents of the Supreme Chamber of Control and the members of the Supreme Chamber of Control Board does not violate Supreme Chamber of Control's subordination to the Sejm and fits with the disposition embodied in article 207 of the Constitution.