

Decision

dated 23 April 1996 (K. 29/95)

The Constitutional Tribunal sitting with the bench composed of the Chairman, Janusz Trzcíński and Judges: Lech Garlicki (Reporting Judge), Krzysztof Kolasiński, Wojciech Łączkowski, Błażej Wierzbowski

(...)

held

1.a. article 8, sections 1 and 2 of the Local Self government Act dated 29 September 1995 and Amending Some Other Statutes (Journal of Laws, Number 124, Item 601) contravenes article 72, section 1 of the Constitutional Act dated 17 October 1992 on the Mutual Relationships between the Executive and Legislative Branches of the Republic of Poland and on Local Self government (Journal of Laws, Number 84, Item 426 amended in 1995, Number 38, Item 184 and Number 150, Item 729) in connection with article 1 of constitutional provisions upheld by article 77 of the Constitutional Act as its interfered excessively into the requirement to stabilize the number of staff by township councils during their term thereby violating the principle of keeping their staff within their terms. Therefore article 8, sections 1 and 2 is inconsistent with article 3, section 1 of the above mentioned constitutional provisions.

b. article 8, sections 1 and 2 of the above mentioned law conforms with article 5, article 67, sections 1 and 2 and article 68 of constitutional provisions maintained in force under article 77 of the Constitutional Act.

2. article 8, section 3 of the law above contravenes article 67, section 2 of constitutional provisions upheld by article 77 of the Constitutional Act, invoked above.

3. article 23, section 2 of the Local Self-government Act dated 8 March 1990 (uniform text: Journal of Laws, 1996, Number 13, Item 74) as expressed in article 1, sub-section 12 of the above mentioned Act dated 29 September 1995 contravenes article 71, section 4 of the Constitutional Act.

4. article 24a of the Local Self government Act dated 8 March 1990 as worded in article 1, sub-section 13 of the above mentioned Act dated 29 September 1995 conforms with article 1, article 67, section 2 and article 69 of the constitutional provisions upheld by article 77 of the Constitutional Act.

5a. article 24b of the Local Self-government Act dated 8 March 1990 as expressed in article 1, sub-section 13 of the Act dated 29 September 1995, cited above, to the extent it concerns councillors elected before the entry into force of this provision contravenes article 72, section 1 of the Constitutional Act dated 17 October 1992, cited above, in connection with article 1 of constitutional provisions upheld by article 77 of the same Constitutional Act because it interferes excessively with the requirement of stabilization of staff in township councils thereby violating the principle of keeping their staff during their terms. It makes this provision in the scope stated above inconsistent with article 3, section 1 of the constitutional provisions cited above.

b. article 24b of the Act dated 8 March 1990, cited above, is, in its remaining scope, in conformity with article 72, section 1 of the Constitutional Act and with article 1, article 67, section 2 and article 68 of constitutional provisions upheld by article 77 of same Constitutional Act.

6. article 37b of the Local Self-government Act dated 8 March 1990 as expressed in article 1, sub-section 18 of the Act dated 29 September 1995, cited above, contravenes article 1 of constitutional provisions upheld by article 77 of the Constitutional Act, cited above.

Reasoning

(...)

III

(...)

1. One of the important elements of the amendment of the Local Self government Act made in September 1995 was the introduction of provisions excluding combining a councillor's mandate and holding any administrative position within a township. The purpose of this solution was to counter corruption and create the necessary distance between decision-making and executive authorities of a township. Particularly a new article 24a, section 1 of the Local Self government Act prohibits entering into an employment relationship in a township (commune) office (or township organizational unit) with a councillor holding a mandate in this township, and having entered into such relationship is deemed equal to resignation of a mandate (article 24a, section 5). In turn article 24b of the same law prohibits (article 1) a person elected to the council to be employed in a township office where he/she was elected or obtained a managerial position in an organizational unit of the township. Being elected as a councillor creates an obligation to obtain an unpaid leave comprising the term plus three month after the term in the council has expired (article 24b, section 2), and failure to do so is tantamount to resignation of the mandate (article 24b, section 5).

The Constitutional Tribunal is of the opinion that the above provisions should be interpreted against the background of the more general norm of article 2 of the Small Constitution which bans the subjects it indicates from accepting functions irreconcilable with performing their office, mandate or a function. Even if a subjective scope does not include councillors directly (they are not the persons described in the Constitutional Act) but this provision cannot be treated as an enumeration and assumed that it does not refer the above ban to other persons holding a mandate, an office or a public function. It should be construed then as a certain general rule and as an obligation for the ordinary lawmaker to refer it to persons holding offices, positions or mandates which are clearly defined in constitutional provisions. As far as other offices, positions and mandates are concerned the ordinary lawmaker maintains the freedom of decision in matters of, if and to what extent to impose similar limitations. It is a known fact that the Act dated 5 June 1992 on limitations on economic activity of persons performing public functions (Journal of Laws, Number 56, Item 274) covered in its subjective scope also councillors. In light of the provisions of that law the Constitutional Tribunal has pointed out the importance of a mandate for representation as a „voluntary public service whose essence is, among others, the acceptance by such persons additional obligations of which other citizens are free” (resolution of 13 April 1994, Number W. 2/94, Constitutional Tribunal's Collection of Decisions 1994, part I, p. 191.) This means the legislative body may impose on councillors various limitations concerning their professional life under condition that these limitation are rationally justified by the public interest they are to serve and the extent of these limitation shall be in proportion to a magnitude of that interest. The Constitutional Tribunal has stressed that assessment of the rationality and proportionality belongs first of all to the legislative body, and the Tribunal is allowed to intervene only if the „lawmaker exceeded the boundaries of its regulatory discretion in a manner so drastic that the violation of constitutional clauses shall be evident.”

(judgment of 26 April 1995, Number K. 11/94, Constitutional Tribunal's Collection of Decisions 1995, part I, p. 134).

The public interest which is supposed to be protected by the „anti-corruption provisions” of articles 24a and 24b of the self government law ties in „preventing public officials from situations and entanglements capable not only of undermining their impartiality or honesty, but also of undermining the authority of... state organs or weakening the confidence of their constituencies and public opinion in their actions (Number W. 2/94, op.cit., p. 191). The Constitutional Tribunal is of the opinion that the introduction of a ban on combining the councilor's mandate with employment in the organizational system of the township is rationally tied with public interest and is in proportion to its importance. Even if the separation of powers does not apply to the organs of local self government referred to in article 1 of the small Constitution (judgment of 23 October 1995, Number K. 4/95, Constitutional Tribunal's Collection of Decisions ZU Number 2/95, pp. 96-97) it does not prohibit in any way the ordinary lawgiver from undertaking solutions aimed at preserving personal distance between the decision making (and reviewing) bodies and the executive apparatus.

It does not contradict equality (article 67, section 2 of constitutional provisions) as this principle is not against differential treatment by statutes of different subjects (judgment dated 28 November 1995, Number K. 17/95, Constitutional Tribunal's Collection of Decisions ZU Number 3/95, p. 177). The fact of holding a councillor's mandate has, in the context of the above regulations, a character relevant enough to justify a different treatment of councillors. A problem in applying the equality principle might appear if the lawgiver introduced a differential treatment among the councillors. It is wrong, however, as one of the Applicants of a petition wants it, to compare the situation of councillors and deputies to the Sejm in this respect as the bodies they are members of are of a different constitutional status.

Also, it does not contradict the constitutional right to employment (article 68 of constitutional provisions) as this right should not be understood as absolute. Just as there may exist professions or occupations that cannot be legally combined with other professions or occupations, accepting a representative mandate may determine the freedom of choice of one's job or keeping it. To be a member of a council is not mandatory and as long the lawmaker provides the interested party with a choice between the mandate and employment (and, what is more, establishes a presumption of loss of mandate and not the job in the case of non-decision on the part of the person involved) the right to employment has not been violated. Of no consequence here is, from this point of view, the argument that the above prohibitions cover also unemployed councillors who would like to enter an employment relationship with the office of a township in public works. Also such situations could give rise to the suspicion of partiality or unjustified privilege. One cannot detect a violation of the right to employment in article 24b, section 2 of the Local Self-government Act that extended the unpaid leave to three month after the mandate has expired. It does not seem that giving this term a mandatory character is the only possible interpretation of this provision, which should also be seen in its guarantee function as an assurance that a former councillor has a chance to research the job market. The Prosecutor General has offered a similar interpretation of this provision. The Constitutional Tribunal is of the opinion that the solutions adopted in article 24a and 24b of the Local Self government Act remain within regulatory discretion, an attribute of a legislative body, and finds justification in the values resulting from article 2 of the Small Constitution and, for this reason, cannot be deemed as being generally in breach of the Constitution. A similar view has been expressed by both the Prosecutor General and most of the applicants of the petition.

2A.A fundamental issue in this case is the permissibility of applying of the newly established limitations to councillors of the present term as it was in article 8 of the Act dated 29 September 1995. It has been questioned by all applicants of a petition, some of them limiting the allegations of unconstitutionality to article 8.

According to the Constitutional Tribunal this problem should be looked at from two points of view. First, the point of view of individual councillors affected by these new provisions. Second, the point of view of the local council itself as a body elected for a given term.

2.B. Most allegations brought up by the Petition's applicant are related to the analysis of the legal situation of individual councillors and is based – in general terms – on the presumption that the lawmaker may not, during his/her term, modify that situation in a way unfavorable for the addressees of this provision. This line of reasoning leads to invoking the principle of the rule of law with all its consequences (law is not retroactive, a ban on interference with the acquired rights, the imperative to give a proper adjustment period, the principle of stability of law, etc.) The Constitutional Tribunal did not share this line of reasoning. The sequence of Tribunal decisions concerning the lawmaker's limitations arising from the rule of law is already established and deserves full approval. However, it applies to a situation where the addressee of new provisions is the citizen (or a similar subject) acting as an individual participant in legal relations. But the provisions in question refer to a specific relationship, concerning holding a mandate in an elective body. The way the mandate is acquired is specific: election, and holding it is not the same, as some of the applicants of the petition want it, as a subjective, equitably acquired right covering the whole period of its term. The right to occupy an office, position or mandate in public authorities does not constitute an „acquired right” as it is meant in the sphere of civil or administrative law, or the social security system, and bans and imperatives referring to those spheres cannot be applied here automatically. In other words the freedom of interference possessed by the lawmaker into the legal situation of a councillor within the term is much wider as it results from the legal, public character of the very function of a councillor. Arguments should be treated similarly invoking confidence in the State, stability of law, etc. The lawmaker may foresee various situations where a councillor's mandate shall expire before the end of a term (changes in the territorial administrative division, recalling of the councillor by his/her constituencies, dissolution of a local council) and development of a list of such situations, even during a term, is not automatically in breach of the Constitution.

The Constitutional Tribunal is not of the opinion that the disputed regulation violates the principle that the law must not be retroactive. Newly established norms do not apply to events taking place before their entry into force and only modify the future situation of those subjects whose legal situation was different under old provisions. A new regulation does not change any thing retrospectively, and does not interfere with the past cases of combining the mandate with employment within the township system but only introduces a change for the future in reference to the remaining portion of a term. Therefore, the new regulation is at no point retrospective (e.g. judgment of 22 September 1990, K. 7/90, Constitutional Tribunal's Collection of Decisions 1990, pp. 50-51) and also for this reason there is no violation of article 1 of the constitutional provisions. In this matter the Tribunal agrees with the position of the Prosecutor General.

2.C. Permissibility of applying new limitations to the councillors of the present term should also be considered from the point of view of the place of a township council in the political system. Article 72, section 1 in describing legal principles governing the elections to local self government expressed that they are elective bodies and therefore function in terms they are elected for. Even if constitutional provisions do not decide the length of these terms

there is no doubt that these terms result from their electiveness which makes it their constitutional, inherent feature. According to the Constitutional Tribunal, functioning within terms means not only the delegation of a given body for a specific period of time, but also the imperative to stabilize the body of persons its consists of within such term. In other words, situations where members of an elective (functioning within terms) body are being replaced should be treated as exceptions. The above rule becomes more clear in reference to the organs elected directly by their constituencies. General consequences of functioning within terms intertwine then with the obligation to respect the electorate's will as expressed in the democratic act of election. It is particularly important if vacancies taking place during the term are being filled in a different way than general elections. From this point of view there becomes visible a direct relationship between stabilization of members of a body functioning within terms and the general democratic rule of law (article 1 of the constitutional provisions).

Article 72, section 1 of the Small Constitution in connection with article 1 of constitutional provisions mandates assurance of the stability of membership in local councils during their term. Even if this stability cannot be absolute, the rules proper for interpretation of exceptions should apply here. From this point of view a regulation adopted in article 8 of the Act dated 29 September 1995 becomes the source of serious constitutional doubts. Their implementation shall mean to many councillors an alternative of giving up their jobs or their mandate. As indicate the Applicants of the petition, and not without reason, the most likely effect shall be the resignation of their mandates. This should lead to the need of completing the membership of councils either in additional elections (which does not affect the democratic legitimization of so transformed council) or by allowing the next candidate on the ticket to become a council member (which may inspire criticism as it these are the candidates who lost the elections). The result may be distortion of the voters' will who, voting for persons employed in the local council structure, expressed their confidence in them and did not perceive it as an obstacle to be represented by them. Also, there is no doubt that new regulations interfere with the stability of membership of present councils. It is enough to add that such interference covers a large number of councillors (according to the Constitutional Tribunal Jurisdiction Bureau it is 4,017 members) to regard this number – also a view of the Tribunal – as totally out of proportion with the scale of public interest thereby protected. The proceedings before the Tribunal have not demonstrated that the situation has deteriorated to such a degree to necessitate immediate legislative intervention. For these reasons the Constitutional Tribunal has decided that article 8, sections 1 and 2 are in breach of the Constitution. This means that article 8, sections 1 and 2 are also in breach of article 3 of the constitutional provisions. The Tribunal upheld its earlier expressed view that article 3 of the constitutional provisions imposes an obligation on legislative bodies to word the provisions of their statutes in accordance with the provisions of the Constitution (see Constitutional Tribunal judgments: in case K. 15/91, Constitutional Tribunal's Collection of Decisions 1992, part I, Item 8 and in cases P. 1/95 and K. 9/95). In passing statutes of content inconsistent with the Constitution, the lawmaker has failed to carry out his constitutional duty. This conclusion allows the Tribunal to resign from further analysis of article 8, section 2 which is mostly identical in content with article 24b, section 4 of the Self government Act. It has to be said, however, that in the process of implementation of the provisions some irregularities may arise like the constant creation by a local council of new organizational units, which will repeatedly open a six-month period for making a choice between membership in the council and employment.

2.D. The Constitutional Tribunal does not see grounds to acknowledge nonconformity of article 8, sections 1 and 2 with other constitutional provisions invoked by some of the Applicants of the petition.

In particular, there are no grounds for viewing this regulation as a limitation of the right to be elected and allegations that it violates the principle of universal election as expressed in article 72, section 1 of the Small Constitution. The provisions in question do not deprive anyone of his/hers election rights, but only establish an obligation to choose between holding a mandate and employment. A ban on running for council has not been established here as such a decision to be made after the election. What we have here then is not inability to be elected (which would mean a limitation of the universal right to be elected), but the institution of incompatibility, which has a different character. Also, unwarranted are allegations of violation of the developmental character of the rights and obligation of citizen in article 67, section 1 of the constitutional provisions, a very difficult provision to determine its own legal ramifications. Left without examination, however, has to be the allegation raised by one of the Applicants of the petition that article 8, sections 1 and 2 violate article 4 of the Act dated 8 March 1990 – the law on elections to township councils. The Constitutional Tribunal is not supposed to examine nonconformity between acts of the same rank as a solution to such problems provide general rules of interpretation.

There is no basis to invoke article 5 of the constitutional provisions as it refers to the subject matter competence of local self government (a sum of its competencies has to be guaranteed by its „share in power”) and not to the way the organs composing self government are organized. There is no basis to question the conformity of article 8, sections 1 and 2 with the principle of equality under law (article 62, section 2 of the constitutional provisions) or with the labor law (article 68 of the constitutional provisions). The same arguments apply here which were mentioned when stating the nonconformity of articles 24a and 24b with these provisions.

3. To state unconstitutionality of article 8, sections 1 and 2 of the Act dated 29 September 1995 does not solve the problem yet, as the possible loss of validity by this provision would not exclude the application of articles 24a and 24b of the Local Self government Act to councillors of the present term. According to article 15 of the Act dated 29 September 1995 it enters into force 14 days after its publication, therefore article 24a and 24b of the Local Self government Act also entered into force on the same date, however their effect is partially moderated by article 8. A loss of validity only by article 8 would have thus caused a substantial decline in councillors' legal situation, as they would lose the six-month period referred to in this provision.

For the above reasons the Tribunal decided that a judgment declaring unconstitutionality should also refer to article 24b of the Local Self-government Act within the scope that this provision covers councillors of the present term, elected prior to entry into force of this provision. The wording of this provision indicates that it refers to the past situation, prior to its entry into force. The exclusion of the possibility to apply article 24b to situations already existing is the only way to guarantee stability of membership of a council of the present term. There is no reason, however, to deem unconstitutional the possibility to apply article 24b to councillors obtaining their mandate after its entry into force, as it may be that vacancies in the council shall be caused by other reasons. Applying to them article 24b shall not be an interference with membership of a council as established before the amendment of the Local Self government Act of 1995.

On the other hand, the Tribunal does not see reason to include in the judgment declaring unconstitutionality the implementations of article 24a, section 1 of the Local Self government Act in the present term. The wording of this provision indicates that it refers to future situations, excluding the entry into employment relationship of a councillor already holding a mandate with the council's office. Problems which may appear in connection with implementing the above provision in the period of time between its entry into force and the

end of councils' present term are not different as to their nature from the problems which may arise in future terms.

4. Next, the Constitutional Tribunal considered the allegation of nonconformity of article 8, section 3 of the Act dated 29 September 1995 with the constitutional principle of equality as expressed in article 67, section 2 of the provisions maintained in force. Article 8, section 3 has differentiated the legal situation of council members according to whether they are on the Warsaw-Downtown council or on other local councils providing that for the present term the prohibitions stemming from article 8, section 1 of the Act dated 29 September 1995 and article 24b of the Local Self government Act do not refer to those members of the Warsaw-Downtown Council who also hold positions in a district management within this township. The class of „councillors” is thus unified as to its content, so their situation could be assessed on the basis of article 67, section 2 of the constitutional provisions. It may seem then that article 8, section 3 has privileged the Warsaw-Downtown councillors compared to the members of other councils. But as the Prosecutor General has rightly pointed out, the different legal status of councillors in Warsaw-Downtown is the result of its different system laid in the Act dated 25 March 1994 on the status of the Capital City of Warsaw. It is known that law provides a division of Warsaw into districts. Article 28, section 3 and 6 of the law provides that the members of district management boards are appointed by a district council, which makes the legal situation of the members of a management board of a township different (including the Warsaw-Downtown township) who, under article 28, section 1 of that law are elected by the township council. The new article 24a, section 3 of that law does not refer to the prohibitions established therein for council members elected to the management board of the township, whose employment relationship results from election. The members of district management boards in Warsaw-Downtown may not however apply this provision to themselves as their employment results from appointment.

Article 8, section 3 could be then looked at as an attempt, a provisional one, to make the legal situation of councillors/members of district management boards in Warsaw-Downtown equal with councillors/members of township management boards. This was the intention of the lawmaker (longhand minutes of the 57th, session of the Sejm on 24 and 25 September 1995, p. 55). The Constitutional Tribunal is of the opinion that it does not constitute a breach of the principle of equality.

5. Then the Constitutional Tribunal examined an allegation brought up by one of the Applicants of a petition concerning article 23, section 2 of the Local Self government Act. This provision pointed to the possibility of creating clubs composed of council members and acting under the rules provided for in the township bylaw. In the opinion of the Petitioner's applicant the introduction of this provision should be understood as an „indirect affirmation” of the Chief Administrative Court's jurisdiction which questions the possibility of creating internal local self government structures other than described *expressiss verbis* in the Local Self government Act (see, judgment of 19 January 1995, Number 1I SA1682/94, ONSA 4/1995, Item 186). The introduction of a special provision concerning clubs may be used as a basis for reasoning *a contrario* and the conclusion that lack of provisions allowing the creation of internal bodies within councils is tantamount to a ban on creating such bodies. The Constitutional Tribunal did not share the arguments presented by the Petitioner's applicant for the following reasons:

- first, the subject matter of the examination conducted by the Tribunal is the content of the provision as it was expressed. The indication of the possibility to create clubs of council members is in no way in breach of the Constitution, on the contrary, it serves its realization;

- second, the problem of creating clubs (at least if understood as a political form of organization for council members) should be considered against the background of freedom of political parties to act (article 4, section 1 of the constitutional provisions). From this point of view, an indication of clubs in article 23, section 2 of the Local Self government Act is only a confirmation the constitutional right of political parties to create their organizations within local councils, but a ban on creating clubs (or imposing excessive limitation on their activities) would be inconsistent with the Constitution (in reference to the Sejm see a judgment of 26 January 1993, Number U. 10/92, Constitutional Tribunal's Collection of Decisions 1993, part I, p. 32). Constitutional bans or imperatives of this kind do not refer to the internal bodies within local councils;

- third, the jurisdiction of the Chief Administrative Court (whose authority is fully recognized and respected by the Constitutional Tribunal) concerned the problem of creating other organs within a local council. The club of council members is not an organ of the council but a way council members organize themselves, and, as one can assume, being of a political character. Then, it is a completely different level of council activity, and it is hard to expect that the way council members clubs (caucuses) are regulated by the law should affect the way the internal council organs are. No bans or imperatives concerning these provisions result directly from article 23, section 2 of the Local Self government Act.

Article 71, section 4 of the Small Constitution (and also article 6, section 1 of the European Charter of Local Self government) guarantee for local self government the freedom to determine their internal structure, within statutory limits. The provision of the law which has recognized the ability to create clubs of council members does not limit that freedom in any way.

6. Finally, the Constitutional Tribunal examined an allegation brought up by one of the Applicants of the petition that the new article 37b of the Local Self government Act is inconsistent with article 7, section 2 of the European Charter of Local Self government thereby violating article 1 of the constitutional provisions, as the rule of law entails the duty of the lawmaker to respect international agreements. The Tribunal does not see reason to take a general position on the matter and stated that even if the Charter was ratified by Poland (a Government Declaration of 14 July 1994, Journal of Laws, Number 124, Item 608) which makes it an integral part of the Polish legal system and is immediately binding, but it was ratified without a prior statutory delegation. This makes its situation weaker in relation with domestic statutes, compared to agreements whose ratification was authorized by the Sejm (see judgment of 23 October 1995, Number K. 4/95, Constitutional Tribunal's Collection of Decisions ZU Number 2/95, p. 107). For this reason one cannot assume that the Charter has priority over domestic legislation.

According to article 1 of the Constitutional Tribunal Act, the Tribunal does not have the power to decide on the conformity between statutes and international agreements (Decision dated 17 October 1995, Number K. 10/95, Constitutional Tribunal's Collection of Decisions ZU Number 2/95, p. 85 and a judgment K. 4/95, p. 107, cited above). Therefore the allegation should be left without examination.

(...)