

JUDGEMENT
of 21 February 2001
Ref. No. P. 12/00*

The Constitutional Tribunal, in a bench composed of:

Marek Safjan – Presiding Judge
Jerzy Ciemniewski
Teresa Dębowska-Romanowska
Lech Garlicki
Stefan J. Jaworski
Wiesław Johann
Krzysztof Kolasiński
Biruta Lewaszkiwicz-Petrykowska
Andrzej Mączyński
Jadwiga Skórzewska-Łosiak
Jerzy Stępień – Judge Rapporteur
Janusz Trzeciński
Marian Zdyb,

Joanna Szymczak – Recording Clerk,

having considered at the hearing on 21 February 2001, with the participation of duly authorised representatives of the parties to the case at hand: the District Court in Warsaw, the Sejm of the Republic of Poland and the Public Prosecutor-General, the questions of law submitted by the bench of the Criminal Chamber VIII of the said court on whether:

the provision of Article 2 paragraph 4, in connection with Article 1 paragraph 2 subparagraph 2, of the Act on the Tribunal of State conforms to the legal norm contained in the provision of Article 156 paragraph 1 of the Constitution of the Republic of Poland and – in consequence – whether in the light of the norm contained in the provision of Article 156 paragraph 1 of the Constitution members of the Council of Ministers shall be responsible for infringing the Constitution or acts of parliament, and also for criminal offences committed in connection with the duties of their office, before the Tribunal of State only or also before a common court of law

adjudicates as follows:

Article 2 paragraph 4 in connection with Article 1 paragraph 2 subparagraph 2 of the Act of 26 March 1982 on the Tribunal of State (consolidated text of 1993, Journal of Laws – Dz.U. No. 38, item 172, amended by: No. 73, item 350, of 1996; No. 35, item 321, of 1999), construed as allowing the responsibility of a member of the Council of Ministers before a common court of law for a criminal offence committed in connection with the duties of his office, unless the Sejm has adopted a resolution to bring him to responsibility before the Tribunal of State, conforms to Article 156 paragraph 1 of the Constitution of the Republic of Poland.

* The sentencing part of the judgement was published in the Journal of Laws [Dziennik Ustaw] - Dz.U. No. 14, item 146.

Statement of Reasons:

I

1. The District Court in Warsaw, considering the case of defendants who during the period covered by the charge were members of the Council of Ministers, submitted to the Constitutional Tribunal, by a decision of 13 July 2000, adopted under Article 193 of the Constitution, the following question of law:

Does the provision of Article 2 paragraph 4, in connection with Article 1 paragraph 2 subparagraph 2, of the Act on the Tribunal of State conform to the norm contained in the provision of Article 156 paragraph 1 of the Constitution of the Republic of Poland, and – in consequence – in the light of the norm contained in the provision of Article 156 paragraph 1 of the Constitution, shall members of the Council of Ministers be responsible for infringing the Constitution or acts of parliament, and also for criminal offences committed in connection with the duties of their office, before the Tribunal of State only or also before a common court of law?

In its statement of reasons for the decision on submitting the question of law, the District Court compared the content of Article 33b, paragraph 2 of the Constitution of 1952 with the wording of Article 156 paragraph 1 of the current Constitution of the Republic of Poland and ascertained as a result of the analysis of the above provisions, that the exclusive competence of the Tribunal of State embraces not only deciding about the responsibility of top public officers, including members of the Council of Ministers, for infringing the Constitution or acts of parliament, but that the jurisdiction of the Tribunal of State extends on an exclusive basis to the considering of cases of responsibility for criminal offences committed by members of the Council of Ministers in connection with the duties of their office. For, as the District Court indicated, whereas Article 33b paragraph 2 of the 1952 Constitution had the character of a facultative norm, conditioning the criminal responsibility before the Tribunal of State on the defendant being simultaneously brought to be responsible under constitutional responsibility, Article 156 paragraph 1 of the Constitution of the Republic of Poland sets out the principle of mandatory responsibility of members of the Council of Ministers before the Tribunal of State also for criminal offences committed in the way it sets forth, namely for offences 'committed in connection with the duties of their office'.

As the District Court underlined, the constitution-maker, extending the competence of the Tribunal of State to the latter category of cases, expressed his will in Article 156 paragraph 1 'in a clear and precise way', without formulating any conditions, especially such one that would make conditional on functioning of the norm contained in that provision on initiating of proceedings before the Committee on Constitutional Responsibility of the Sejm.

According to the District Court, the norm contained in the provision of Article 156 paragraph 1 of the Constitution has superiority over all other norms in the case under consideration, as set out in the Act on the Tribunal of State, and especially in the provision of Article 2 paragraph 4 of that Act, which institutes the facultative competence of the Tribunal of State for considering cases of criminal offences committed by members of the Council of Ministers, if the resolution to bring the person to account under constitutional responsibility stated the purposefulness of a joinder of the acts committed.

Since in the case in question the practice applied by both district and appellate courts is varied, the question of law submitted to the Constitutional Tribunal as stated in the introduction appears justified, as the District Court stated in conclusion, especially in the light of the content of Article 28 of the Act on the Tribunal of State.

2. The Public Prosecutor-General, presenting his position in the letter of 28 September 2000, expressed the opinion that the proceedings in the case should be discontinued pursuant to Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act due to the loss of binding power of the provision of Article 2 paragraph 4, in connection with Article 1 paragraph 2 subparagraph 2 of the Act of 26 March 1982 on the Tribunal of State (consolidated text of 1993, Journal of Laws – Dz.U. No. 38, item 172, with subsequent amendments) upon the entry into force of the Constitution of the Republic of Poland.

In the opinion of the Public Prosecutor-General, contrary to the assertions of the District Court, the wording of the provision of Article 156 paragraph 1 of the Constitution is not clear and precise enough to ensure the linguistic interpretation to affirm unambiguously the exclusive competence of the Tribunal of State over the cases of criminal offences committed by members of the Council of Ministers in connection with the duties of their office, all the more that the Court's interpretation of that provision ignored the purport of Article 156 paragraph 2 of the Constitution, although both those provisions make an indivisible entirety. The categorical wording of the expression used in paragraph 1: 'shall be responsible before the Tribunal of State (...) also for offences', as the Public Prosecutor-General further argued, may be construed as establishing a binding guideline for the Sejm that in case of a member of the Council of Ministers being brought to responsibility for constitutional delict, the relevant resolution should also include the charge of a criminal offence committed in connection with the duties of his office. In other words, as the Public Prosecutor-General stressed, the provision of Article 156 paragraph 1 of the Constitution formulates the principle of joint criminal and constitutional responsibility before the Tribunal of State – in the case of concurrent responsibility – with respect to members of the Council of Ministers, which excludes the competence of common courts of law over the cases of the criminal offences in question only when the Sejm adopts a resolution to bring a member of the Council of Ministers to responsibility before the Tribunal of State.

Constitutional responsibility is an 'additional' responsibility of a kind, over and above that borne by all other citizens and justified by the need to penalise such deeds by persons performing the highest posts in the state that are socially harmful and illegal but not always leading to criminal responsibility. Furthermore, the Public Prosecutor-General stated, the interpretation of Article 156 paragraph 1 of the Constitution as presented by the District Court would result in admitting that the constitution-maker created special premises of responsibility of members of the Council of Ministers for criminal offences committed in connection with the duties of their office, because if the Sejm failed to adopt the resolution referred to in Article 156 paragraph 2 of the Constitution, those persons would not only be exempted from Constitutional, but also criminal responsibility. Now, there are a number of reasons why such resolution could fail to be adopted, including reasons of a political nature. Such interpretation would be irreconcilable with the principle of equality before the law as expressed in Article 32 paragraph 1 of the Constitution, whose application to criminal offenders means that everyone is responsible for criminal offences on the conditions expressed in the provisions of the Penal Code.

Neither can it be overlooked, as the Public Prosecutor-General further stressed, that the constitution-maker expressly restricted the competence of the Tribunal of State to adjudicating on cases of constitutional delicts, since Article 198 *et. seq.* concerning the Tribunal of State contain no mention of any possibility for that body to adjudicate on cases of criminal offences, while the establishment, under separate constitutional provisions, of the exceptional competence of the Tribunal of State over criminal cases *ratione personae* with respect to the President of the Republic of Poland (Article 145 paragraph 1) and members Council of Ministers (Article 156 paragraph 1, in a different scope), may not change the

functions of that body as defined by the Constitution nor make the Tribunal of State a special criminal court for those persons.

If a member of the Council of Ministers commits a constitutional delict, which is a necessary precondition for bringing him to responsibility before the Tribunal of State, and a criminal offence in connection with the duties of his office, it is advisable to jointly consider those charges in consideration of the requirements of procedural efficiency and the speed of the proceedings, all the more that the same act will jointly entail, as a rule, both constitutional and criminal responsibility. The failure of the Sejm to adopt the resolution referred to in Article 156 paragraph 2 of the Constitution, as the Public Prosecutor-General stated in conclusion, would only prevent the bringing of a member of the Council of Ministers to constitutional responsibility, while it would not constitute an obstacle to prosecuting criminal proceedings in a common court of law.

Coming to the issue of how to define the relationship between the purport of Article 156 paragraph 1 of the Constitution and the content of the challenged provision of Article 2 paragraph 4, in connection with Article 1 paragraph 2 subparagraph 2, of the Act on the Tribunal of State, the Public Prosecutor-General remarked, firstly, that the latter provision regulates the same matter as Article 156 and Article 198 paragraph 1 and 2 of the Constitution of the Republic of Poland, and secondly, that it sets forth fundamentally different rules of criminal responsibility of persons subject to constitutional responsibility and provides a different definition of the group of persons subject to constitutional responsibility. The difference in regulation consists in the fact that the provision of Article 156 excludes the possibility for the Sejm to decide on the 'advisability' of joint considering by the Tribunal of State of acts giving rise to constitutional and criminal responsibility, which on the other hand is proclaimed by Article 2 paragraph 4 of the Act on the Tribunal of State. For, as the Public Prosecutor-General stated, regardless of the interpretation of Article 156 of the Constitution, it must be assumed that the issue of joint constitutional and criminal responsibility was decided by the constitution-maker himself, since he did not leave the legislator with any possibility for legislating either *ratione personae* or *ratione materiae*. The Constitution regulates that aspect in a comprehensive and exhaustive manner (Article 198 paragraph 1 and 2, Article 156 paragraph 1, and Article 145 paragraph 1), and the only delegations it authorises concern the regulation, by an act of parliament, of the penalty to be decided by the Tribunal of State (Article 198 paragraph 3) and of the organisation of the Tribunal of State and the rules of procedure before that body (Article 201).

According to the Public Prosecutor-General opinion, the above arguments point to the existence of a 'contradiction' between the said legal norm, adopted before the Constitution has entered into force, and the norm of Article 156 of the Constitution, which must be resolved, in the absence in the Constitution of any general derogatory clause with respect to earlier legal order, by referring to the principle of direct application of the Constitution expressed in its Article 8 paragraph 2, and to the principle of *lex posterior derogat priori*.

In reasoning that part of his statement, the Public Prosecutor-General referred to the decision made by the Constitutional Tribunal in case Ref. No. SK 19/99 (Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 7/1999, item 161). In stating its reasons for that decision, the Constitutional Tribunal had expressed the opinion that 'recognition that two provisions – one of an earlier act of parliament and one of the new Constitution – regulate the same matter and are characterised by a similar degree of specificity (symmetry of purport), allows to assume that the conflict between those two provisions is clear enough to create the situation of *contradiction*, which requires that priority be given to the new Constitution'.

That statement led the Public Prosecutor-General to the conclusion that the questioned provision of the Act could not be subject to review by the Constitutional Tribunal, which was

only competent to adjudicate on legal norms in force as at the date of adjudication. This in turn leads to the position that – since the provision concerned by the question of law had lost its binding force – the proceedings in the case ought to be discontinued under Article 39 paragraph 1 subparagraph 3 of the Constitutional Tribunal Act.

On the other hand, the Public Prosecutor-General found no possibility to apply to that case the transitional provision of Article 241 paragraph 5 the Constitution, which provides for an exception from the general rule of direct applicability of the Constitution. In his opinion, that provision applies to proceedings in cases submitted to the Tribunal of State and initiated before the entry into force of the Constitution and the case in question does not belong to this category.

II

At the hearing on 21 February 2001, the representative of the District Court in Warsaw and the representative of the Public Prosecutor-General maintained their positions as previously expressed in writing. The representative of the Public Prosecutor-General admitted that the conclusion of the Public Prosecutor-General's written statement of position that the provision of Article 156 paragraph 1 of the Constitution directly derogated the challenged provision of an earlier Act, might leave room for doubt. According to the position taken by the representative of the Public Prosecutor-General at the hearing, Article 2 paragraph 4 of the Act on the Tribunal of State might also be interpreted in conformity with the Constitution, provided that Article 156 paragraph 1 of the Constitution did not set forth the exclusive responsibility of members of the Council of Ministers before the Tribunal of State for criminal offences committed in connection with the duties of their office.

Deputies Jan Piątkowski and Marek Markiewicz, representing the Sejm at the hearing, challenged the argument on the contradiction between the questioned provision of the Act on the Tribunal of State and Article 156 paragraph 1 of the Constitution, if that provision is interpreted as not settling the question of 'exclusively criminal responsibility of ministers before the Tribunal of State'.

III

The Constitutional Tribunal established the following:

1. Prior to considering the present case, it should be analysed whether the submitted issues constitute two questions, as it has been formally defined by the submitting Court, or in essence a single question, which is posed fundamentally in the wording of the first sentence and only completed by the content of the second sentence, which sets the limits of the question on the constitutionality of the challenged provision.

The first option would result in the necessity to discontinue proceedings by virtue of Article 39 paragraph 1 subparagraph 1 of the Act of Parliament on the Constitutional Tribunal, on account of the inadmissibility of awarding the judgement in respect of the second question, since its literal wording, stripped from the context of the first question and examined separately, would necessarily result in the conclusion that it is actually a question on the interpretation of Article 2 paragraph 4 of the Act on the Tribunal of State, which the Constitutional Tribunal is not authorised to do once the current Constitution has entered into force. However, both the context of the case and the intention of the District Court clearly show that the task here is to examine the constitutionality of Article 2 paragraph 4, in connection with Article 1 paragraph 2 subparagraph 2, of the Act on the Tribunal of State, only from the viewpoint of the competence of a common court of law over cases of criminal

offences committed by a member of the Council of Ministers in connection with the duties of his office. And both the judgement in this case and its statement of reasons refer to that interpretation of a single substantive question.

There is no doubt, that the defendants listed in the statement of reasons for the question of law were members of the Council of Ministers in the period covered by the charges of the indictment, and the acts they are charged with were related to the offices they held. Neither can it be questioned that, should the provisions of the act of parliament concerned by the question be deemed unconstitutional, the District Court would consider the possibility of acknowledging its lack of competence to consider the case Ref. No. VIII K 281/99. Therefore, it should be stated that considering of the case by the District Court depends on the answer to the question of law and thereby it should be acknowledged that the necessary premises for submitting the questions expressed in the decision of 13 July 2000 to the Constitutional Tribunal under Article 193 of the Constitution have been met. The question of law is an instrument allowing a court to invalidate the challenged provision, and thereby it is identical with a motion by the entities enumerated in Article 191 of the Constitution.

2. The Act of 26 March 1982 on the Tribunal of State in Article 1, paragraph 2 subparagraph 2 sets forth the responsibility of members of the Council of Ministers, among other persons, before the Tribunal of State for infringements of the Constitution and acts of parliament. Furthermore, Article 2 paragraph 4 of that Act states that the persons enumerated in the above provision are subject to constitutional responsibility before the Tribunal of State, and that they may be subject to criminal responsibility before the Tribunal of State for a criminal offence committed in connection with the duties of their office, if the resolution on bringing them to constitutional responsibility recognises the joint considering of those acts as purposeful.

Article 33 b paragraph 2 of the previous Constitution, introduced by the amendment of 26 March 1982 (Act amending the Constitution of the People's Republic of Poland, Journal of Laws – Dz.U. of 1982, No. 11, item 83) stated in turn that the Tribunal of State might adjudicate on the criminal responsibility of persons brought to constitutional responsibility for criminal offences committed in connection with the duties of their office. In the light of the wording of the provisions just referred to, there could be no doubt that if a person brought to constitutional responsibility had not been also brought to criminal responsibility due to the Sejm's failure to adopt a resolution on joint considering of both acts, then the considering of the alleged criminal offence still remained within the competence of a common court of law. This was the position taken by the Supreme Court in considering the case Ref. No. U KKN 235/96 (unpublished judgement), where it stated that if 'constitutional responsibility is not realised at all (because, e.g., no group of 115 deputies willing to file the initial motion could be constituted or the Sejm failed to adopt a resolution on bringing specific persons to account under constitutional responsibility, or when the Sejm failed to decide in the resolution on joint treatment of the two categories of responsibility) – there are no legal obstacles to the realisation of the criminal responsibility level in a common court of law. Even more, the principle of legality (Article 5 of the former Code of Criminal Procedure) entails the obligation to bring the offender to account under that kind of responsibility ' (page 7 of the statement of reasons).

The formula used in Article 33b paragraph 2 of the previous Constitution differs from the literal wording of Article 156 paragraph 1 of the current Constitution of the Republic of Poland, which stipulates that members of the Council of Ministers are responsible before the Tribunal of State for infringing the Constitution or acts of parliament, as well as for criminal offences committed in connection with the duties of their office.

The confrontation of the said provisions of the two Constitutions has led the District Court to conclude that, while under the previous Constitution criminal responsibility of members of the Council of Ministers before the Tribunal of State for criminal offences committed in connection with the duties of their office was facultative ('the Tribunal of State may adjudicate on criminal responsibility...'), in the light of Article 156 paragraph 1 of the Constitution currently in force that responsibility has become obligatory ('Members of the Council of Ministers shall be responsible...'); and on those grounds the District Court contended that Article 2 paragraph 4 of the Act on the Tribunal of State did not conform to the Constitution, since it also set forth only facultative responsibility of members of the Council of Ministers for criminal offences committed in connection with the duties of their office.

However, the answer to the questions of the District Court should not be sought only in a literal interpretation of Article 2 paragraph 4 of the Act on the Tribunal of State in comparison with the wording of Article 156 paragraph 1 of the Constitution, but also in considering the essence of constitutional and criminal responsibility as defined in the Constitution and the totality of Constitutional provisions and values that apply to this case.

3. The tradition of Polish constitutional jurisprudence has seen various approaches in various historical periods to the subjects responsible before the Tribunal of State, but as a rule the essential component of that responsibility was always related to the so-called constitutional offence; that concept is taken to mean an act or failure to act in violation of the Constitution or an act of parliament. This is the approach adopted in Articles 198, 145 and 156 of the current Constitution. An infringement of the Constitution or an act of parliament may take the form of a criminal offence, but even in such a case the concept of „constitutional offence” and „criminal offence” may not be seen as identical. Nor can be the concept of „constitutional offence” be treated as a wider concept that would „absorb” the criminal offence. Constitutional responsibility and responsibility „for a criminal offence” are two different systems of responsibility, which in certain cases set forth in the Constitution may be applied in conjunction by the Tribunal of State to the same persons.

4. By virtue of Article 145 paragraph 2 of the Constitution, bringing the President of the Republic of Poland to constitutional responsibility falls within the exclusive competence of the National Assembly. The President may be indicted pursuant to a resolution adopted by a majority of 2/3 of votes of the statutory number of National Assembly members, upon the motion of 140 members. Whereas a member of the Council of Ministers, by virtue of Article 156 paragraph 2, is brought to account under constitutional responsibility pursuant to a resolution adopted by the Sejm upon the motion of the President of the Republic of Poland or by at least 115 deputies. It must be stressed that the Constitution does not provide for any exceptions to such a definition of the bodies authorised to initiate and effectively conduct the preliminary stage of proceedings in constitutional responsibility, which are then to continue before the Tribunal of State.

At all stages of the proceedings, criminal responsibility belongs, as a rule, to the domain of administration of justice, which – as set out in Article 175 paragraph 1 of the Constitution – is performed by courts. According to the Constitution, courts are composed of: the Supreme Court, common courts of law, administrative courts and military courts (Article 175). Thus, the structure of Chapter VIII of the Constitution leaves no doubt that neither the Constitutional Tribunal nor the Tribunal of State are included to the category of courts.

The courts have been listed separately, under the heading „Courts and Tribunals” (Article 175 *et. seq.* of the Constitution), while the Tribunal of State was set apart from that category under a separate heading (Article 198 *et. seq.* of the Constitution). Thus both the

structure of Chapter VIII and its title and headings establish a distinction in the systemic positions of courts and the Tribunal of State.

The Constitution provides for two exceptions to the rule that administration of justice is performed by courts, in particular by common courts of law (Article 177).

The first exception is set forth in Article 145 paragraph 1, which stipulates that the President of the Republic of Poland may be brought to responsibility before the Tribunal of State for infringing the Constitution or acts of parliament or for committing a criminal offence. The use of the operator „or” in the wording of that provision, which corresponds to an regular alternative, indicates that the President is responsible before the Tribunal of State for a constitutional delict and a criminal offence combined, or only for a constitutional offence, or only for a criminal offence. In other words, the President of the Republic may not be brought to responsibility for a criminal offence before a common court of law. For that instance, jurisprudence formulates an opinion on the exclusive and complete competence of the Tribunal of State with respect to the President of the Republic of Poland (see. L. Garlicki *Polskie prawo konstytucyjne – zarys wykładu [Polish constitutional law – an outline of the lecture]*, Warszawa 2000, p. 397; a similar opinion is expressed in: J. Mordwiłko, *Opinia w sprawie dopuszczalności pociągnięcia do odpowiedzialności konstytucyjnej byłego Ministra Sprawiedliwości zajmującego aktualnie stanowisko sędziego Sądu Najwyższego, sporządzona pod rządami nowej konstytucji [Opinion on admissibility of bringing the former Minister of Justice who at present is a judge of a Supreme Court to constitutional responsibility under the provisions of new Constitution]*, [In:] *Przegląd Sejmowy [Sejm Review]* No. 3/99, p. 74). The President's responsibility before the Tribunal of State is complete, because it embraces all criminal offences which he may have committed during his term of office rather than just those he may have committed in connection with his office. The President's responsibility before the Tribunal of State is also exclusive, because for committing a criminal offence he may be brought to responsibility exclusively before the Tribunal of State.

This special competence of the Tribunal of State with respect to the person of the President of the Republic of Poland is an expression of the President's special constitutional position as the highest representative of the Republic of Poland and thereby the first person in the state. Thus he receives a formal and total immunity.

The second exception is provided for in the provision of Article 156 paragraph 1 of the Constitution with the following wording: 'members of the Council of Ministers shall be responsible before the Tribunal of State for an infringement of the Constitution or acts of parliament, as well as for the commission of a criminal offence connected with the duties of their office'. In this case, the use of the operator 'as well as' rather than the conjunction 'or', as is the case of the wording of Article 145 paragraph 1, leads to the conclusion that a member of the Council of Ministers may be brought to responsibility for a criminal offence before the Tribunal of State provided that he has been earlier, or is simultaneously, charged with the commission of a constitutional delict. With respect to that category of persons, the term adopted is partial and concurrent competence of the Tribunal of State with respect to members of the Council of Ministers in cases of criminal offences (see. L. Garlicki, *op.cit.*, p. 398; J. Mordwiłko, as above).

Not every criminal offence committed by a member of the Council of Ministers may be considered by the Tribunal of State, but only such that was committed in connection with the duties of his office (hence the partial competence). A necessary precondition for the responsibility of a member of the Council of Ministers before the Tribunal of State for a criminal offence is for the Sejm to adopt a resolution to bring him to responsibility under the procedure set out in Article 156 paragraph 2 of the Constitution (hence the concurrent competence). The clear-cut distinction with respect to criminal responsibility between the President of the Republic and members of the Council of Ministers is the consequence of the

different position of members of the Council of Ministers in the state, incomparable to that of the President of the Republic. Hence there are also different premises and a different procedure for indicting the President for having committed a criminal offence. Those distinctions, resulting from the fundamental distinction between the constitutional position of the head of state and that of member of the Council of Ministers, must be taken into account in the interpretation of Article 156 of the Constitution.

Such a relationship between constitutional and criminal responsibility of a member of the Council of Ministers justifies the argument about the accessory character of proceedings before the Tribunal of State in the case of a criminal offence as compared with proceedings in respect of a constitutional delict. This solution is fully coherent with the concept of constitutional responsibility taken in its historical context. One may remind here the relations between those two rigours of responsibility as set forth by Article 2 of the Act of 27 April 1923 on the Tribunal of State (Journal of Laws – Dz.U. No. 59, item 415) and Article 9, in connection with Article 19, of the Act of 14 July 1936 on the Tribunal of State (Journal of Laws – Dz.U. No. 56, item 403).

Thus, in the light of systemic and functional interpretation, the Tribunal of State becomes a body (a court) of administration of justice only after the Sejm has adopted a resolution to bring a member of the Council of Ministers to constitutional responsibility and simultaneously bring him to responsibility for criminal offences. The cognisance of the Tribunal of State with respect to a member of the Council of Ministers in this approach is neither exclusive nor even automatic.

5. The Constitutional Tribunal shares the position taken by the Supreme Court in its statement of reasons for the judgement of 25 March 1997 (*Ref. No. U KKN 235/96*), which referred to the *ratio legis* of the constitutional provision on the Tribunal of State and the Act on the Tribunal of State. As the Supreme Court argued, it cannot be asserted that the Tribunal of State was established not only as a special court considering cases of constitutional responsibility, but also as a special criminal court for deciding on the criminal responsibility of high-rank public officers for criminal offences committed in connection with the duties of their office. In the opinion of the Supreme Court, this concept would mean 'that within that category of criminal cases a need was seen to entrust them to a special court in recognition of the fact that common courts of laws are not qualified to examine the case in an adequate manner. This would be an exception to the principle of equality before the law, and as such it would have to be established very clearly'. The history of the establishment of the Tribunal of State in Poland proves that the lawmaker's intention was different, the Supreme Court says: 'The Tribunal of State was established with the intention to subject high-rank public officers to additional responsibility over and above that borne by all other citizens'.

The Constitutional Tribunal also fully identifies with the reasoning and the theses expressed on that subject by the Supreme Court, recognising that they remain fully applicable to the new constitutional regulation, although they were formulated on the basis of the previous constitutional system. This is because there is nothing to indicate that the intention of the 1997 constitution-maker was to entirely transform the character of responsibility before the Tribunal of State and to reshape the scope of its competence with respect to members of the Council of Ministers. Such an intention would have had to be expressed at least in the parliamentary discussion on the Constitution. However, detailed analysis of the materials related to that issue yields no evidence of a qualitative change in the previous position and function of the Tribunal of State, which has been essentially established, as it has been emphasised above, to examine cases of constitutional responsibility. Moreover, such intention would have had to be expressed first of all in the wording of the related constitutional norms. For, had the constitution-maker wanted to make the Tribunal of State a special court for members of the Council of Ministers, the wording of Article 156 paragraph 1

of the Constitution would have had to be structured in a manner analogous to that of Article 145 paragraph 1, which makes the Tribunal of State a special court of a kind for the President of the Republic of Poland. However, such a conclusion cannot be correctly derived from the constitutional provisions currently in force.

6. An essential point of reference for the interpretation of Article 156 of the Constitution may be provided by other fundamental constitutional principles and freedoms, which ought to be confronted with the conclusions resulting from adopting alternative guidelines of interpretation of Article 156 of the Constitution. With that in mind, the Constitutional Tribunal also considered the object of the question of the District Court on the grounds of the principle of legality (Article 7 of the Constitution) and equality of all before the law (Article 32). These principles are fundamental for a state ruled by law. The principle of legality means that a public authority may not take decisions without a legal basis, but it may also be understood to mean that a public authority 'cannot avoid taking decisions, if binding legal norms impose such a duty on it' (see: P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej [Commentary to the Constitution of the Republic of Poland]*, Warszawa 2000, p. 19).

When applied to criminal procedure, the principle of legality means an absolute obligation to prosecute offences and its main goal is to bring every offender to justice. It is a directive that requires a justice administration body to unconditionally institute and pursue all proceedings that are legally admissible and justified by facts. Article 10 of the Code of Criminal Procedure states that a body authorised to prosecute criminal offences must institute and pursue preparatory proceedings, and that the public prosecutor must make and support an indictment for an act prosecuted *ex officio* (§ 1) and that, with the exception of cases set out in an act of parliament or in the international law, nobody can be released from responsibility for a criminal offence (§ 2). 'The principle of legality with respect to the prosecution of criminal offences is a vital condition of the preservation of democracy and rule of law, and putting an emphasis on this fact is important for the society. The public expects the criminal responsibility of all offenders to be treated in an equal and consistent manner, regardless of their office, wealth, earlier merits, local influence or any other elements of personal or political nature; it is the result of the consolidation of the general conviction about the equality of all citizens before the law. The principle of legality satisfies the public's sense of justice...' (T. Grzegorzcyk, J. Tylman *Polskie postępowanie karne [Polish penal proceedings]*, Warsaw 1999, p. 111).

Proceeding to analysis of the situation outlined in the question of law on the basis of the principle of equality before the law, one must first note that in accordance with the well-established jurisdiction of the Constitutional Tribunal, the principle of equality as expressed in Article 32 paragraph 1 of the Constitution entails the requirement of equal treatment of all holders of rights within a given class (category). All holders of rights characterised by an equal degree of a given relevant feature ought to be treated in an equal way, i.e., by judged by the same norms, without any positive or negative discrimination. In the assessment of a given legal regulation from the viewpoint of the principle of equality one must consider whether it is possible to point to a common relevant feature justifying the equal treatment of the holders of rights in respect of the purport and aim of the given regulation by law. Equality before the law also justifies the choice of a given criterion of differentiation instead of another one. Conversely, the principle of equality entails a different treatment of different holders of rights, i.e., such holders of rights who do not show a common relevant feature. To answer the question whether a given criterion may serve to differentiate the holders of rights, one must decide: 1) whether the criterion remains reasonably related to the aim and content of the given legal norm; 2) whether the importance of the interest which the distinction is to serve remains

in an adequate proportion to the weight of the interests that will be infringed as a result of the distinction; and 3) is the differentiating criterion related with other constitutional values, principles or norms that justify different treatment of specific holders of rights (see, e.g., the judgements of the Constitutional Tribunal of: 3 September 1996, *Ref. No. K. 10/96*, *Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 4/1996*, p. 281; 16 December 1996, *Ref. No. U. 1/96*, *OTK ZU No. 6/1996*).

The confrontation of the constitutional principles of fundamental importance referred to above with the content of Article 156 of the Constitution and the provisions of the Act on the Tribunal of State must lead to the conclusion that any interpretation that would entirely exclude the responsibility of members of the Council of Ministers before a common court of law would fundamentally clash with the principle of equal treatment and the principle of legality.

Jurisprudence also includes the opinion that the acceptance of the principle of responsibility of members of the Council of Ministers before the Tribunal of State for all criminal offences committed in connection with the duties of their office would have to be recognised as a privilege lacking sufficient justification (see: P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej [Commentary to the Constitution of the Republic of Poland]*, Warsaw 2000, p. 207).

The opinion that members of the Council of Ministers constitute a class of holders of rights characterised by a feature that requires the application to them of a different treatment as compared with the remaining whole body of citizens in the field of substantive and formal criminal law is by no means vindicable in the light of the above interpretation of the principle of equality. The acceptance of such opinion would necessarily lead to the conclusion that there is a certain group of citizens in the Republic of Poland (one could want to say 'an estate') which in a certain situations would stand above the law just because of their belonging to that very group. Whereas the special and exclusive competence of the Tribunal of State with respect to the President in the domain of his criminal responsibility is sufficiently justified by his constitutional position as the first person in the State, there is no way to recognise, in view of the constitutional position of members of the Council of Ministers, that there should be a premise justifying an identical description of the competence of the Tribunal of State with respect to them. Quite the contrary, there are no such premises to be seen on the grounds of the Constitution.

7. In answering the questions of law, the Constitutional Tribunal also considered the position expressed by the Legislative Council of the 8th term on 25 March 1998, which contained the statement that the Constitution of the Republic of Poland invalidated the provision of Article 2 paragraph 4 of the Act on the Tribunal of State in so far as that provision allowed criminal responsibility before the Tribunal of State with respect to members of the Council of Ministers, subject to the expediency of such responsibility being expressed in a Sejm resolution. That position is founded upon the conviction that there is an obvious contradiction between the provision of Article 2 paragraph 4 of the Act on the Tribunal of State and the provision of Article 156 paragraph 1 of the Constitution, because of 'the introduction, in Article 156 paragraph 1, of the exclusive competence of the Tribunal of State with respect to considering the responsibility of members of the Council of Ministers for criminal offences committed in connection with the duties of their office'. Taking that position, the Legislative Council recognised that the case under consideration was an example of 'a constitutional norm that allows that norm to be directly introduced into the legal system instead of an earlier norm contained in an act of parliament'.

The Constitutional Tribunal does not share the opinion that the contradiction between the above-mentioned norms is obvious enough to justify the view of direct derogation of the

challenged provision of the Act on the Tribunal of State. One must agree here with the view of the Public Prosecutor-General that the wording of the provision of Article 156 paragraph 1 of the Constitution is not clear or precise enough to justify the thesis of a symmetry of substance between Article 2 paragraph 4 of the Act on the Tribunal of State and Article 156 paragraph 1 of the Constitution. According to the jurisdiction of the Constitutional Tribunal to this day (see: judgement *Ref. No. SK 19/99, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 7/1999, item 161, p. 849*), direct derogation of a norm contained in an act of parliament adopted before the Constitution has entered in force may only be possible in a situation of symmetry of substance between the confronting provisions, which however is not the case of the provisions in question.

One must note that the Legislative Council was aware of the issue of responsibility of persons who had been members of the Council of Ministers before the Constitution entered into force and who had committed at that time a criminal offence in connection with the duties of their office. The Legislative Council suggested that the answer to that issue is looked for on the grounds of the transitional provision contained in Article 241 paragraph 5 of the Constitution, which, according to the Council, must be construed to mean that proceedings initiated in common courts of law before the entry into force of the Constitution of the Republic of Poland against members of the Council of Ministers for criminal offences committed in connection with the duties of their office may be continued in those courts unless the Sejm has adopted a resolution on the case under Article 2 paragraph 4 of the Act on the Tribunal of State. One must, however, point to the fact that Article 241 paragraph 5 of the Constitution stipulates that 'proceedings (...) before the Tribunal of State initiated before the entry into force of the Constitution shall be continued in accordance with the constitutional provisions in force at the date of initiation of the proceedings'. The wording of that provision clearly shows that it refers to cases where proceedings before the Tribunal of State were already underway when the new Constitution took effect.

8. The current purport of Article 156 paragraph 1 of the Constitution does indeed impose upon the Sejm the duty to indict a member of the Council of Ministers charged with a constitutional delict also for the commission of a criminal offence, if there are grounds for that. In the opinion of the Constitutional Tribunal, the Sejm may not today, under the new Constitution, make conditional a joint considering of acts constituting both a constitutional delict and a criminal offence upon the adoption of a resolution on the expediency of the joint considering of those deeds, as it was the case under the previous Constitution. It is now the duty of the Sejm, and one may even speak – as the District Court does – of an obligation, to bring a member of the Council of Ministers to responsibility for a criminal offence, if he/she is to be charged with the commission of a constitutional delict. This does not mean, however, that a common court of law loses the competence to examine the case of the criminal offence as soon as the act becomes the object of indictment on grounds of constitutional delict or as soon as a preliminary motion is submitted to the Committee on Constitutional Responsibility. For if the Sejm failed for any reason to meet the obligation of joint considering of the responsibility for the constitutional delict and the criminal offence, then a common court of law would still remain competent with respect to the criminal case. Its competence over such cases would only cease after the Sejm adopted a resolution on bringing a member of the Council of Ministers to responsibility for a criminal offence before the Tribunal of State; moreover, in certain cases it would have to be „restored” if the Tribunal of State failed to adjudicate on the case of the criminal offence.

9. Such definition of the relationship between the Sejm and a common court of law in respect of the responsibility of members of the Council of Ministers for a constitutional delict

and a criminal offence, is to be derived from the principle of separation of and balance between the legislative, executive and judicial powers, as expressed in Article 10 of the Constitution. This is the founding principle of the structure of public authority in the Republic of Poland.

With respect to the previous Constitution, for the period before 31 December 1989, one could speak, at the most, on what state authority bodies functioned in the domains of specific powers, that is the legislative, the executive and the judicial one, and also on the type of detailed relations between the state authority bodies, determined by relevant provisions of the former Constitution.. One could not support, however, the opinion that in the above-mentioned period it explicitly expressed the principle of separation of and balance between the legislative, executive and judicial powers the way it is done in the current Constitution. Apart from the unambiguous wording of Article 10, the principle of separation of and balance between the powers is also expressed in the provisions on the role of the judiciary, and especially the common courts of law, in the administration of justice, contained in Articles 175 and 177 of the current Constitution.

The principle of separation of and balance between the powers also entails the mutual control by state authorities of their activities within the limits of their powers and an actual possibility of checks and balances between the powers. Therefore, since Article 177 of the Constitution sets forth the general competence of courts of law to administer justice, it means *ipso facto* that any exceptions to the general competence thus defined are not to be subjected to intensive interpretation. Thus, if for any reason an act covered by an indictment as a constitutional delict by a member of the Council of Ministers would not be prosecuted, in proceedings before the Tribunal of State, as a criminal offence, then the duty of a common court of law would be to pursue criminal proceedings within the framework of the general competence to administer justice. Otherwise, three constitutional principles would be infringed: the principle of legality (Article 7), the principle of equality before the law and equal treatment by public authorities (Article 32) and the principle of separation of and balance between the legislative, executive and judicial powers (Article 10 paragraph 1).

The wording of Article 156 paragraph 1 of the Constitution may not be taken to imply that the system of common courts of law loses its competence over members of the Council of Ministers for any reasons *ratione personae* or *ratione materiae*. This would have to imply that the constitution-maker introduced in that case a general deviation from the principle of performance of administration of justice by the system of common courts of law, replacing it not merely by the 'competence of other courts', which is allowed by Article 177 of the Constitution, but also by the competence of the Tribunal of State, which is not a court as long as it does not perform the administration of justice in a specific criminal case pursuant to an appropriate resolution of the Sejm. As it has been demonstrated above (p. 10), this would clash with the literal wording of the provision in question. In the opinion of the Constitutional Tribunal, another obstacle to that would also be the systemic interpretation of Chapter VIII of the Constitution.

Proceedings in constitutional and criminal responsibility before the Tribunal of State were introduced by the Act of 1982, adopted under a Constitution which made the Sejm prevail over other state authorities. It would thus be impossible today to assume, under the current Constitution which introduced the principle of separation of and balance between the powers, that the aim of the constitution-maker had been to simultaneously restrict the competence of common courts of law over members of the Council of Ministers who commit a criminal offence and to make the Tribunal of State a *sui generis* special court for citizens from that category, who would be charged with the commission of a criminal offence in connection with the duties of their office regardless of whether that charge was accompanied by the allegation of a constitutional delict. Such a solution would restrict the constitutional

position of the system of common courts of law and would constitute a specific relict from the period of formal superiority of the Sejm over the remaining state authorities.

10. Therefore, logical, linguistic, systemic and teleological interpretation of the provisions of Constitution analysed above dictates the opinion that until the Sejm indicts for a criminal offence a member of the Council of Ministers brought to responsibility for a constitutional delict, the common court of law remains competent to pursue criminal proceedings with respect to such an act.

That thesis makes it possible to assert all the more vigorously that the competence of common courts of law in cases of a criminal offence is also maintained when the constitutional delict did not become subject of proceedings before the Tribunal of State.

The assumption that the competence of a common court of law in proceedings concerning a criminal offence committed by members of the Council of Ministers continues as long as the Sejm does not include it in an indictment before the Tribunal of State along with the allegation of a constitutional delict, entails the assertion that Article 156 paragraph 1 of the Constitution did not introduce any new elements that would be relevant enough, as compared with Article 33b paragraph 2 of the previous Constitution, as to warrant the view on the existence of a conflict between Article 2 paragraph 4 of the Act on the Tribunal of State with Article 156 paragraph 1 of the Constitution in force, within the extent defined in the sentencing part of the judgement. It would be advisable to note, however – to fend off any doubts in interpretation – that responsibility for a criminal offence before a common court of law is only admissible when the Sejm failed to adopt a resolution on bringing the member of the Council of Ministers to responsibility.

For these reasons, it is appropriate to adjudicate as in the sentence.