

**JUDGEMENT**  
of 28 November 2001  
**Ref. No. K. 36/01\***

**The Constitutional Tribunal in a bench composed of:**

Marek Safjan – Presiding Judge  
Teresa Dębowska-Romańska  
Lech Garlicki – Judge Rapporteur  
Stefan J. Jaworski  
Wiesław Johann  
Krzysztof Kolasiński  
Andrzej Mączyński  
Janusz Niemcewicz  
Jadwiga Skórzewska-Łosiak  
Jerzy Stępień  
Janusz Trzciniński  
Marian Zdyb,

Grażyna Szałygo – Recording Clerk,

having considered at the hearing on 28 November 2001, an application submitted by the Commissioner for Citizens' Rights, in the presence of the duly authorised representatives of the parties to the case at hand: the applicant, the Sejm of the Republic of Poland, and the Public Prosecutor-General, to determine the non-conformity of:

Article 8 paragraph 1 of the Act of 9 May 1996 on the Exercise of the Deputies' and Senators' Mandate (Journal of Laws – Dz.U. No. 73, item 350; amended by: No. 137, item 638; of 1997 No. 28, item 153, No. 98, item 604, No. 106, item 679, No. 121, item 770, No. 160, item 1080; of 1998 No. 162, item 1118; of 1999 No. 52, item 527 and 528; of 2000 No. 6, item 69; of 2001 No. 94, item 1032) within the scope of the deeds committed before obtaining the mandate, in situations where criminal proceedings concerning the person have been initiated before the date of his/her election to be a deputy (senator), to Article 32 paragraph 1 and Article 105 paragraph 3 of the Constitution of the Republic of Poland.

a d j u d i c a t e s as follows:

**Article 8 paragraph 1 of the Act of 9 May 1996 on the Exercise of the Deputies' and Senators' Mandate** (Journal of Laws – Dz.U. No. 73, item 350; amended by: No. 137, item 638; of 1997, No. 28, item 153, No. 98, item 604, No. 106, item 679, No. 121, item 770, No. 160, item 1080; of 1998, No. 162, item 1118; of 1999, No. 52, item 527 and 528; of 2000, No. 6, item 69; of 2001, No. 94, item 1032) **does not conform to Article 32 and Article 105 paragraph 3 of the Constitution of the Republic of Poland owing to the fact that it requires the consent of the Sejm or Senate for the continuation of criminal proceedings instituted against this person prior to the date of his/her election as deputy (senator).**

Statement of Reasons:

## I

1. On 17 October 2001 the Constitutional Tribunal received the application from the Commissioner for Citizens' Rights, who applied for determining non-conformity of Article 8 paragraph 1 of the Act of 9 May 1996 on the Exercise of the Deputies' and Senators' Mandate (Journal of Laws – Dz.U. No. 73, item 350 with amendments) to Article 32 paragraph 1 and Article 105 paragraph 3 of the Constitution of the Republic of Poland.

In reasoning for his application the Commissioner for Citizens' Rights pointed first at the arguments implying non-conformity of the challenged provision to Article 105 paragraph 3 of the Constitution. According to the opinion of the applicant, the essence of the problem consists in the fact that the challenged Act has gone so far as to extend the limits of formal immunity, which is inadmissible according to the quoted Article 105 paragraph 3 of the Constitution, because Article 8 paragraph 1 of the Act of 9 May 1996 implies that the prohibition of making the deputies to Parliament responsible before criminal or penal-administrative law without the consent of the Sejm or Senate applies also to the deeds committed by the deputies or senators before they gained their seats to Parliament. This implies, firstly, that the ban to make the members of Parliament legally responsible is extended also to the deeds committed prior to the date when they obtained their mandates; secondly, that penal proceedings initiated with respect to such deeds are stayed by virtue of the law alone on the day that the person concerned obtains the mandate; and thirdly, that the parliamentary immunity may only be waived if approved by the Sejm or Senate.

The purport of Article 105 paragraph 3 of the Constitution leads to completely different conclusions. By virtue of that provision the legislator has limited the scope of formal immunity with respect to those persons, concerning whom the penal proceedings had been initiated before the date of their election as deputies or senators. According to this provision, penal proceedings initiated before the date of election as deputy are stayed at the request of the Sejm until the date of termination of the respective mandate. In such case, also the course of limitation is suspended for the same period of time in relation to the respective penal proceedings. Article 108 of the Constitution implies, in turn, that the same legal consequences apply, accordingly, to senators.

Comparison of the purport of Article 8 paragraph 1 of the Act of 1996 with Article 105 paragraph 3 of the Constitution has led the applicant to the conclusion that the Constitution has set forth the limits of formal immunity of the deputies and senators much more narrowly, since the constitutional regulation has adopted the principle that the penal proceedings initiated with respect to a person before the date of that person's election as deputy (or senator) has to be continued, as a rule. The staying of such proceedings is an exception, for the occurrence of which it is necessary for the Sejm or Senate to request the staying of proceedings that are already in progress. Lack of such a request in the form of a resolution of the appropriate chamber of Parliament implies, therefore, that the penal proceeding may be continued.

As evidence for the correctness of the applied interpretation of Article 105 paragraph 3 of the Constitution, the Commissioner for Citizens' Rights has quoted the views prevailing in academic studies on penal law, constitutional law and in judicial decision statements of the Supreme Court. On that basis the Applicant has assumed that Article 8 paragraph 1 of the challenged Act, when formulating the requirement of the consent of the Sejm (Senate) for making the deputies or senators responsible

before the criminal law for deeds committed prior to obtaining of their mandates, even when the criminal proceedings concerning such persons have been initiated before they obtained their mandate, is in non-conformity to the Constitution.

The Commissioner for Citizens' Rights has found also that Article 8 paragraph 1 of the Act of 9 May 1996 does not conform to Article 32 paragraph 1 of the Constitution. The applicant has assumed that the constitutional principle of equality of all citizens before the law and the resulting imperative of their equal treatment by the public authorities, justifies particular prudence in allowing any divergences from that principle on the level of ordinary legislation. Undoubtedly, such divergences should be treated as exceptions, interpretation of which cannot be intensive. Such a situation occurs in the case of the considered institution of formal parliamentary immunity, which is regarded both by court case law and by the jurisprudence as an exception from the principle of equality of the citizens before the law. This implies that the regulatory discretion of the legislator in this regard is considerably narrowed down and allows only such exceptional legislative solutions, which find justification in other constitutional values and principles. The allowance of impunity for the deputies and senators certainly does not fit within such limits, particularly if this was to imply their immunity from responsibility for deeds committed prior to their having obtained their mandate, the exercise of which is supposed to justify such exceptional treatment. Yet, such inadmissible consequences are generated by the challenged Article 8 paragraph 1 of the Act of 9 May 1996.

In the conclusion of his application the Commissioner for Citizens' Rights has petitioned for determining of non-conformity of the challenged regulation to Article 105 paragraph 3 and Article 32 paragraph 1 of the Constitution.

2. In a letter dated 10 November 2001, the Public Prosecutor-General gave the expression of his position concerning the case, sharing the position of the applicant as to the non-conformity of Article 8 paragraph 1 of the Act of 9 May 1996 to Article 105 paragraph 3 of the Constitution, and with respect to the part concerning the non-conformity of that provision to Article 32 paragraph 1 of the Constitution, the Public Prosecutor-General petitioned for the discontinuance of proceedings owing to the redundancy of any judicial decision in that respect.

Having recognised, that the substance of the case may be reduced to the interpretation of the scope of formal parliamentary immunity, the Public Prosecutor-General referred mainly to that issue.

Against the background of the general concept of formal immunity, the Public Prosecutor-General compared the purport of Article 105 paragraph 3 of the Constitution and the challenged Article 8 paragraph 1 of the Act of 1996. He pointed out thereby, that both provisions regulate the same subject matter, namely the possibility of calling deputies and senators to penal responsibility in a situation, when the criminal proceedings against them were initiated prior to the date of their election. The identified symmetry of purport is exhausted, however, when it comes to the legal consequences of the formal immunity at the level of the Constitution and of the respective Law.

Referring to the different legal consequences of the two regulations, the Public Prosecutor-General underlined that it follows from Article 105 paragraph 3 of the Constitution that formal immunity is not an obstacle to the conduct of penal proceedings in the phase preceding the identification of the suspected person: it is therefore possible to initiate the proceedings concerning such a case (*ad rem*), the purpose of which is to determine the fact that a crime has been committed and to secure the evidence. On the other hand, the quoted provision of the Constitution rules

out the initiation and conduct of that phase of the proceedings, which is directed specifically at the person of a given deputy or senator. This provision, however, restricts the functioning of formal immunity to only those deputies and senators, against whom the penal proceedings were initiated prior to the date of their election. Although the immunity in that case has not been completely excluded, but it also does not prevail by virtue of the law, as it may only be activated by the explicit demand on the part of the Sejm or Senate.

Yet, at the level of the regulation by the respective act of parliament utterly different legal consequences are foreseen. Indeed, the challenged Article 8 paragraph 1 of the 1996 Act implies that not only it does not differentiate the legal situation of deputies and senators depending on the time when the proceedings concerning them were initiated, but also it stipulates that any such proceedings in progress are always stayed by virtue of the law. The possibility of their continuation has been made dependent upon the consent of the Sejm or Senate.

In conclusion of that part of his deliberations, the Public Prosecutor-General stressed that whereas Article 105 paragraph 3 of the Constitution has „the purpose to narrow down the formal immunity (as an exception) to truly necessary dimensions, which should prevent the transformation of immunity into an instrument assuring impunity to the member of parliament”, the challenged Article 8 paragraph 1 of the Act of 1996, in turn, „extends beyond the limits of necessity in diverging from the principle of equality and the principle of the state of law, and so it causes the non-conformity of that provision of the respective Act to Article 105 paragraph 3 of the Constitution”.

Against the background of the considered symmetry of the purport of the respective provision of the Constitution and the challenged Act, the Public Prosecutor-General raised the question, whether „owing to the fact that the Constitution was a later (and hierarchically superior) act in relation to the Act on the Exercise of the Deputies' and Senators' Mandate (...) the resolution of the collision between these regulations should take place by means of the establishment of the unconstitutional nature of the provision of the respective law, or whether that conflict was obvious enough for the direct derogation of Article 8 paragraph 1 of the Act to take place (...)”. Despite of certain doubts, the Public Prosecutor-General adopted the position that direct derogation of the challenged provision was not possible, above all because the regulation contained in Article 105 paragraph 3 of the Constitution „(...) was a regulation unknown to the legislation of the time preceding the [current] constitutional order. It entitles the chambers of Parliament to demand the penal proceedings to be stayed, which right was hitherto not awarded to these chambers”. Yet, taking into account that, on the one hand, the challenged Article 8 paragraph 1 of the respective Act constitutes a regulation dating back to the time preceding the [current] constitution, and on the other hand, that Article 105 paragraph 3 of the Constitution does not specify the mode of execution of the demand for the staying of penal proceedings, it should therefore be assumed that it is necessary to obtain the judgement on the non-conformity of the challenged provision to the Constitution, and subsequently to have the Sejm adopt the respective appropriate regulation at the level of an act of parliament that would conform to Article 105 paragraph 3 of the Constitution.

The Public Prosecutor-General, however, did not share the objection raised by the applicant concerning the non-conformity of the challenged provision to Article 32 paragraph 1 of the Constitution. In his letter he pointed out that „in the case of establishment of the non-conformity of a provision to one of the quoted constitutional models, the analysis of the constitutional validity of the same provision in the aspect

of other constitutional models became irrelevant”. In this situation the Public Prosecutor-General came to the conclusion that the adjudication on the non-conformity of the challenged provision to Article 32 paragraph 1 of the Constitution remained without any impact upon the substantial consequence of the respective judgement and applied for the discontinuance of proceedings in that part.

3. By a letter dated 23 November 2001, the position on behalf of the Sejm of the Republic of Poland was expressed by its Marshal.

As a matter of introduction, the Marshal of the Sejm underlined that the essential grounds for the application to establish the non-conformity of Article 8 paragraph 1 of the Act of 9 May 1996 to Article 105 paragraph 3 of the Constitution concerning deeds committed prior to obtaining the mandate [of a deputy], in the situation when penal proceedings concerning the respective person had been initiated prior to the date of the election of that person as deputy (senator), did not give rise to any doubts.

The Constitution currently in force, in comparison to the previous legislation, has significantly limited the scope of protection granted to the deputies and senators. This is substantiated, in particular, by the purport of Article 105 paragraph 3 of the Constitution, which has been quoted in this case as the model for review. The essence of that provision is that as long as the Sejm or Senate do not adopt a resolution demanding the staying of already running proceedings concerning a person, who obtained the parliamentary mandate after that fact, such proceedings should be continued in accordance with the generally prevailing rules. Under such circumstances the position of the applicant is fully justified, that Article 105 paragraph 3 of the Constitution not only creates the possibility of such proceedings to be continued, but also, in accordance with the principle of the rule of law, it obliges the judiciary bodies to continue their conduct.

The Marshal of the Sejm also shared the position of the applicant concerning the necessity to subject the challenged provision to the review of its conformity to Article 32 paragraph 1 of the Constitution. The arguments referred to by the Commissioner for Citizens’ Rights on the account of this issue provide significant complementation to the first objection. In connection with that it was pointed out that the petition lodged by the Public Prosecutor-General to discontinue the proceedings on this account was not justified. Consideration of the objections not only has its independent merits for the assessment of its conformity to the Constitution, but it is also desirable from the general social and public interest point of view. It was pointed out at this occasion, that the arguments of the Public Prosecutor-General on the lack of symmetry of purport between Article 8 paragraph 1 of the Act of 9 May 1996 and Article 105 paragraph 3 of the Constitution were unconvincing. The Marshal of the Sejm found that the quoted provision of the Constitution could and should provide an independent basis for the judicial decisions of the common courts of law. This problem is the more significant, as the practice of the courts may be observed, which consists of frequent staying of already initiated proceedings in anticipation of the renouncement of immunity by a person who has in the meantime obtained the mandate of deputy or senator.

In conclusion the Marshal of the Sejm of the Republic of Poland petitioned for the establishment of the non-conformity of the challenged provision to both of the constitutional models indicated by the Commissioner for Citizens’ Rights.

At the hearing on 28 November 2001, the parties to the case upheld the positions previously formulated in writing. Both the Commissioner for Citizens' Rights and the representative of the Sejm of the Republic of Poland drew particular attention to the need for the Constitutional Tribunal to adopt a position concerning the problem of conformity of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate to Article 32 of the Constitution. Both, the general weight of the equality principle in the system of constitutional values, as well as the essence of the immunity privilege as an exceptional divergence from the equality principle, require that issue to be considered by the Constitutional Tribunal. Hence, the petition of the Public Prosecutor-General to discontinue the proceedings with respect to that scope of the examination was unjustified, according to the remaining parties participating in the hearing.

### III

The Constitutional Tribunal established the following:

1. The institution of immunity is one of the classical elements of parliamentary law, and for ages it has been regarded as an essential guarantee of the proper functioning of parliament as the organ representing the Nation. When conceived in this way, immunity should be treated not so much as an individual privilege, granted to the individual members of parliament, but rather as a privilege of the institution (see: *judgement of the Constitutional Tribunal of 28 January 1991, Ref. No. K. 13/90, OTK in 1991, p. 76*). „Protection of the person is only a reflection of the legal protection of the independence of parliament as a collective organ” (Z. Czeszejko-Sochacki, *Prawo parlamentarne [Parliamentary Law]*, Warszawa 1997, p. 74). This implies that the parliamentary immunity cannot be considered in terms of the categories of rights *in personam* (and therefore on the basis of the principles of interpretation resulting from Chapter Two of the Constitution), but only in terms of institutional categories (and therefore in terms of the principles of the functioning of the organs of the state). In other words, the sense and the need for immunity reach only as far as that is necessary for the assurance of the proper functioning of parliament as an organ and the proper exercise of his/her mandate by the deputy (senator) as a member of that organ. There are no constitutional grounds, however, for the parliamentary immunity to be treated as a means of assuring impunity to those member of parliament, who have violated the law (*Konstytucja Rzeczypospolitej Polskiej. Komentarz [The Constitution of the Republic of Poland. Commentary]*, ed. by L. Garlicki, Warszawa 2001, Comment No. 7 to Article 105, p. 7). Thus, the scope of immunity, the principles of its derogation and staying, should be determined only to such an extent, which is connected with the protection of the chamber and its members against external interference with the parliamentary activities. The more the course of political practice is civilised and the more the probability of such interference diminishes, the less room remains for the application of parliamentary immunity. The process of interpretation of the provisions on immunity must adopt as the point of departure the actual role of parliament and the actual scope of exposure to hazards, which may be created with respect to the parliament by the activities of the executive government authorities.

Parliamentary immunity treats a member of parliament in a different (privileged) way than the other citizens, and thereby the regulations concerning

immunity must also be subject to evaluation from the point of view of the principle of equality. From this point of view immunity should be regarded in terms of an exception from the general principle that everyone is responsible under the criminal law in the event of having committed a crime, and the implementation of such responsibility belongs initially to the organs of the public prosecutor's office, and ultimately to the independent courts (see e.g.: M. Zubik, *Immunitet parlamentarny a zawieszenia postępowania karnego [Parliamentary Immunity and the Staying of Penal Proceedings]*, PiP 1998, No. 7, p. 57). This implies that the regulations concerning immunity must be interpreted according to the principles of interpretation applied to exceptions, which rules out, i.a., the application of intensive interpretation (see: *Resolution of the Supreme Court dated 16 February 1994, I KZP 40/93*, Supreme Court Penal Division's Decisions – OSNKW 1994, No. 3-4, p. 19-20, and also – in relation to the attorney's immunity privilege, which has however more broad implications – *Resolution of the Supreme Court dated 24 February 1998, I KZP 36/97*, OSNKW 1988, No. 3-4, p. 9-10).

2. Against the background of these general considerations the Constitutional Tribunal examined the regulations contained in Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate. It needs to be stressed that the subject matter of the present case is not the overall evaluation of the structure of the institution of immunity, but only one particular problem, namely the scope of application of immunity to events that happened prior to obtaining by a given person of the mandate to sit in parliament. With regard to this the provisions of Polish parliamentary law have undergone a significant evolution.

Until the year 1997 the constitutional provisions did not regulate separately the scope of reference of the immunity privilege applying to deeds committed before obtaining the respective mandate, which implied that proceedings conducted with regards to an act committed prior to having obtained the mandate became subject to the scope of immunity from the moment of obtaining such a mandate. This was given expression in the Act on the Exercise of the Deputies' and Senators' Mandate adopted in 1996. Article 8 paragraph 1 of that Act indicated that „the prohibition to call a deputy or senator to criminal or penal-administrative responsibility without the consent of the Sejm or Senate concerns also the deeds committed prior to having obtained the mandate”. Thereby, „penal proceedings initiated before such a date, from the moment of obtaining the mandate is stayed; it may be resumed after having obtained the consent to do so from the Sejm or Senate”. This provision, therefore, first of all established the general principle, that immunity was to be applied also to deeds committed before obtaining the mandate, regardless of whether the respective penal proceedings were already initiated. The same principle was referred to „penal-administrative proceedings”, but it should be recalled that in 1996 that notion was already deprived of any clear legal meaning (void), because – the „penal-administrative” proceedings once known in the Polish law had since many years turned into the form of „proceedings concerning cases of misdemeanours”. A second element of the purport of Article 8 paragraph 1 consisted of the establishment of the absolute imperative to stay the proceedings concerning all criminal cases that were in progress against a member of parliament from the moment of his/her obtaining the mandate and making the undertaking of proceedings dependent on the consent of the respective chamber of parliament, given in the form of a resolution on the derogation of immunity.

The Constitution of 1997 introduced new, more detailed regulation, as in Article 105 paragraph 3 it indicated that „criminal proceedings instituted against a

person before the day of his/her election as Deputy, shall be suspended at the request of the Sejm until the time of expiry of the mandate". By virtue of Article 108, the same principle applies also to the senators. The new Constitution, therefore, did not change the general concept that immunity applies also to those deeds that were committed prior to obtaining the mandate. It has introduced a new distinction, however, unknown under the previous constitutional or legislative regulations, by making the period of protection from responsibility dependent on whether prior to the date of election the respective criminal proceedings had been initiated. If the institution of such proceedings against the person of a deputy or senator had not taken place prior to the date of their election (that is the date of the official announcement of the election results, or – in the case of assuming the deputies' mandate in the course of term of office of the respective chamber – prior to the date of issue of the respective decision by the Marshal of the Sejm), the initiation of proceedings may only take place after the derogation of immunity, so from that point of view the moment when the respective act was committed is irrelevant. The justification for such a solution consists in the necessity to protect the members of parliament from being exposed to pressures, harassment or even blackmail of instituting criminal proceedings against them in the course of their exercise of the mandate. That argument, however, is not applicable, if the criminal proceedings were already in process at the time of election. Nevertheless, such situations were also covered by the immunity protection, but within a narrower scope, as the application of immunity was made dependent on the positive action of the chamber of parliament, i.e. on the adoption of a resolution demanding the respective proceedings to be stayed. Thereby, on the grounds of Article 105 paragraph 3 there is no basis for the automatic reference of the effectiveness of immunity to the deeds committed before the date of election, concerning which the proceedings *ad personam* were already instituted. The stay of criminal proceedings in such cases did not occur automatically any more, but only upon demand by the chamber. There was therefore accordance as to the stipulation in the doctrine of the law, that until such time when the chamber would lodge such a demand, there were no grounds for staying the respective criminal proceedings, and therefore the obligation existed for it to be continued (e.g. M. Zubik, *Uchylenie immunitetu parlamentarnego [Derogation of Parliamentary Immunity]*, Przegląd Sejmowy 1997, No. 6, p. 18; P. Winczorek, *Komentarz do Konstytucji RP z dnia 2 kwietnia 1997 r. [Commentary to the Constitution of the Republic of Poland of 2 April 1997]*., Warszawa 2000, p. 137; *Konstytucja...*, *ibid.*, Comment No. 24 to Article 105, p. 18; K. Grajewski, *Immunitet parlamentarny w prawie polskim [Parliamentary Immunity in Polish Law]*, Warszawa 2001, p. 180-181 and p. 247).

In parliamentary practice the consequences of the new constitutional regulation were noticed immediately. The beginning of the 3d term of the Sejm „coincided” with two proceedings being in process against newly elected deputies. In both cases the Marshal of the Sejm informed the deputies concerned about the possibility to institute the respective proceedings of the Sejm in order to demand the penal proceedings to be stayed, but both of the deputies concerned filed their declarations of being ready to submit to further criminal proceedings in their own cases, which required to be treated on the terms of Article 105 paragraph 4. Similar information was also addressed to the deputies concerned by the Marshal of the Sejmu of the 4<sup>th</sup> term, but this time the same problem assumed even more serious dimensions in terms of the number of cases in question.

No progress was made, however, on undertaking in the legislative dimension of the evaluation of the adequacy of the regulation contained in Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate. As it is well known,

the intention to introduce a comprehensive amendment of the Act on the Exercise of the Deputies' and Senators' Mandate was reflected in the works of the Rules and Deputies' Affairs Committee of the Sejm, and in the prepared draft amendments it was foreseen, among other things, to eliminate the hitherto existing Article 8. This intention was not realised, however, and when partial amendments to the Act on the Exercise of the Deputies' and Senators' Mandate were introduced, which were done under time pressure accompanying the approaching end of that term of parliament, Article 8 was omitted for reasons that are difficult to establish.

3. Since 17 October 1997, the Polish legal system comprises concurrently the provisions of Article 105 paragraph 3 of the Constitution and of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate. Comparison of the normative purport of these provisions leads to the following conclusions:

1) Both of these provisions refer the full dimensions of the operation of formal immunity to deeds committed before obtaining the mandate (prior to the date of election), with respect to which penal proceedings had not been instituted against the person of a specific deputy or senator prior to that date;

2) Both of these provisions allow the formal immunity to refer also to deeds committed before having obtained the mandate (prior to the date of election), concerning which, prior to that date, criminal proceedings had been instituted against the person of a specific deputy or senator, but they formulate that reference in different ways;

3) Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate introduces, as a matter of principle, the application of immunity to such cases, and therefore makes any further conduct of criminal proceedings dependent on the adoption by the Sejm (Senate) of a resolution on the derogation of immunity; Article 105 paragraph 3 of the Constitution allows the application of immunity in such cases, but only in the situation, when the chamber finds it desirable and expresses this view in a resolution demanding the proceedings to be stayed (it should be noted here, that this is a separate resolution and one should not confuse it with a resolution on the derogation of immunity; this is expressed, i.a., in the doubts as to the formal requirements of adopting such a resolution (see: K. Grajewski, *ibid.*, p. 247-249). Until such a resolution is adopted, however, the immunity does not apply to the proceedings that are mentioned in Article 105 paragraph 3;

4) A consequence of that difference is the difference in the regulation of the procedural consequences of the staying of criminal proceedings. Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate rules that the proceedings are stayed automatically, and therefore the organ conducting the proceedings is obliged to stay them as soon as it obtains the information that the suspected or accused person has been elected to parliament. If that organ regards the continuation of the respective proceedings to be justified, it must institute the proceedings having the purpose to obtain the derogation of the immunity. Article 105 paragraph 3 of the Constitution, however, foresees that the staying of criminal proceedings takes place „upon the demand of the Sejm”, which implies that until such a demand has been filed, there are no grounds for staying the proceedings and they may be continued in accordance with the generally prevailing rules. The organ conducting the proceedings, therefore, has no grounds for their staying, and it can only inform the Marshal about the proceedings in progress, so as to enable the chamber to consider the need to demand the stay of these proceedings. The chamber of parliament, however, has does not have any obligation to adopt such a resolution, and it is not even obliged to put on the agenda of its deliberations the issue of the

possible adoption of such a resolution (and – as has already been mentioned – in parliamentary practice it has been assumed that the initiative in this regard belongs to the member of parliament concerned). In other words, according to Article 105 paragraph 3 the chamber of parliament may remain inactive with respect to the information that criminal proceedings are in course against a newly elected member of parliament. In the course of duration of such inactivity the respective proceedings must continue, as there is no basis for it to be stayed.

In the light of the above presented analysis the Constitutional Tribunal finds that the provisions of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate do not conform – on two significant matters – to the provisions of Article 105 paragraph 3 of the Constitution. Firstly, in the manner of applying the privilege of immunity to deeds, with respect to which criminal proceedings have been instituted concerning a given person prior to the date of election of that person to parliament – Article 8 paragraph 1 applies the immunity in an automatic manner, whereas Article 105 paragraph 3 makes that dependent on the adoption of an appropriate resolution by the Sejm (Senate). Secondly, when determining the consequences of the election of such a person to parliament – Article 8 paragraph 1 deems it to be an obligatory premise for the staying of criminal proceedings; Article 105 paragraph 3 foresees the continuation of the proceedings, and allows the staying of such proceedings only upon the demand of the chamber.

This leads to the conclusion that the provisions of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate contain – in terms of the essence of their substance – regulations that differ from the regulations of Article 105 paragraph 3 of the Constitution. That non-conformity goes so far that there is no possibility to simultaneously apply Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate, and Article 105 paragraph 3 of the Constitution, as these provisions mutually exclude one another. The difference between the two compared regulations goes so far, therefore, that it assumes the form of their contradiction, and such contradiction cannot be removed by means of interpretation. This implies that Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate does not conform to Article 105 paragraph 3 of the Constitution; and as a note on the margin one may add that it would be difficult to find a case of non-conformity that would be more outstanding and obvious.

4. The Constitutional Tribunal drew attention to the fact, that Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate is a pre-constitutional regulation. This leads to the question of whether the entry into force of Article 105 paragraph 3 of the Constitution did not lead to the derogation of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate. The Constitutional Tribunal upholds the position that in the situation when „two provisions – of the old Act and of the new Constitution – concern the same subject matter and are characterised by a similar degree of specific content (symmetry of purport), it may be assumed that the collision of these regulations is distinct enough to produce the situation of their mutual <contradiction>, which demands that precedence should be given to the new Constitution, in accordance with the general principle that *lex posterior derogat legi priori*” (judgement of 8 December 1999, Ref. No. SK 19/99, Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 7/1999, p. 849; similarly, Judgement of 8 March 2000, Ref. No P1/99, OTK ZU No. 2/2000, p. 224-225).

The Constitutional Tribunal is of the opinion, however, that derogation in the form conceived as described above did not take place. Firstly, Article 8 paragraph 1

sentence 1 of the Act on the Exercise of the Deputies' and Senators' Mandate concerns all actions committed prior to obtaining of the mandate, both when criminal proceedings against a person have already been instituted, and when such proceeding prior to the date of obtaining the mandate were not yet initiated. In the second situation the regulations of Article 8 paragraph 1 and Article 105 paragraph 3 coincide and there are no grounds for speaking of derogation. Secondly, one cannot lose from sight the practice of the application of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate. It is true that in the parliamentary practice (and especially in the pronouncements by the Marshal of the Sejm) the direct application of Article 105 paragraph 3 of the Constitution was assumed. At the same time, however, although during the 3d term of the Sejm 4 amendments to the of the Act on the Exercise of the Deputies' and Senators' Mandate were introduced, these changes did not cover Article 8 paragraph 1. The legislator has consciously left that provision in the Law, so he apparently did not believe that it had lost its binding force. The consequence of that inactivity was the application of that provision – already after the elections of the year 2001 – in order to stay some of the criminal proceedings in progress against newly elected deputies. This implies that some of the courts treat the provision of Article 8 paragraph 1 as still being in force.

For this reason the Constitutional Tribunal is of the opinion that there are grounds for issuing substantive judgement and states that Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate does not conform to Article 105 paragraph 3 of the Constitution of the Republic of Poland owing to the fact that it requires obtaining of the consent of the Sejm or Senate for the further continuation of the conduct of criminal proceedings instituted against the person of a deputy (senator) prior to the date of the election of that person to become a deputy (senator).

5. The Constitutional Tribunal is of the opinion that the adjudication establishing the unconstitutionality should cover the entire normative purport of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate, in spite of the fact that the provisions of that regulation are only partly in non-conformity to Article 105 paragraph 3, and in the remaining part (concerning the deeds with respect to which no criminal proceedings against the person were instituted prior to the date of the election of that person) they coincide with the provisions of Article 105 paragraph 2 and 3. Notwithstanding, Article 8 paragraph 1 constitutes a certain editorial whole and it is not possible to „carve out” from it those fragments that are of unconstitutional nature. Such a technique may only be applied in the situation when the derogation of the whole provision would cause a legal gap, unfavourably modifying the legal situation of the addressees of that provision.

Such a situation does not occur, however, in the present case. The elimination of the entire Article 8 paragraph 1 from the binding legal order will not cause any gap in the law, as the regulation contained in Article 105 paragraph 3 of the Constitution is precise enough, so as to be directly applied both by the parliament, and by the organs of the judiciary and the public prosecutors' offices. The Constitutional Tribunal underlines that Article 8 paragraph 2 of the Constitution obliges everyone to directly apply its provisions. Although this does not grant to anyone – with the exception of the Constitutional Tribunal – the competence to adjudicate on the unconstitutional nature of a law and to refuse to apply its provisions (see, in particular: *judgement of 4 October 2000, Ref. No. P. 8/00*, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 6/2000, p. 1017), but it does not relieve the courts (and all the other organs of public authority) of the obligation to

directly apply the provisions of the Constitution. The Constitutional Tribunal reminds that the direct application of the Constitution by the courts may assume two forms. The most typical one in practice is the so called coexistence of the application of the provision of the Constitution with the provisions of the act of law, which takes place in a situation, when the given matter is, at the same time regulated both on the constitutional level and the act of parliament level. In such case the constitutional regulation, or together with the respective provision of the act of parliament – becomes the building block for the construction of the respective legal norm (which is feasible only if the same provision is characterised by a sufficient degree of specificity and precision), or it becomes a landmark for the method of determination of the legal significance of the act of parliament (which assumes the shape of the so called interpretation of the law in accordance with the Constitution and may take place also on the basis of the general principles of Constitution).

The second form of direct application of the Constitution by the courts consists in application of the constitutional regulation as the only basis for the resolution of a case. This happens rarely, because – on the one hand it may occur only when the given subject matter is not regulated by an act of parliament (which is the exception in our legal system), and – on the other hand – only if the constitutional provision is characterised by being sufficiently specific and precise. The Constitutional Tribunal is convinced that such a situation has indeed emerged in the context of the present case (and for this reason the Tribunal believes that the position of the Public Prosecutor-General that „the provision of Article 105 paragraph 3 cannot be applied directly” is inadequate).

The elimination – by virtue of the judgement of the Constitutional Tribunal – of Article 8 paragraph 1 of the Act on the Exercise of the Deputies’ and Senators’ Mandate from the system of the law in force implies, therefore, that the institution of the course of the proceedings on cases, when prior to obtaining of the mandate a crime has been committed, will be directly determined by the provision of Article 105 paragraph 3 of the Constitution. This provision is characterised by a sufficient degree of precision and specificity, in order to be directly applied, even when, the „groundwork” of supporting regulation by an act of parliament is lacking.

As far as the deeds, with respect to which criminal proceedings against the person were not instituted before the date of election of such a person to parliament are concerned, Article 105 paragraph 2 and paragraph 3 of the Constitution apply in conjunction. This implies that the institution of criminal proceedings against such a person is subject to the general rules of Article 105 paragraph 2, which means that it can only happen under the condition of the prior derogation of immunity by the chamber concerned, unless the deputy or senator expresses his/her consent for being called to legal responsibility by the procedure of Article 105 paragraph 4.

With regard to deeds, concerning which the criminal proceedings against the person were already instituted before the date of the election of that person to parliament, however, the particular regulation of Article 105 paragraph 3 is applicable. This implies that such criminal proceedings must be continued, and it is stayed only when the chamber demands that by adopting the respective resolution. Until the time of the possible adoption of such a resolution, however, there are no grounds for the staying of the criminal proceedings, as – in the light of Article 22 of the Code of Penal Procedure, the staying of proceedings may only take place in the situations enumeratively specified in the binding legislation. If the proceedings were stayed by the application of Article 8 paragraph 1 of the Act on the Exercise of the Deputies’ and Senators’ Mandate, than from the moment of the cessation of legally binding force of that provision (that is from the date of the announcement of the

sentence of the present Judgement in the Journal of Laws) the premise for such suspension will disappear, and the criminal proceedings will have to be resumed *ex officio*. The Constitutional Tribunal underlines once again that the regulation contained in Article 105 paragraph 3 is precise enough, so as to be expected to be applied directly, and that there is no need to wait for new legislative regulation of these issues. The courts and other organs of public authority are therefore obliged to apply it also with respect to all of those proceedings, which were initiated before the cessation of the legally binding force of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate, and if such proceedings have been stayed, the obligation exists to resume them *ex officio* without delay.

In complementing these deliberations, it should be stressed once again that the direct application of the Constitution cannot be conceived as the authorisation of the courts to refuse to apply the provisions of an act of parliament that is in binding force, instead of addressing the respective legal question to the Constitutional Tribunal. The Constitution unequivocally authorises only the Constitutional Tribunal to decide on the unconstitutionality of any act of parliament, which also implies the obligation of the court to file a respective legal question, if the court believes or supposes that a given act of parliament does not conform to the Constitution. Therefore – in the context of the cases, which have led the Commissioner for Citizens' Rights to lodge the application considered here – there may be reason for concern over the fact that the courts – when adopting the decisions on the staying of criminal proceedings concerning the newly elected members of parliament – did not address any legal question to the Constitutional Tribunal concerning the conformity to the Constitution of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate, despite of the fact that substantial doubts concerning that issue had been raised not only in the legal doctrine, but also confirmed by the parliamentary practice of the Sejm in its 3<sup>rd</sup> and 4<sup>th</sup> terms of office. At the same time, in the existing case law of judicial decisions it is possible to indicate not infrequent examples of the dissemination of the faulty practices of self-dependent refusal to apply the regulations of the binding legislation. In consequence, it needs to be stated that – on the one hand – the activities of some courts feature a peculiar deficit of constitutional reflection, consisting of the failure to notice the constitutional problems even in situations, when the need to address a legal question to the Constitutional Tribunal emerges rather obviously, and on the other hand, in the activities of some courts the phenomenon of excessive constitutional activity is noted, which consists of the inclination to adopt arbitrary decisions self-dependently, presenting them in the form of the direct application of the Constitution, in such situations, where the Constitution foresees the necessity to observe the procedure of the legal question.

6. The Constitutional Tribunal subsequently considered the problem of conformity of Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate to Article 32 of the Constitution. It should be stressed once again, that the general shape of the regulations on immunity can and should be appraised from the point of view of the principle of equality, as these regulations introduce the divergence from the constitutional imperative of equal treatment. Therefore, granting of immunity to a specific group of persons must always either find support in specific constitutional provisions (as in the case of immunity of parliamentarians, immunity of the judges, or immunity resulting from Article 206 and Article 211 of the Constitution) or it must constitute a necessary premise of the appropriate implementation of particular constitutional principles or norms (e.g. the assurance of the right to a fair court trial – when the attorneys' or prosecutors' immunity is

concerned, or with regard to the assurance of respect for the international law, when the diplomatic immunity is concerned).

The substance of the present case, however, is not the evaluation of the very establishment of parliamentary immunity in general, but only the assessment of the scope of the application of such immunity to deeds committed before obtaining of the mandate. That scope was structured on the basis of the criterion of the moment of initiation of the penal proceedings with respect to the person of the member of parliament. If that occurred after obtaining of the mandate, the formal immunity is fully applicable. It is of course a divergence from the principle of equality, as the deeds committed by a person not being a member of parliament should be subject to the general penal responsibility, and the subsequent gaining of the mandate to parliament does not need to limit such responsibility. However, as that limitation follows directly from Article 105 paragraph 3 of the Constitution, there is no possibility to confront that solution with the constitutional principle of equality. This is so, because the Constitution of the Republic of Poland does not comprise any intrinsic hierarchy of its own provisions and the divergences from the principle of equality made in the very provisions of the Constitution are not subject to appraisal by the Constitutional Tribunal.

The situation is different when both the act and the institution of the criminal proceedings against the person concerned took place before obtaining of the mandate. Article 105 paragraph 3 does not automatically cover it by the formal immunity, whereas this is done by Article 8 paragraph 1 of the Act on the Exercise of the Deputies' and Senators' Mandate. As that is a norm contained in an act of parliament, it is subject to confrontation with the constitutional principle of equality. It has already been noted above that the limitations of responsibility for deeds committed before obtaining of the mandate have to be treated as divergences from the principle of equality. This does not yet decide on the unconstitutional nature of Article 8 paragraph 1, for – as we know – certain divergences from the imperative of equal treatment of similar situations – are acceptable, when that is sufficiently convincingly justified by appropriate arguments. The Constitutional Tribunal believes, however, that the challenged regulation does not find any justification in such arguments. As the institution of proceedings took place before obtaining of the mandate, there is no possibility of harassment or blackmailing of the member of parliament by the prospect of calling him to face criminal liability, as the respective proceedings are already in progress. If the issue at stake would consist of the risk of abuse of the proceedings in progress for political purposes, however, the chamber has always the option to demand the suspension of such proceedings. It should also be noted that none of the participants in the proceedings presented any arguments whatsoever in favour of the justification of the regulation challenged here. Therefore, it had to be concluded that it constituted a privilege that was unjustified and devoid of any constitutional basis, and thereby it violated Article 32 of the Constitution of the Republic of Poland.

For all of the above reasons the Constitutional Tribunal has adjudicated as in the sentence of its judgement.