

Judgment of 28<sup>th</sup> November 2001, [K 36/01](#)  
**TEMPORAL SCOPE OF PARLIAMENTARY IMMUNITY**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> Plenary session	<b>Dissenting opinions:</b> 0
<b>Legal provisions under review</b>		<b>Basis of review</b>
Statutory prohibition on holding Members of Parliament criminally liable, in respect of acts committed by them prior to obtaining their parliamentary mandate, without the consent of the Sejm or Senate  [Exercise of the Mandate of Deputy or Senator Act 1996: Article 8(1)]		Principle of equality Limitation of parliamentary immunity in relation to Members of Parliament against whom criminal proceedings were instituted prior to acquisition of their mandate  [Constitution: Article 32 and Article 105 (3)]

Within the Polish legal system, a number of categories of persons exercising important State functions enjoy privilege involving exclusions or limitations in respect of their liability for criminal offences (including petty and fiscal offences). Members of Parliament, i.e. Deputies and Senators, are, inter alia, within the categories of persons enjoying this privilege (Article 105, read in conjunction with Article 108, of the Constitution).

Article 105(1) of the Constitution stipulates that Members of Parliament shall not be held liable “for activities performed within the scope of a Deputy’s [or Senator’s] mandate during the term thereof nor following expiry thereof”. The aforementioned immunity may not be set aside. Accordingly, activities performed within the scope of a parliamentary mandate are encompassed within a so-called material immunity, specifically meaning that they may not be regarded as criminal offences. On the other hand, Article 105(2) of the Constitution provides for a so-called formal parliamentary immunity, i.e. a relative exemption from prosecution for criminal offences. A Deputy or a Senator may, by himself, grant consent to be held criminally liable (Article 105(4) of the Constitution); alternatively, such consent may be granted by the relevant House of Parliament (in relation to Deputies this would be the Sejm, i.e. the first chamber of Parliament, whereas in relation to Senators it would be the Senate), in accordance with principles and proceedings specified by statute (cf. Article 105(6) of the Constitution).

The constitutional regulation of formal parliamentary immunity is slightly different when concerning the situation where, on the day election results are announced, criminal proceedings are already pending against a newly elected Deputy, i.e. such proceedings were instituted prior to such a person having obtained his/her parliamentary mandate. In such circumstances, pursuant to Article 105(3) of the Constitution, those criminal proceedings should continue unless the Sejm (or Senate) requests suspension thereof until such time as the mandate of the Deputy (or Senator) has expired. Nevertheless, the Exercise of the Mandate of Deputy or Senator Act 1996 was adopted before the new Constitution entered into force, and Article 8(1) thereof provides that parliamentary immunity in respect of criminal liability shall also extend to acts com-

mitted by Deputies prior to having obtained their parliamentary mandate. Any criminal proceedings instituted prior to such a person (being suspected or already accused) having obtained their parliamentary mandate were, by virtue of law, suspended on the day this mandate was obtained, although the Sejm or the Senate could consent to hold such person criminally liable.

The aforementioned inconsistency between the new Constitution and the earlier 1996 Act was raised by various courts and public prosecutor's offices in connection with criminal cases pending against a few Deputies having obtained parliamentary mandates in the 2001 autumn elections.

Challenging Article 8(1) of the 1996 Act before the Constitutional Tribunal, the Commissioner for Citizens' Rights alleged that this provision failed to conform to Article 105(3) of the Constitution, which clearly limits the scope of parliamentary immunity in relation to persons with regard to whom proceedings have already been instituted prior to their election as a Deputy or Senator. The Commissioner submitted, moreover, that Article 8(1) was incompatible with an individual's right to equal treatment by public authorities, stemming from the constitutional principle of equality (Article 32(1)).

In addition to the ruling on the non-conformity of the reviewed provision, the Constitutional Tribunal reiterated that the direct application of the Constitution (in this case: Article 105(3)), in situations where a binding statute contains provisions contrary therewith (in this case: Article 8(1) of the Exercise of the Mandate of Deputy or Senator Act 1996), is impermissible (cf. points 7 and 8 below). In contradistinction to opinions permitting courts' incidental constitutional review of statutes in particular pending cases, the decisions of the Constitutional Tribunal consistently reiterate that, in such matters, the competence to rule that a statute is incompatible with the Constitution is vested solely in the Tribunal.

## RULING

**The challenged provision does not conform to Article 32 and Article 105(3) of the Constitution, since it requires the consent of the Sejm or Senate to continue with criminal proceedings instituted against persons prior to their election as a Deputy or Senator.**

## PRINCIPAL REASONS FOR THE RULING

1. The institution of parliamentary immunity guarantees the proper functioning of Parliament as an organ representing the nation. Parliamentary immunity may not be viewed as a subjective right vested in individual Members of Parliament, but rather as a privilege of the institution. There are no constitutional grounds for considering parliamentary immunity as a means for guaranteeing the legal immunity (*ergo* impunity) of Members of Parliament having infringed the law.
2. Since parliamentary immunity involves treating its beneficiaries in a manner different to citizens as a whole (i.e. privileged), the constitutional principle of equality (Article 32) requires that this privilege, vested in a limited group of persons, be based on a specific constitutional provision (currently: Article 105(3), read in conjunction with Article 108, Article 181, 206 and 211) or alternatively – when parliamentary immunity is vested by an ordinary statute (i.e. sub-constitutional) – be necessary for the proper re-

alisation of defined constitutional principles or values. Accordingly, any provisions concerning such types of privileges, as an exception to the principle of equality of accountability, may not be interpreted expansively.

3. When a provision of an earlier statute and a provision of the new Constitution deal with the same matter and are characterised by a similar degree of specificity (symmetry of content) it may be assumed that a derogation has occurred in relation to the former provision, in accordance with the rule *lex posterior derogat legi priori*.
4. Since 17<sup>th</sup> October 1997, when the new Constitution entered into force, the Polish legal system simultaneously includes the following provisions: Article 105(3) of the new Constitution (read in conjunction with Article 108) and Article 8(1) of the Exercise of the Mandate of Deputy or Senator Act 1996. These provisions regulate, in a contradictory manner, the functioning of formal parliamentary immunity in relation to acts performed prior to the obtaining of parliamentary mandate (i.e. prior to the day of election). Article 8(1) of the 1996 Act provides that, in such cases, parliamentary immunity shall apply as a matter of principle, making any continuation of criminal proceedings conditional upon the adoption by the Sejm or Senate of a resolution setting such immunity aside. Conversely, Article 105(3) of the Constitution provides that parliamentary immunity shall apply in such cases only where the appropriate House of Parliament considers this desirable and expresses this desire in a resolution requiring suspension of the proceedings. Despite the mutual inconsistency of these provisions, it is not possible to contemplate the loss of binding force of Article 8(1) of the 1996 Act, pursuant to the rule *lex posterior...*, since this provision applies to all acts performed prior to obtaining a parliamentary mandate, whether or not criminal proceedings had already been instituted against such a person prior to obtaining the mandate, whereas Article 105(3) of the Constitution refers only to the former situation (i.e. where such proceedings had actually begun). Furthermore, although the legislator introduced, under the new Constitution 1997, a few amendments to the 1996 Act, he did not decide to repeal the reviewed provision, which is considered by some courts as still binding. This fact also speaks in favour of ruling by the Constitutional Tribunal on the merits that Article 8(1) of the 1996 Act is unconstitutional.
5. There is no convincing justification for providing Members of Parliament with the immunity resulting from the privilege provided for in the scope and situations envisaged by Article 8(1) of the Exercise of the Mandate of Deputy or Senator Act 1996. Accordingly, such a privilege does not conform to Article 32 of the Constitution. It is not possible to speak of the potential to harass or blackmail Members of Parliament with the perspective of criminal liability, since criminal proceedings will already have been initiated and will be pending before they obtained their parliamentary mandate. In the event that there exists a danger that the pending proceedings would be abused for political reasons, the appropriate House of Parliament may require suspension of such proceedings (Article 105(3) of the Constitution).
6. Article 105(3) of the Constitution is sufficiently precise to be directly applied by Parliament, judicial authorities or public prosecution authorities. This means that criminal proceedings instituted against a particular person prior to his/her election as a Deputy or Senator must be continued, since the mere fact of exercising a parliamentary mandate does not, by itself, constitute grounds for suspending those proceedings (cf. Arti-

cle 22 of the Criminal Procedure Code); such proceedings may only be suspended on the basis of a resolution of the appropriate House of Parliament.

7. The direct application of the Constitution by the courts may result in the simultaneous application of constitutional provisions and statutory provisions or, alternatively, in pronouncing a decision whose only basis is the relevant constitutional provision. The simultaneous application of the Constitution and statute would, therefore, either mean that the constitutional provision, which is sufficiently concrete and precise, becomes – together with the statutory provision – the grounds for construing the legal norm constituting the basis of the ruling; or that the organ applying the law determines the meaning of the statutory provision, which conforms to the Constitution (as well as to general constitutional principles). Conversely, it is only permissible to use a constitutional provision as the sole grounds for judicial rulings where the relevant issue is not regulated by statute (which occurs only exceptionally within our legal system) and, furthermore, only where the relevant constitutional provision is characterised by a sufficient degree of specificity and precision.
8. The norm contained in Article 8(2) of the Constitution imposes a duty on the courts and other organs of public authority to directly apply constitutional provisions. Yet the Constitution does not vest in any public authority, save for the Constitutional Tribunal, the competence to rule on the inconsistency of a statute with the Constitution or to deny applying statutory provisions considered to be unconstitutional. In order to avoid the obligation to apply statutory provisions considered to be incompatible with the Constitution, the courts are required to refer a question of law to the Constitutional Tribunal (Article 193 of the Constitution). In the courts' judicial practise, there may be indicated two kinds of irregularities concerning the matter in question. The specific "deficiency of constitutional reflection" involves failing to notice reservations as to the constitutionality of the applied statute, even where the need to refer a question of law to the Tribunal seems to be self-evident. On the other hand, the phenomenon of the courts' specific "constitutional over-activity" involves the courts providing an independent ruling upon the unconstitutionality of the statute (i.e. in the absence of referring the question of law), in the guise of applying the Constitution directly.

#### Provisions of the Constitution

**Art. 8.** 1. The Constitution shall be the supreme law of the Republic of Poland.

2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

**Art. 32.** 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

**Art. 105.** 1. A Deputy shall not be held liable for activities performed within the scope of a Deputy's mandate during the term thereof nor following expiry thereof. Regarding such activities, a Deputy can only be held liable before the Sejm and, in a case where he has infringed the rights of third parties, he may only be proceeded against before a court with the consent of the Sejm.

2. From the day of announcement of the results of the elections until the day of the expiry of his mandate, a Deputy shall not be subjected to criminal liability without the consent of the Sejm.

3. Criminal proceedings instituted against a person before the day of his election as Deputy, shall be suspended at the request of the Sejm until the time of expiry of the mandate. In such instance, the statute of limitation with respect to criminal proceedings shall be extended for the equivalent time.

4. A Deputy may consent to be brought to criminal liability. In such instance, the provisions of paras. 2 and 3 shall not apply.

5. A Deputy shall be neither detained nor arrested without the consent of the Sejm, except for cases *in flagrante delicto* and in which his detention is necessary for securing the proper course of proceedings. Any such detention shall be immediately communicated to the Marshal of the Sejm, who may order an immediate release of the Deputy.

6. Detailed principles of and procedures for bringing Deputies to criminal liability shall be specified by statute.

**Art. 108.** The provisions of Articles 103-107 shall apply, as appropriate, to Senators.

**Art. 181.** A judge shall not, without prior consent granted by a court specified by statute, be held criminally liable nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person

**Art. 193.** Any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.

**Art. 206.** The President of the Supreme Chamber of Control shall not be held criminally liable nor deprived of liberty without prior consent granted by the Sejm. The President of the Supreme Chamber of Control shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The Marshal of the Sejm shall be notified forthwith of such detention and may order an immediate release of the person detained.

**Art. 211.** The Commissioner for Citizens' Rights shall not be held criminally liable nor deprived of liberty without prior consent granted by the Sejm. The Commissioner for Citizens' Rights shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The Marshal of the Sejm shall be notified forthwith of any such detention and may order an immediate release of the person detained.