79/8/A/2010

JUDGMENT

of 20 October 2010
Ref. No. P 37/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Bohdan Zdziennicki – Presiding Judge
Stanisław Biernat
Maria Gintowt-Jankowicz
Mirosław Granat
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz – Judge Rapporteur
Andrzej Rzepliński
Sławomira Wronkowska-Jaśkiewicz
Mirosław Wyrzykowski,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 20 October 2010, in the presence of the Sejm and the Public Prosecutor-General, the following joined questions of law referred by:

1) the Supreme Administrative Court, as to whether:

a) Article 31(1)(2) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws - Dz. U. of 2007 No. 63, item 424, as amended) is consistent with Article 2, Article 47, Article 51(3) and (4) in conjunction with Article 31(3) of the Constitution of the Republic of Poland,

b) Article 31(2), second sentence, of the Act referred to in point 1(a) above, is consistent with Article 2, and Article 78 in conjunction with Article 31(3) of the Constitution,

c) Article 32(2) of the Act referred to in point 1(a) above is consistent with Article 2, and Article 78 in conjunction with Article 31(3) of the Constitution,

d) Article 32(4) of the Act referred to in point 1(a) above is consistent with Article 45(1) in conjunction with Article 31(3) of the Constitution,

e) Article 32(5) of the Act referred to in point 1(a) above is consistent with Article 45(1) in conjunction with Article 31(3) of the Constitution,

f) Article 32(6) of the Act referred to in point 1(a) above is consistent with Article 32(1), Article 45(1) and Article 78 in conjunction with Article 31(3) of the Constitution,

g) Article 32(8) of the Act referred to in point 1(a) above is consistent with Article 32(1), and Article 45(1) in conjunction with Article 31(3) of the

* The operative part of the judgment was published on 29 October 2009 in the Journal of Laws - Dz. U. No. 63, item 533.

Constitution,

2) the Voivodeship Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny*), as to whether Article 31(1)(2) of the Act referred to in point 1(a) above, insofar as it provides for refusal to provide interested persons with documents concerning them, is consistent with Article 2, Article 31(3), Article 32(1) and Article 51(3) of the Constitution,

adjudicates as follows:

1. Article 31(1)(2) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws - Dz. U. of 2007 No. 63, item 424, No. 64, item 432, No. 83, item 561, No. 85, item 571 and No. 140, item 983, of 2009 No. 178, item 1375 as well as of 2010 No. 79, item 522 and No. 94, item 602), **in the version in force until 26 May 2010, i.e. prior to the entry into force of the Act of 18 March 2010 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents** (Journal of Laws – Dz. U. No. 79, item 522)**, is inconsistent with Article 2, Article 32(1), Article 47 as well as Article 51(3) and (4) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.**

2. Article 31(2), second sentence, and Article 32(2) of the Act of 18 December 1998 referred to in point 1 above, in the version indicated there, are inconsistent with Article 2 as well as Article 78 in conjunction with Article 31(3) of the Constitution.

3. Article 32(4) and (5) of the Act of 18 December 1998 referred to in point 1 above, in the version indicated there, is inconsistent with Article 45(1) in conjunction with Article 31(3) of the Constitution.

4. Article 32(6) of the Act of 18 December 1998 referred to in point 1 above, in the version indicated there, is inconsistent with Article 32(1), Article 45(1) and Article 78 in conjunction with Article 31(3) of the Constitution.

5. Article 32(8) of the Act of 18 December 1998 referred to in point 1 above, in the version indicated there, is inconsistent with Article 32(1) as well as Article 45(1) in conjunction with Article 31(3) of the Constitution.

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The admissibility of questions of law referred by the Supreme Administrative Court and the Voivodeship Administrative Court in the present case.

1.1. Pursuant to Article 193 of the Constitution *in fine*, the content of which is repeated in Article 3 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act): "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".

An essential characteristic of a question of law is its close relation to pending proceedings in an individual case and doubts that have arisen in the course of those proceedings. The occurrence of that characteristic is a necessary premiss of instituting and conducting proceedings concerning a question of law before the Constitutional Tribunal. Resorting to a question of law is possible from the moment of instituting court proceedings until the legally effective determination thereof. A question of law must fulfil the following premisses: 1) a premiss concerning the scope ratione personae, 2) a premiss concerning the scope ratione materiae as well as 3) a functional premiss.

A premiss concerning the scope ratione personae means that a question of law may be referred to the Constitutional Tribunal by a court. This premiss has been fulfilled in the present case.

As regards the premiss concerning ratione materiae, what must be the subject of a question of law is a specific legal norm, with regard to which the court referring the question has to show that allegations regarding its constitutionality or compliance with the law are so significant that there is a need to clarify them by the Constitutional Tribunal, in the course of review proceedings commenced by way of a question of law (cf. the judgement of the Constitutional Tribunal of 2 December 2008, Ref. No. P 48/07, OTK ZU No. 10/A/2008, item 173 and the jurisprudence indicated therein).

The functional premiss of a question of law is its relevance, i.e. a correlation which consists in a direct relation between the content of the challenged provision and the facts of a case in relation to which a given question of law has been referred. When accepting a question of law for examination, the Constitutional Tribunal considers whether its ruling on the constitutionality of the provision will have an effect on the determination of that case. Indeed, what may constitute the subject of a question of law is a provision the elimination of which from the legal system, as a result of a judgment delivered by the Constitutional Tribunal in that regard, will have an impact on the determination of the case in relation to which the question of law was referred.

Review proceedings commenced by way of a question of law constitutes a review of law which concerns a specific case, pending before a court, when in the context of that case doubts arise as to the legality or constitutionality of a provision which is to be applied in the case. It is the obligation of the court referring the question of law to indicate that relation. The lack of a functional premiss affects the jurisdiction of the Constitutional Tribunal, as it poses a formal obstacle to a complete and substantive review of constitutionality of challenged norms and leads to the discontinuation of proceedings on the grounds that issuing a judgment is inadmissible (cf. *inter alia* the decisions of the Constitutional Tribunal of: 29 March 2000, Ref. No. P 13/99, OTK ZU No. 2/2000, item 68; of 10 October 2000, Ref. No. P 10/00, OTK ZU No. 6/2000, item 195; of 27 April 2004, Ref. No. P 16/03, OTK ZU No. 4/A/2004, item 36; of 15 May 2007, Ref. No. P 13/06, OTK ZU No. 6/A/2007, item 57; of 6 November 2008, Ref. No. P 60/07, OTK ZU No. 9/A/2008, item 164; of 20 November 2008, Ref. No. P 18/08, OTK ZU Ref. No. 9/A/2008, item 168 as well as of 10 December 2008, Ref. No. P 39/08, OTK ZU No. 10/A/2008, item 187 as well as the judgments of the Constitutional Tribunal of: 6 March 2002, Ref. No. P 7/00, OTK ZU No. 2/A/2002, item 13; 30 May 2005, Ref. No. P 7/04, OTK ZU No. 5/A/2005, item 53). A substantive review commenced by a question of

law and conducted by the Constitutional Tribunal comprises not only the provisions the interpretation or application of which determine the case pending before the court referring the question (cf. the judgment of the Constitutional Tribunal of 16 November 2004, Ref. No. P 19/03, OTK ZU No. 10/A/2004, item 106)

The Tribunal, as an organ of public authority acting on the basis and within the limits of the law (Article 7 of the Constitution), has jurisdiction to assess whether the constitutionality of a provision challenged in a question of law is of significance to the content of a ruling which is to determine the issue in relation to which the question of law was referred. The tasks of the Constitutional Tribunal do not include pointing out to courts which provisions should be applied in a specific case; but – on the other hand – the thesis that it is only the court referring a question that decides whether a given provision may be the subject of a question of law could lead to non-compliance with Article 193 of the Constitution, by requiring the Tribunal to adjudicate on questions of law which concern issues that are not directly relevant as regards the determination of a case pending before a given court.

The fulfilment of all formal requirements by the court referring a question of law determines the Tribunal's obligation to examine the question of law.

1.2. Both in the literature on the subject and in the established jurisprudence of the Constitutional Tribunal, it is assumed that the subject of review proceedings commenced by way of a question of law is a provision which should constitute the legal basis of adjudication to be made by the court referring the legal question.

In the statement of reasons for the judgment of 24 October 2007, Ref. No. SK 7/06, the Constitutional Tribunal stated that, what should be understood by the term "legal basis", was "the entirety of legal provisions (norms) applied by an organ of public authority for the purpose of issuing an act of applying the law. The legal basis understood this way comprises not only the provisions of substantive law, but also procedural regulations, as well as, at the same time, basic systemic provisions which establish a given organ of public authority and equip it with appropriate powers within the scope of which a final decision is made with regard to the complainant (systemic provisions)" (Journal of Laws – OTK ZU No. 9/A/2007, item 108).

The provisions of law that may be subject to review by the Constitutional Tribunal, in the course of review proceedings commenced by way of a question of law, are legal provisions which will be used (applied) during court proceedings and which may be used by the court to issue an act of applying the law (a ruling) on the basis thereof. These may be both the provisions (norms) of procedural law, which set out the manner in which given proceedings are conducted, as well substantive law provisions (norms), on the basis of which it is possible to assess facts; lastly, these may be provisions (norms) governing powers and systemic provisions (norms).

The questions of law in the present case have been referred to the Constitutional Tribunal, due to the constitutional doubts of administrative courts of different instances in relation to the judicial examination of administrative decisions issued by an organ of public authority, in respect of its substantive and procedural validity.

In both questions of law referred to the Constitutional Tribunal, the Supreme Administrative Court and the Voivodeship Administrative Court challenged Article 31(1)(2) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws - Dz. U. of 2007 No. 63, item 424, as amended; hereinafter: the Act on the Institute of National Remembrance or the Act), which - due to its content - is a procedural provision; however, an organ of public authority, as a result of applying it, derives substantive law

content and, on that basis shapes, subjective rights in proceedings before the Institute of National Remembrance.

The Constitutional Tribunal draws attention to the fact that if "(...) the adjudicating court has constitutional doubts as to a provision which is to be a premiss of its ruling, it should in the first place aim at eliminating them by applying rules concerning interpretation and conflicts of law, which are well-known in the field of law, in particular – where possible – by way of interpretation which is consistent with the Constitution (cf. Z. Czeszejko-Sochacki, "Procedury kontroli konstytucyjności norm", [in:] *Studia nad prawem konstytucyjnym*, J. Trzciński and B. Banaszak (eds.), Wrocław 1997, p. 74 and the substantive pages; A. Kabat, *Pytania prawne do Trybunału Konstytucyjnego*, Białystok 1995). Such action fulfils the requirement that statutes should be interpreted in compliance with the Constitution, and it should precede the referral of a question of law to the Constitutional Tribunal under Article 193 of the Constitution (cf. W. Kręcisz, "Glosa do postanowienia SN z 7 czerwca 2002 r., I KZP 17/02", *Przegląd Sejmowy* Issue No. 5/2002, p. 134; B. Nita, "Glosa do wyroku TK z 16 stycznia 2001 r., P 5/00", *Palestra* Issue No. 7-8/2002, s. 210)

(…) A ruling of the Constitutional Tribunal, apart from the effects which have a general impact (*erga omnes*), is to make it possible to determine an individual case in relation to which a given question of law has been formulated. Therefore, the subject of a question of law may not be an issue of validity of interpretation raised in isolation assumed by the court with regard to provisions that are to serve as the legal basis of a ruling to be issued. The issue of interpretation of challenged regulations could, however, be of relevance for the determination of the case by the Constitutional Tribunal, if the court referring the question concluded that the interpretation adopted and well-established in jurisprudence remains contrary to the regulations included in a legal act which is higher in the hierarchy of sources of law (the decision of the Constitutional Tribunal of 15 May 2007, Ref. No. P 13/06).

In the present case, the issue of the well-established jurisprudence, based on the assumed interpretation, being contrary – according to the courts referring the questions of law – to the indicated constitutional principles of challenged Article 31(1)(2) of the Act on the Institute of National Remembrance, has clearly been emphasised in both questions of law.

2. *Acquis constitutionnel* as a starting point for the review of constitutionality in the case under examination.

2.1. The assessment of constitutionality of challenged Article 31(1)(2) of the Act on the Institute of National Remembrance may not be carried out by overlooking and leaving aside the jurisprudence of the Constitutional Tribunal, which was issued as a result of the examination of constitutionality of lustration statutes (the Act of 11 April 1997 r. on the disclosure of work or service in state security authorities or the cooperation with them in the years 1944-1990 of persons performing public functions, Journal of Laws - Dz. U. of 1999, No. 42, item 428, as amended; hereinafter: the Lustration Act of 11 April 1997; as well as the Act of 18 October 2006 on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents, Journal of Laws – Dz. U. No. 218, item 1592; hereinafter: the Lustration Act of 18 October 2006), in their subsequent versions, and in the Act on the Institute of National Remembrance, as well as the understanding of certain statutory definitions and terms assumed in the jurisprudence of the Constitutional Tribunal. This is even more necessary that the argumentation which underlay the judgment of the Constitutional Tribunal of

11 May 2007, Ref. No. K 2/07 (OTK ZU No. 5/A/2007, item 48) and the preceding judgement of 26 October 2005, Ref. No. K 31/04 (OTK ZU No. 9/A/2005, item 103), as well as their statements of reasons remain up-to-date and relevant in the present case. The assessment of conformity of Article 31(1)(2) of the Act on the Institute of National Remembrance, from the point of view of the higher-level norms included in Article 47 and Article 51(3) and (4) of the Constitution as well as in Article 2 of the Constitution, may not disregard the previous *acquis constitutionnel*. The remarks and statements made by the Constitutional Tribunal, in its entire present jurisprudence, as regards issues primarily concerning the Act on the Institute of National Remembrance and the lustration statutes, in most cases, are still up-to-date, in particular in the context of the same or similar normative scope of the provisions under examination. Legal matters regulated by the statutes overlap and, as the Tribunal stated in the case K 2/07, "in particular the Act on the Institute of National Remembrance constitutes, together with the Act of 18 October 2006 [the Lustration Act], one mechanism for institutional, functional and procedural reasons" (part III, point 4.1. of the statement of reasons", p. 544).

In the judgment in the case K 31/04, the Constitutional Tribunal – with reference to the legal provisions which were in force then – expressed its view on the right of access to documents held by the Institute of National Remembrance in the context of persons who are not aggrieved parties (within the meaning of the Lustration Act of 11 April 1997), as well as the restriction of that access. In the light of the Lustration Act of 11 April 1997, which was in force at that time, the Constitutional Tribunal adjudicated that Article 30(1) and Article 31(1) and (2) of the Act on the Institute of National Remembrance, in conjunction with Article 6(2) and (3) of that Act as well as in conjunction with Article 3 of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts (Journal of Laws - Dz. U. No. 153, item 1270, as amended; hereinafter: the Law on Proceedings Before Administrative Courts), insofar as they deprive interested persons – other than an aggrieved party – of the right to obtain information on documents concerning them, which are stored and available, as well as on the procedure to gain access to those documents, in accordance with Article 47 and Article 51(3) and (4) of the Constitution.

Article 30(1) of the Act on the Institute of National Remembrance, in the version it was challenged then, read as follows:

"Upon filing an application, an aggrieved party shall be provided with information on available documents which concern him or her".

By contrast, Article 31 used to read as follows: "An aggrieved party or a person with whom the aggrieved party has a relationship based on either close blood relations, adoption or marriage, or *de facto* marital cohabitation, shall be informed by the Institute of National Remembrance about documents which concern him/her and the procedure for being granted access thereto (paragraph 1).

"Upon filing an application, the aggrieved party shall be provided with the copies of documents concerning him or her" (paragraph 2).

In the case K 31/04, although substantive provisions which rule out access to documents, in the version in force prior to the entry into force of the new Lustration Act of 18 October 2006, were declared to be constitutional – however, in principle, under the condition that the interpretation of the provision specified in the operative part of the judgment is taken into account. This caused diversification of restrictions on access to documents held by the Institute of National Remembrance. The provisions reviewed in the case K 31/04 were deemed constitutional in the light of the interpretation thereof that was assumed; what was deemed constitutional was a restriction exclusively concerning documents which were held in the archives of the Institute of National Remembrance, and had been prepared by persons other than aggrieved parties (i.e. by the functionaries, staff

or collaborators of state security authorities). The documents prepared by those persons had to concern them, and access to the said documents was contingent on the submission of an additional statement on service, work or cooperation with regard to those authorities (Article 35(2) of the Institute of National Remembrance).

With reference to the ruling in the case K 31/04, which concerned Article 30(1) and Article 31(1) and (2) of the Institute of National Remembrance (in the version in force prior to the entry into force of the Lustration Act of 18 October 2006), when analysing the legal character the archives held by the Institute of National Remembrance as well as taking into account the aim of the Act which was specified in its preamble, the Tribunal drew, *inter alia*, the following conclusions: "It is obvious that the pursuit of indicated (...) objectives should be carried out with respect to subjective rights and constitutional guarantees. In other words, the Act on the Institute of National Remembrance - which in a positive way regulates, under the conditions set out therein, the access of the indicated eligible persons to the archives governed by the Act - may not violate the rights of other interested persons, which in particular arise from Article 47 and Article 51(3) and (4) of the Constitution, which constitute basic (...) higher-level norms for review" (part III, point 2.1. of the statement of reasons; p. 1230).

2.2. Adjusting the wording of the Act on the Institute of National Remembrance to the requirements of the judgment in the case K 31/04, as regards restrictions on access to documents and data collections was the subject of subsequent legislative amendments. As a result of the ruling issued in the case K 31/04, the legislator undertook actions which were to lead to taking the effects of that judgment in the content of Act on the Institute of National Remembrance. Article 39(18) of the Lustration Act of 18 October 2006 amended, *inter alia*, Article 30 and 31 of the Act on the Institute of National Remembrance. In the explanatory note for the Lustration Bill (Sejm Paper No. 360, 5th term of the Sejm), it was indicated that the Act on the Institute of National Remembrance "to a large extent requires the introduction of new regulations due to the ruling of the Constitutional Tribunal of 26 October 2006, in the case K 31/04". Given the rationality of the legislator's actions, it could be assumed that the intention behind the amendment was that the provisions of the Act on the Institute of National Remembrance, including the provisions of Articles 30 to 35, in the version determined on the basis of Article 39(18) of the Lustration Act of 18 October 2006, implemented the conclusions of the Constitutional Tribunal which had been presented in the judgment in the case K 31/04, in a way that allowed all interested persons to have access to the documents which concerned them from the archives of the Institute of National Remembrance. Enacted at that time, in particular the wording of Article 31 of the Act of the Institute of National Remembrance, and particularly the challenged paragraph 1(2), is the subject of examination in the present case.

2.3. In another case concerning "lustration", in the statement of reasons for the judgment of 11 May 2007, Ref. No. K 2/07, the Constitutional Tribunal stated that the Act on the Institute of National Remembrance constituted, together with the Lustration Act of 18 October 2006, one mechanism for institutional, functional and procedural reasons (cf. part III, point 4.1. of the statement of reasons). Therefore, if documents that were made and held by state security authorities in order to reflect cooperation with those authorities, within the meaning of Article 3a of the Lustration Act of 18 October 2006, become the basis for carrying out negative social, moral and political evaluation as well as taking negative legal measures with regard to persons obliged to submit lustration declarations as well as to other persons whose data were entered into records stored in relevant catalogues, in a democratic state ruled by law those persons have to be granted the right to protection

and defence of their dignity, honour and good reputation. Thus, they must have the right to exercise that protection by the right of access to the complete range of documents that concern them and that are used against them. Such a right may not be limited to access to personal data. It must take into account access to documents that remain in the archives of the Institute of National Remembrance, where it is alleged that persons concerned participated in the preparation of those documents. This is of significance, from the point of view of the content of those documents, conclusions drawn and formulated by the functionaries of state security authorities, on the basis of provided information, and in particular from the point of view of the element of "the infringement of "the freedoms and rights of persons and citizens" (cf. part III, point 1.8. of the statement of reasons).

Assessing the constitutionality of the Lustration Act of 18 October 2006 and the Act on the Institute of National Remembrance in the same year, the Constitutional Tribunal stated that Article 30(2)(2) of the Act on the Institute of National Remembrance was inconsistent with Article 2, Article 45 and Article 61 of the Constitution (point 50 of the operative part of the judgment), as well as Article 52a(5) of the Act on the Institute of National Remembrance was inconsistent with Article 2, Article 30, Article 31(3), as well as Article 42(1) and (3) of the Constitution in conjunction with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the European Convention on Human Rights) (point 54 of the operative part of the judgment).

Challenged in point 54 of the operative part of the judgment in the case K 2/07, Article 52a(5) of the Act on the Institute of National Remembrance had identical normative content as Article 30(2)(2) of the Act on the Institute of National Remembrance. The said issue was the subject of the decision of the Constitutional Tribunal of 28 May 2008 (Ref. No. K 2/07, OTK ZU No. 4/A/2008, item 75), which was issued due to the application of the Marshal of the Sejm, submitted in accordance with Article 74(1) of the Constitutional Tribunal Act, in which he had requested the Tribunal to settle doubts as to the content of the judgment in the case K 2/07, in particular with regard to Article 30(2)(2) of the Act on the Institute of National Remembrance. In the said decision, the Tribunal stated, *inter alia*, that: "(...) declared [to be unconstitutional] in point 50 of the operative part of Article 30(2)(2) of the Act on the Institute of National Remembrance has identical content as Article 52a(5) of the said Act, which has also been declared to be unconstitutional. What occurs here is an identical norm, although it is contained in different provisions). In the first and latter case, what is meant is the person that was regarded by state security authorities as a secret informer or assistant in the operational gathering of information. What concerns the issue of unconstitutionality of the catalogue specified in that provision is point 16.1 of part III of the statement of reasons for the judgment (OTK ZU No. 5/A/2007, pp. 576-577), and the content thereof concerns and comprises also that category of persons, as referred to in Article 30(2) of the Act on the Institute of National Remembrance. Indeed, it would be impossible to assume that the Tribunal differently treats the same category of persons, as to the identity of whom - in the light of the Act - there is no doubt, depending on the fact in which provision the category is referred to. Attention should be drawn to the fact that the Tribunal, while carrying out a review of constitutionality, adjudicates on norms. A norm which is constitutionally disqualified may be contained in an excerpt from in one or several subdivisions of the text (provisions), and one-time disqualification is relevant to all situations of possible application of the norm".

2.4. The above remark concerning the judgment in the case K 2/07 is of significance to the assessment of allegations raised in the present case.

The Constitutional Tribunal points out that the same category of persons referred to in Article 52a(5) and Article 30(2)(2) of the Act on the Institute of National Remembrance, has also been mentioned by the legislator in Article 31(1)(2) of the said Act, which has been challenged in the present case. The said provision was not the subject of adjudication in the case K 2/07, as it had not been challenged by the applicant. The lack of assessment of constitutionality of Article 31(1)(2) of the Act on the Institute of National Remembrance in the case K 2/07 may not justify and substantiate negative administrative decisions which were issued on the basis of that provision, only for the reason that the Constitutional Tribunal, bound by the scope of the application (Article 66 of the Constitutional Tribunal Act), did not adjudicate on a provision which had not been challenged.

Article 31(1)(2) of the Act on the Institute of National Remembrance is functionally related to the content of Article 30(2)(2) of the said Act and may have legal effects as long as it is synchronised in respect of its content with the content of Article 30(2)(2) and Article 52a(5) of the said Act. The declaration in the judgment of the Constitutional Tribunal that the norm contained in Article 30(2)(2) and Article 52a(5) of the said Act is unconstitutional has an impact on the content of the norm contained in Article 31(1)(2). In the present case, the Constitutional Tribunal definitely confirms the thesis formulated in the above-mentioned decision of 28 May 2008, in the case K 2/07, that one-time constitutional disqualification of a norm contained in an excerpt, or in one or several subdivisions of the text (provisions) is relevant to all situations of possible application of the norm.

Indeed, it should borne in mind that Article 31 of the Act on the Institute of National Remembrance specifies merely the form of refusal to consider an application for access to the copies of documents concerning a given applicant; whereas Article 30, which immediately precedes it, provides for a subjective right of access to documents, which is a more specific statutory formulation of the constitutional principle that everyone shall have a right of access to official documents and data collections, set out in Article 51(3) of the Constitution. It is obvious that a provision which specifies merely a procedural form of determining the right, in the case of an administrative decision, may not be a basis for determining and specifying the substantive content of the right itself, its limits and the terms of exercise thereof.

2.5. As a result of the judgment of the Constitutional Tribunal, in the case K 2/07, several provisions of the Lustration Act of 18 October 2006 and the Act on the Institute of National Remembrance have been eliminated from the legal system, due to being declared unconstitutional. Since the judgment in the case K 2/07 became legally effective the legislator has amended both statutes five times. However, the amendments have not concerned Article 31(1)(2) of the Act on the Institute of National Remembrance.

The Constitutional Tribunal has on a number of occasions emphasised in its jurisprudence that the Rules on Legal Drafting of 20 June 2002 (Journal of Laws - Dz. U. No. 100, item 908; hereinafter: the Rules on Legal Drafting) constitute a certain canon which should be respected by the legislator. According to those rules, statutory provisions should be formulated in such a way that they would clearly present the intentions of the legislator to the addressees of the norms contained therein, i.e. they should be precise, communicative and adequate to the legislator's objective (cf. the judgment of 21 April 2009, Ref. No. K 50/07, OTK ZU No. 4/A/2009, item 51).

Article 31(1)(2) of the Act on the Institute of National Remembrance is a procedural provision which defines the way of fulfilling the obligation of an organ of public administration, in the case where a citizen undertakes actions in order to exercise his/her subjective right which is guaranteed by an ordinary statute as well as by the

Constitution. The Constitution provides for imposing a restriction on a subjective right in accordance with terms set out in a statute. The legislator may not ignore a new legal situation stemming from a ruling by the Constitutional Tribunal if, as a result of a constitutional review that has been carried out, it turns out that such a restriction does not meet the requirements arising from Article 2, Article 45 and Article 61 of the Constitution (Article 30(2)(2) of the Act on the Institute of National Remembrance), as well as from Article 2, Article 30, Article 31(3), Article 42(1) and (3) of the Constitution in conjunction with Article 6 of the European Convention on Human Rights (Article 52a(5) of the Act on the Institute of National Remembrance), and indicates that there is no correlation between the regulations of a subjective right and procedural provisions.

3. The date of 27 May 2010 marked the entry into force of the Act of 18 March 2010 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents (Journal of Laws - Dz. U. No. 79, item 522; hereinafter: the amending Act of 18 March 2010).

3.1. Due to the amendments introduced by Article 1(9)(a) and (b) as well as Article 1(10) of the amending Act of 18 March 2010, Article 30(1) and (2), Article 31(1) and (2) as well as Article 32(1) of the amending Act on the Institute of National Remembrance have new wording:

– Article 30(1): "Any person shall have the right to apply to the Institute of Remembrance for access to the Institute's documents which concern him or her".

– Article 30(2): "The Institute of Remembrance shall grant access to the documents referred to in paragraph 1, which concern the applicant, or to the copies thereof if the state of the documents does not allow for such access, or if access to the same documents is requested by a number of persons at the same time, or when the Institute possesses only the copies of the documents, provided that:

1) the Institute of Remembrance shall grant access to the documents referred to in paragraph 1, which concern the applicant and which have been prepared by the applicant, or with his/her involvement, as part of his/her work or service provided for state security authorities, or as part of his/her tasks carried out as a secret informer or assistant in the operational gathering of information;

2) (expired)".

– Article 31(1): "Access to the copies of documents in the case referred to in Article 30(2)(1) shall be granted by the Institute of Remembrance by way of administrative decision".

– Article 31(2): "An appeal against the decision referred to in paragraph 1 shall be lodged with the President of the Institute of Remembrance".

– Article 32(1): "After examining the appeal referred to in Article 31(2), the President of the Institute of Remembrance shall issue a decision in which:

1) the decision referred to in Article 31(1) shall be confirmed;

2) the decision referred to in Article 31(1) shall be revoked and the case shall be referred to the organ of first instance for re-examination".

3.2. The amending Act of 18 March 2010 entered into force before the judgment of the Constitutional Tribunal was issued. As a general rule, pursuant to Article 39(1)(3) of the Constitutional Tribunal Act, the Tribunal shall, at a sitting in camera, discontinue proceedings if a given normative act has ceased to have effect to the extent challenged

prior to the delivery of a judicial decision by the Tribunal. An exception to that rule is provided for in Article 39(3) of the Constitutional Tribunal, in accordance with which: "The regulation stated in item 1 point 3 is not applied if issuing a judgement on a normative act which lost its validity before issuing the judgement is necessary for protecting constitutional freedoms and rights". This rule has also been applied to questions of law (cf. e.g. the decisions of the Constitutional Tribunal of: 19 April 2006, Ref. No. P 12/05, OTK ZU No. 4/A/2006, item 49, 18 April 2007, Ref. No. P 12/04, OTK ZU No. 4/A/2007, item 44, as well as the judgment of the Constitutional Tribunal of 22 September 2009, Ref. No. P 46/07, OTK ZU No. 8/A/2009, item 126).

Pursuant to Article 133(1) of the Law on Proceedings Before Administrative Courts, the Voivodeship Administrative Court has an obligation to issue a judgment "on the basis of records of the case", i.e. on the basis of the facts of the case and the legal provisions in force at the time of undertaking an action or causing negligence which is the subject of a lawsuit; and in the present case – at the time of issuing the reviewed decisions of the President of the Institute of Remembrance. "What is authoritative is legal provisions in force at the time of undertaking an action or causing negligence which is the subject of a lawsuit. However, the court is also obliged to take into account a judgment by the Constitutional Tribunal concerning the non-conformity of a statute or another normative act to the Constitution, a statute or an international agreement" (B. Adamiak, J. Borkowski, *Postępowanie administracyjne i sądowoadministracyjne*, Warszawa 2006, pp. 445-446 and the jurisprudence of the Supreme Administrative Court).

Except for the provision about its entry into force, the amending Act of 18 March 2010 contains no transitional provisions which would allow for departing from that rule and would provide for adjudicating on the basis of a new statutory regulation by the Voivodeship Administrative Court. Refraining from adjudicating on a question of law of the Supreme Administrative Court is even more undesirable. Indeed, the said court examines a cassation appeal and, pursuant to Article 183(1) of the Law on Proceedings Before Administrative Courts, "shall hear the case within the limits of the cassation appeal".

As the Constitutional Tribunal has noted in the case P 46/07, "an administrative court examines whether an administrative decision is consistent with the law in force on the day of the issue of the decision. By way of referring a question of law to the Constitutional Tribunal, the administrative court signals that it has constitutional doubts as to the legal basis of the issued decision. In such a case, in accordance with the well-established jurisprudence of the Tribunal, the administrative court signals its readiness to depart from the principle of *tempus regit actum* in a situation where a challenged provision would be regarded as inconsistent with the regulations of the Constitution". The only factor modifying legal provisions in a given case, and in particular as regards a case examined by the Supreme Administrative Court in the course of proceedings commenced by way of a cassation appeal, could be a ruling issued by the Constitutional Tribunal, concerning the non-conformity of a challenged provision to the Constitution (cf. e.g. the judgment of the Constitutional Tribunal of 13 March 2007, Ref. No. K 8/07, OTK ZU No. 3/A/2007, item 26).

The Constitutional Tribunal finds it crucial - for the protection of the constitutional rights and freedoms of persons who are complainants in proceedings before courts referring questions of law - to examine the constitutionality of challenged provisions in accordance with Article 39(3) of the Constitutional Tribunal Act.

4. Article 31(1) and (2) of the Act on the Institute of National Remembrance as the subject of allegation in the questions of law referred by the Supreme Administrative Court and the Voivodeship Administrative Court in Warsaw.

4.1. In its question of law, the Supreme Administrative Court has challenged, *inter alia*, Article 31(1)(2) of the Act on the Institute of National Remembrance, as regards its conformity to Article 2, Article 47, and Article 51(3) and (4) in conjunction with Article 31(3) of the Constitution.

The question of law of the Voivodeship Administrative Court in Warsaw challenges only the conformity of Article 31(1)(2) of the Act on the Institute of National Remembrance, insofar as it provides for refusal to grant interested persons access to documents which concern them, to Article 2, Article 31(3), Article 32(1) and Article 51(3) of the Constitution.

Article 31 of the Act on the Institute of National Remembrance reads as follows:

"1. Refusal to consider the application referred to in Article 30, insofar as it concerns granting access to documents:

1) which have been prepared by the applicant, or with his/her involvement, as part of his/her work or service provided for state security authorities, or as part of his/her tasks carried out as a secret informer or assistant in the operational gathering of information,

2) from the content of which it follows that the applicant:

a) was regarded by state security authorities as a secret informer or assistant in the operational gathering of information,

b) took on a commitment to provide information to a state security authority or to provide any assistance to that authority as regards operational activities,

c) carried out tasks assigned by a state security authority, and in particular provided information to that authority,

is in the form of an administrative decision. The said decision is tantamount to refusal to exercise rights set out in Article 33(2).

2. The decision referred to in paragraph 1 should include factual and legal substantiation. It may be possible to refrain from providing factual substantiation or limit such substantiation, insofar as disclosing information to the applicant makes it impossible to implement the Act of 18 October 2006 on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents.

3. "An appeal against the decision referred to in paragraph 1 shall be lodged with the President of the Institute of Remembrance"

As all the participants emphasise in the proceedings in the present case, an important factor which is of significance for the assessment of constitutionality of challenged Article 31(1)(2) of the Act on the Institute of National Remembrance is content equivalence between that provision and Article 30(2)(2) of the Act on the Institute of National Remembrance, which was declared to be inconsistent with Article 2, Article 45 and Article 61 of the Constitution in the judgment in the case K 2/07 (point 50 of the judgment).

Article 30(1) and (2) of the Act on the Institute of National Remembrance, in the version submitted to the Constitutional Tribunal for assessment in the case K 2/07, read as follows:

"1. Any person shall have the right to apply to the Institute of Remembrance to be granted access to the copies of documents which concern him or her.

2. The Institute of Remembrance shall grant access to the documents referred to in paragraph 1, which concern the applicant, except for the documents:

1) which have been prepared by the applicant, or with his/her involvement, as part of his/her work or service provided for state security authorities, or as part of his/her tasks carried out as a secret informer or assistant in the operational gathering of information

2) from the content of which it follows that the applicant:

a) was regarded by state security authorities as a secret informer or assistant in the operational gathering of information,

b) took on a commitment to provide information to a state security authority or to provide any assistance to that authority as regards operational activities,

c) carried out tasks assigned by a state security authority, and in particular provided information to that authority".

The Constitutional Tribunal declared Article 30(2)(2) of the Act on the Institute of National Remembrance to be unconstitutional, which resulted in eliminating that provision, within the challenged scope, from the legal system as of the day of publication of the judgment in the Journal of Laws – Dz. U. No. 85, under item 571. The publication took place on 15 May 2007.

4.2. The Act on the Institute of National Remembrance (in the version in force until 26 May 2010) mentions a number of persons who, on the basis of the Act, have access to the archives covered by the Act, which depends on the legal position of particular categories of persons. Chapter 4 of that Act regulates the issues related to "granting access to documents by the Institute of Remembrance", including procedural rules for granting access to the copies of documents concerning persons who apply for them.

With reference to the content of the questions of law referred by the Supreme Administrative Court and the Voivodeship Administrative Court, what is of significance is the above-mentioned Article 30 of the Act on the Institute of National Remembrance, which grants anyone the right to apply to the Institute of Remembrance for access to the copies of documents which concern him/her (Article 30(1)), to which challenged Article 31(1) of the Act on the Institute of National Remembrance refers.

Article 30(1) of the Act on the Institute of National Remembrance provides for the exercise of a constitutional subjective right, mentioned in Article 51(3) of the Constitution, which guarantees that everyone shall have a right of access to official documents and data collections concerning himself/herself. The said right has been restricted in Article 30(2)(1), which contains a substantive law premiss of refusal to grant access to documents held in the archives of the Institute of National Remembrance. The restriction regarded the copies of documents which have been prepared by the applicant, or with his/her involvement, as part of his/her work or service provided for state security authorities, or as part of his/her tasks carried out as a secret informer or assistant in the operational gathering of information.

Challenged in the questions of law referred by the Supreme Administrative Court and the Voivodeship Administrative Court in Warsaw, Article 31(1)(2) of the Act on the Institute of National Remembrance is procedural in character and specifies the form of the refusal to consider an application for access to documents. The refusal is in the form of an administrative decision. However, the said provision not only indicates the form of the refusal, but also mentions the premisses of refusal to grant access to requested documents, which as regards their content correspond to the substantive premisses included in Article 30(2)(2) of the Act on the Institute of National Remembrance, which is no longer in force, for it was declared by the Constitutional Tribunal to be inconsistent with the Constitution. Consequently, as the two courts referring the questions of law have stressed, Article 31(1)(2) – despite its procedural character – in practice constitutes the substantive

law basis of a decision refusing to grant access to the copies of documents indicated in the decision.

4.3. In Article 51, the Constitution stipulates that everyone shall have a right of access to official documents and data collections concerning himself/herself. Pursuant to Article 51(3), second sentence, the Constitution provides for a possibility of a statutory restriction on the subjective right set out in Article 51(3) *in principio* (access for "everyone" to documents and data collections). However, this is admissible only for the reasons indicated in Article 31(3) of the Constitution, i.e. when this is necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Everyone's right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute (Article 51(4)), alluding to the right to privacy expressed in Article 47 of the Constitution and elaborating on that right, may not be effectively limited to a certain category of persons. Such information autonomy is applicable unconditionally, due to the guarantee character of the right to legal protection of honour and good reputation of the individual. It may be subject to restriction solely for the reasons set out in Article 31(3) of the Constitution.

In the case K 2/07, the Tribunal stated that "no interest of the state may sanction and justify maintaining untrue or incomplete information, or information acquired by means contrary to statute, in official documents and data collections. Unlike Article 51(3), Article 51(4) of the Constitution does not contain authorisation to impose a statutory restriction on the right indicated therein. However, this does not mean that Article 31(3) of the Constitution has no application here. Due to the double character of collected documents and data - which not only provide information about a given person, but which are also historical documents containing knowledge about types and methods of activity carried out by the state security authorities of the totalitarian state – deleting the information is out of the question, and such a view is justified by Article 31(3) of the Constitution (part III, point 2.8. of the statement of reasons).

4.4. The Tribunal also emphasised that: "in the case of statutory regulations which are to be based on the indicated principles, what becomes significant is the proper application of the constitutional principle of proportionality, understood not only as a component of the constitutional principles that stipulate the lack of restriction on the rights and freedoms of the individual, but also as a systemic principle, which is an immanent ingredient of the concept of a democratic state ruled by law. The said principle sets out all the necessary elements of statutory regulation, such as – for instance – the scope ratione personae and ratione materiae of the regulation, the depth of the state's interference with the matters of individuals and society, or the character and negative consequences of sanctions" (part III, point 2.9. of the statement of reasons for the judgment in the case K 2/07). Those views remain up-to-date, in the context of the constitutional review conducted in the present case, especially that a restriction may be imposed on constitutionally guaranteed rights only in the instances set out in Article 31(3) of the Constitution. The catalogue of premisses mentioned in the provision has a closed character and may not be interpreted in a broadening way (cf. the judgment of the Constitutional Tribunal of 25 February 1999, Ref. No. K 23/98, OTK ZU No. 2/1999, item 25).

The access to "official documents and data collections concerning" a given person is subject to protection arising from Article 51(3) of the Constitution. The restriction on "everyone's" right of access to official documents and data collections concerning

himself/herself may only be imposed by a statutory regulation. The said restrictions may not be imposed in a random way, and in particular – a general principle expressed in Article 31(3) of the Constitution is not rescinded here. Restrictions on the constitutional right (of access to documents, Article 51(3) of the Constitution) must be justified by the principle of proportionality (Article 31(3) of the Constitution). Therefore, interference with the realm of the individual's rights requires determining whether there is a need to protect another (constitutional) interest that is of higher significance than the compromised interest of the individual (cf. K. Wojtyczek, "Zasada proporcjonalności", [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, B. Banaszak and A. Preisner (eds.), Warszawa 2002, p. 686).

The essence of prohibition against excessive interference is the acknowledgement that the legislator may not introduce restrictions which go beyond a certain degree of oppressiveness, and in particular those that distort the proportion of the degree of infringement of the individual's rights to the significance of the public interest which is to be protected in this way. In this general rendering, the prohibition against excessive interference plays a protective role in relation to all the rights and freedoms of the individual (although, obviously, the criteria of "excessiveness" must be relativised, *inter alia*, due to the character of particular rights and freedoms). The addressee of the prohibition is the state, which should undertake actions in relation to the individual when there is a real need for that. Therefore, the said prohibition becomes one of the manifestations of the principle of protection of citizens' trust in the state and its laws, and thus – one of requirements that a democratic state ruled by law imposes on its organs (cf. the ruling of 26 April 1995, Ref. No. K 11/94, OTK of 1995, part I, item 12 and the judgment of 8 July 2008, Ref. No. K 46/07, OTK ZU No. 6/A/2008, item 104).

"Necessity in a democratic state ruled by law", as one of the premisses of restricting rights and freedoms, arising from the requirements to guarantee security and public order, to protect the natural environment, health or public morals, or the rights and freedoms of other persons, is justified as long as the imposed restrictions are consistent with the principle of proportionality; what follows from the said principle is that a measure aimed at restricting rights or freedoms should serve the achievement of the set objective, at the same time taking into account the requirement of adequacy and the absolute prohibition against interference with the essence of the guaranteed right. As it follows from the jurisprudence of the Constitutional Tribunal, the concept of "essence" of the rights and freedoms is based on the assumption that, within the scope of any specific right or freedom, certain basic elements may be identified, without which such a right or freedom could not exist at all, as well as certain additional elements which may be rendered and modified in various ways by the legislator, without undermining the identity of a given right or freedom (cf. the judgment of the Constitutional Tribunal of 12 January 2000, Ref. No. P 11/98, OTK ZU No. 1/2000, item 3). By contrast, proportionality means that the significance of an interest, in relation to which the diversification of the addressees of the norm has been introduced, should remain appropriately proportionate to the significance of interests which will be infringed as a result of unequal treatment of similar subjects (cf. the judgment of the Constitutional Tribunal of 31 March 2008, Ref. No. P 20/07, OTK ZU No. 2/A/2008, item 31).

With relation to the above remarks, what needs to be considered is the application of Article 31(3) of the Constitution as regards restriction imposed on access to documents concerning the applicant. At the same time, what should be taken into account is the circumstance - frequently repeated in the jurisprudence of the Constitutional Tribunal - that the Constitutional Tribunal is not an organ of the state established to review the purpose and aptness of solutions adopted by the legislator. The starting point of adjudication by the

Tribunal is always the assumption about the rationality of the legislator's actions and the presumption of constitutionality.

In the opinion of the Tribunal, the starting point for assessment of the constitutionality of the challenged provisions of the Act on the Institute of National Remembrance is Article 30(1) of the Act on the Institute of National Remembrance, in which the legislator guaranteed a subjective right which entails that: "Any person shall have the right to apply to the Institute of Remembrance to be granted access to the copies of documents which concern him or her". The analysis of further procedural regulations that constitute the subject of the allegation in the present case leads to the conclusion that they make it impossible to effectively exercise the right guaranteed by the statute and the Constitution. The challenged procedural regulations actually result in refusal to grant access to documents concerning the applicant, and the motives for such refusal and motives for court rulings delivered in the course of review proceedings concerning an administrative decision, are only disclosed to a party that is in possession of the documents. That party is the Institute of National Remembrance, which carries out the tasks of an organ of public authority. A similar restriction applies to court proceedings before the Voivodeship Administrative Court and the Supreme Administrative Court, as a result of ruling out the application of Article 106(2) of the Law on Proceedings Before Administrative Courts, with the public hearing of a case at the same time guaranteed by the Constitution (Article 45(1)).

The view has been formulated in the jurisprudence of the Constitutional Tribunal that in the event of a dispute between an individual and an organ of public authority over the scope or manner of exercising rights and freedoms, the legal basis of adjudication on that dispute may not be in isolation from constitutional regulations (cf. the judgments of the Constitutional Tribunal of: 19 May 1998, Ref. No. U 5/97, OTK ZU No. 4/1998, item 46; 11 May 1999, Ref. No. P 9/98, OTK ZU No. 4/1999, item 75; 6 March 2000, Ref. No. P 10/99, OTK ZU No. 2/2000, item 56). The constitutional regulation guarantees that everyone shall have the right of access to documents concerning himself/herself (Article 51(3)), the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute (Article 51(4)), or eventually the right to legal protection of private and family life, of his/her honour and good reputation (Article 47).

Article 7 of the Lustration Act of 18 October 2006 introduces an obligation to submit lustration declarations, revealing facts from the past as regards work, service or cooperation with state security authorities, as one of measures guaranteeing the achievement of the objectives of the Lustration Act. Apart from that obligation, there is also a need to disclose information held in the archives containing documents of the security apparatus, in order to safeguard the mechanisms of functioning of a democratic state against threats arising from the totalitarian past.

What follows from Articles 47 and 51 of the Constitution is the principle of information autonomy. Information concerning citizens may be published (disclosed) only to the extent this is necessary in a democratic state ruled by law, taking into account the principle of proportionality (Article 31(3) of the Constitution). Above all, however, an individual has the right to legal protection of his/her private and family life, of his/her honour and good reputation, as well as the right to demand the correction of untrue or incomplete information, or information acquired by means contrary to statute.

4.5. Restricting access to documents concerning persons who were mentioned in unconstitutional Article 30(2)(2), by imposing that restriction in a procedural form (Article 31(1)(2)), and not in a substantive law form, and in a situation where the group of persons has been considerably expanded – due to the extension of the concept of

cooperation in Article 3a(2) of the Lustration Act of 18 October 2006 – leads to unauthorised interference with the information autonomy of the individual, and a restriction on measures in the basis of which the individual could exercise the constitutionally guaranteed right to demand correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute. This, in turn, is tantamount to the infringement of Article 51(4) of the Constitution and Article 47 of the Constitution, which is related thereto and which expresses the principle of legal protection of privacy.

The publication of the said catalogues updates the legal protection of the individual's private and family life, her/his honour and good reputation, as well as his/her right to demand the correction of untrue or incomplete information, or information acquired by means contrary to statute. At the same time, measures are applied which aim at restricting the individual's access to documents containing information published in the catalogues of the Institute of National Remembrance. The restriction on access to documents, in the case of persons whom the documents concern, is excessive and disproportionate within that scope (Article 31(3) of the Constitution), as the essence of the rights and freedoms referred to in Article 51(4) and Article 47 of the Constitution has been violated with regard to those persons.

For these reasons, the Constitutional Tribunal concludes that a restriction on access to official documents and data collections held in the archives of the Institute of the National Remembrance, whom the documents and date collections concern, on the basis of Article 31(1)(2) of the Act on the Institute of the National Remembrance, is inconsistent with Article 47, with Article 51(3) and (4) in conjunction with Article 31(3) of the Constitution.

4.6. What follows from the principle of a state ruled by law (Article 2 of the Constitution) is the requirement of appropriate legislation within the scope of powers vested in the organs of the state, performing certain functions by law, and thus systemic appropriateness as regards the principles governing the organisation of the state at the different level of its activity. In the jurisprudence of the Constitutional Tribunal, there is a well-established view that the principles arising from Article 2 of the Constitution should be observed in a particularly restrictive way when it comes to legal acts concerning fundamental values protected by the Constitution, and in particular the rights and freedoms of individuals and citizens. The Constitutional Tribunal has on a number of occasions emphasised that the ordinary legislator should be required to diligently observe directives arising from the principles of appropriate legislation, especially when imposing legal restrictions on the realms which have been regarded as crucial by the legislator himself. The requirement to observe the principles of appropriate legislation by the legislator is functionally linked with the principles of legal confidence and security as well as the principle of protection of citizens' trust in the state and its laws. Apart from procedural aspects, the principles of appropriate legislation also comprise the requirement of sufficient specificity of provisions, which should be formulated correctly, precisely and clearly.

Also, the principle of appropriate legislation comprises the stage of formulating objectives, which is basic from the point of view of legislative process; the objectives are to be achieved by means of establishing a certain legal norm. They constitute the basis of assessment whether provisions, in their final version, appropriately render a given norm and whether they are proper for the achievement of a set objective. The unclear and imprecise wording of a legal provision results in the uncertainty of the addressees thereof, as regards the rights and obligations, in particular where it grants excessive freedom to the organs of public authority responsible for applying the law (or even allows latitude) as

regards interpretation which – within the scope of issues regulated in an unclear and imprecise way – may lead to a situation where the said organ of public authority will assume the role of the law-maker. Therefore, by formulating the content of provisions in an unclear way, the legislator may not grant excessive freedom to the organs of public authority responsible for applying the law as regards determining the scope ratione personae and ratione materiae of provisions. This assumption may be generally called the principle of statutory specificity of interference with the realm of rights and obligations of the addressees of a legal norm. When the lack of clarity of provisions exceeds a certain level, it may constitute a separate premiss of declaring the non-conformity of the provisions to the principle of a state ruled by law, expressed in Article 2 of the Constitution

For the assessment of conformity of the wording of a given legal provision to the requirements of appropriate legislation, three general assumptions are of significance. Firstly, every provision should be formulated in a way which allows to clearly determine who and in what situation is subject to restriction. Secondly, a provision should be precise enough to ensure the unified interpretation and application thereof.

Thirdly, a provision should be formulated in such a way that the scope of its application would comprise only those situations where the legislator, acting rationally, intended to introduce a regulation restricting the exercise of constitutional rights and freedoms (cf. the judgment of the Constitutional Tribunal, Ref. No. K 50/07 and the jurisprudence indicated therein).

Bearing in mind the allegations which have been raised by the courts referring the questions of law, with regard to Article 31(1)(2) of the Act on the Institute of National Remembrance, the Tribunal states that the way of formulating the challenged provision is unclear and imprecise to such an extent that, consequently, in practice of the application thereof, all three assumptions have been infringed.

The relation between Article 30(2)(2) and Article 52a(5) of the Act on the Institute of National Remembrance, which were earlier declared to be unconstitutional, and Article 31(1)(2) of the Act on the Institute of National Remembrance, definitely allows to state that the legislator's objective was not to introduce, in the challenged provision, a norm which would contradict the other two and from which – as a procedural provision – a subjective right may be derived, as well as a restriction on the said right in a way which would be inconsistent with substantive law Article 30(2)(2) of the Act on the Institute of National Remembrance.

In the provisions that were in force prior to the issue of the judgment in the case K 2/07, with reference to Article 31(1) of the Act on the Institute of National Remembrance, it may be stated that part of the provision which is in its point 2 constituted legislative negligence that consisted in repeating the same normative content in several provisions of the same Act. The repetition contained in Article 31(1)(2) of the Act on the Institute of National Remembrance could be treated as not more than information about existing norms. Leaving the norm of Article 31(1)(2) of the Act on the Institute of National Remembrance, which partly corresponded to the norm expressed in provisions declared by the Constitutional Tribunal to be unconstitutional, after the judgment in the case K 2/07, still remained legislative negligence that was contrary to the Rules on Legal Drafting, and in particular to § 25 and § 27 of the Rules.

5. Article 31(2) and Article 32 of the Act on the Institute of National Remembrance as the subject of the allegation in the questions of law referred by the Supreme Administrative Court.

5.1. Article 31(2) of the Act on the Institute of National Remembrance (in the version in force until 26 May 2010), which have been challenged in the question of law referred by the Supreme Administrative Court, reads as follows: "The decision referred to in paragraph 1 should include factual and legal substantiation. It may be possible to refrain from providing factual substantiation or limit such substantiation, insofar as disclosing information to the applicant makes it impossible to implement the Act of 18 October 2006 on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents". The Supreme Administrative Court argues that the second sentence of that provision infringe Article 2, and Article 78 in conjunction with Article 31(3) of the Constitution.

Article 32 reads as follows:

"1. After examining the appeal referred to in Article 31(3), the President of the Institute of Remembrance shall issue a decision in which:

1) the decision referred to in Article 31(1) shall be confirmed;

2) the decision referred to in Article 31(1) shall be revoked and the case shall be referred to the organ of first instance for re-examination".

2. It may be possible to refrain from providing factual substantiation or limit such substantiation, insofar as disclosing information to the applicant makes it impossible to implement the Act of 18 October 2006 on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents.

3. The applicant shall have the right to lodge a complaint against the decision referred to in paragraph 1(1) with an administrative court, within the time limit set out in Article 53 of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts (...).

4. The administrative court shall consider the complaint at a sitting in camera.

5. The provision of Article 106(2) of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts shall not apply.

6. A judgment issued at a sitting in camera shall be substantiated only if the complaint has been considered. A certified copy of the judgment with the substantiation thereof shall be served only on the President of the Institute of Remembrance. The complainant shall be served with a certified copy of the judgment.

7. After issuing the judgment, the administrative court shall forthwith return the records of the case to the Institute of Remembrance.

8. With regard to a cassation appeal, paragraphs 4-6 shall apply mutatis mutandis".

The following allegations have been raised: Article 32(2) of the Act on the Institute of National Remembrance infringes Article 2, Article 78 in conjunction with Article 31(3) of the Constitution; Article 32(4) and (5) of the Act infringes Article 45(1) in conjunction with Article 31(3) of the Constitution; Article 32(6) and (8) of the Act infringes Article 32(1), and Article 45(1) in conjunction with Article 31(3) of the Constitution.

The above-mentioned provisions are procedural in character and regulate the procedure set out in Chapter 4 of the Act on the Institute of National Remembrance, which concerns providing documents by the Institute of National Remembrance and the judicial review of decisions of that organ of public administration.

A person who is eligible to apply for access to the copies of the documents concerning him/her is any person who submits an application to the Institute of National Remembrance (Article 30(1) of the Act on the Institute of National Remembrance). The eligible persons are also those who belong to the category of subjects with regard to whom there is a restriction on access to the copies of documents, as referred to in Article 30(2)(1) of the Act on the Institute of National Remembrance, and when the restriction concerns documents "which have been prepared by the applicant, or with his/her involvement, as

part of his/her work or service provided for state security authorities, or as part of his/her tasks carried out as a secret informer or assistant in the operational gathering of information". This is a substantive law provision, similarly to Article 30(2)(2) of the Act on the Institute of National Remembrance, which was declared unconstitutional in the judgment of the Constitutional Tribunal of 11 May 2007, Ref. No. K 2/07.

Refusal to consider the application in the case of the persons referred to in Article 30(2)(1) of the Act on the Institute of National Remembrance occurs in accordance with, *inter alia*, procedural provisions – Article 31(2), second sentence, and Article 32(2). Article 32(3) stipulates the right to lodge a complaint against a decision of the President of the Institute of National Remembrance with a voivodeship administrative court. The provisions of Article 32(4)-(6) regulate proceedings before the voivodeship administrative court, commenced by way of a complaint against a decision of the organ of administration. By contrast, Article 32(8) of the Act on the Institute of National Remembrance is a regulation on proceedings concerning cassation appeals before the Supreme Administrative Court.

The procedural provisions of the Act which are under review by the Constitutional Tribunal do not introduce different procedures with regard to the persons they concern, as specified in Article 31(1)(2)(a)-(c). The review of constitutionality of challenged Article 31(1)(2) of the Act on the Institute of National Remembrance leads to instituting a review procedure with regard to provisions which are applicable to administrative decisions issued to the complainants who were refused access to the copies of documents that concerned them.

In that situation, the Tribunal states that the constitutional review of entire Article 31(1)(2) of the Act on the Institute of National Remembrance is necessary in the proceedings regarding the question of law referred by the Supreme Administrative Court.

5.2. Proceedings before the Supreme Administrative Court are carried out as a result of a cassation appeal the aim of which is the assessment of validity of the judgment of the administrative court of first instance. The said assessment may only be carried out within the limits of the cassation appeal (Article 183 of the Law on Proceedings Before Administrative Courts). As in the case of Article 31(1)(2) of the Act on the Institute of National Remembrance, the assessment of Article 31(2), second sentence, and Article 32(2), (4), (5), (6) and (8) of the Act on the Institute of National Remembrance - from the point of view of maintaining constitutional standards – will have an impact on a ruling delivered by the Supreme Administrative Court.

As it follows from the content of Article 31(2), second sentence, the said provision allows an organ of the Institute of National Remembrance to refrain from substantiating the decision on refusal to grant access to the copies of documents or to limit that substantiation for the reasons indicated in that provision. By analogy, a possibility of refraining from providing or limiting substantiation for the decision by an appellate authority (the President of the Institute of National Remembrance) – is regulated by Article 32(2). The said provisions refer to proceedings at the level of an administrative organ. Nevertheless, the procedural and substantive aptness and validity of decisions issued by the authority are subject to assessment of the administrative court.

The subject of assessment of the Supreme Administrative Court, as a result of a cassation appeal and within the scope of that appeal, is still the adjudication of the court of first instance – a voivodeship administrative court; however, decisions preceding it, issued by the administrative authority, will be significant from the point of view of allegation, as they determine the scope of and motives for that allegation. Considering a complaint against a decision of the authority, the voivodeship administrative court may, in

accordance with the procedure of Article 145 of the Law on Proceedings Before Administrative Courts, *inter alia*, revoke a decision or order, in whole or in part, if it finds that there has been: a) a violation of substantive law that has affected the outcome of the case, b) a violation of law which provides the basis to reopen administrative proceedings, c) another breach of procedural provisions, provided that it may have affected the outcome of the case considerably (§ 1(1)); it may also find the decision or order to be issued in violation of law, if there are grounds specified in the Code of Administrative Procedure or in other provisions (§ 1(3)). Pursuant to Article 186 of the Law on Proceedings Before Administrative Courts, due to a cassation appeal, the challenged ruling of the voivodeship administrative court may be reversed also in its part not challenged if nullity of proceedings has occurred. However, "interpretation of law made in a case by the Supreme Administrative Court shall bind the court to which the case has been referred" (Article 190, first sentence, of the Law on Proceedings Before Administrative Courts).

A ruling of the Constitutional Tribunal with regard to Article 31(2), second sentence, and Article 32(2) of the Act on the Institute of National Remembrance, will have an impact on the determination of a case examined by the Supreme Administrative Court, in the course of proceedings commenced by way of a cassation appeal. The examination of those provisions, from the point of view of their conformity to the Constitution, will trigger the review of norms governing the scope ratione materiae of review conducted by the voivodeship administrative court and the Supreme Administrative Court, as regards the assessment of conformity to the law of administrative decisions of the Institute of National Remembrance and the determination of the voivodeship administrative court in the course of those review proceedings concerning those decisions.

5.3. Article 31(2), second sentence, and Article 32(2) of the Act on the Institute of National Remembrance provide for the possibility of limiting or refraining from providing factual substantiation for the decision refusing to grant access to the copies of documents concerning the applicant and the decision issued in the course of appellate proceedings. Thus, these regulations exclude, in accordance with Article 43(1) of the Act on the Institute of National Remembrance, pursuant to Article 107(4) of the Act of 14 June 1960 – the Code of Administrative Procedure (Journal of Laws - Dz. U. of 2000 No. 98, item 1071, as amended; hereinafter: the Code of Administrative Procedure).

It follows from Article 43(1) of the Act of the Institute of National Remembrance that "the proceedings in the cases regulated by the Act shall be carried out in accordance with the provisions of the Administrative Code, unless the provisions of the Act provide otherwise". By contrast, Article 107(4) of the Code of Administrative Procedure stipulates that: "It may be possible to refrain from providing factual substantiation for a decision if it takes into account the entire scope of a party's request; however, this does not concern decisions that settle disputes between parties and decisions issued as a result of an appeal". Factual substantiation for a decision should primarily contain the indication of the facts which the organ of public authority acknowledged as proven, the evidence it relied on, and the reasons why it refused to regard the other evidence as credible and valid; by contrast, legal substantiation should explain the legal basis of the decision, and indicate legal provisions (Article 107(3) of the Code of Administrative Procedure).

In the Act on the Institute of National Remembrance, the decision referred to in Article 31(2), second sentence, and Article 32(2) concerns a situation in which an application (a party's request) for access to the copies of documents has not been considered. Thus, there has been an opposite premiss than the one arising from Article 107(4) of the Code of Administrative Procedure, which provides for refraining from substantiating the decision.

The Constitutional Tribunal agrees with the allegation of the Supreme Administrative Court that the lack of factual substantiation, whether partial or complete, leads to a situation where a party to proceedings that wants to exercise the right to appeal against a decision is deprived of an actual possibility of protecting its rights. The Act on the Institute of National Remembrance provides for the possibility of appealing against a decision of an organ of public authority in the course of administrative proceedings, as well as lodging an appeal with an administrative court against a decision issued in accordance with an appeal procedure, within the scope of the constitutional right to appeal against judgments and decisions made at first stage (Article 78 of the Constitution). Detailed substantiation for such an appeal lodged by a party is not required (Article 128 of the Code of Administrative Procedure). An appeal against a decision issued by an organ of the Institute of National Remembrance has a devolutive effect. Despite that, the exercise of the right to appeal against judgments and decisions made at first stage is illusory, since due to an appeal against a decision of an organ of first instance, which does not contain any factual findings, the organ of administration of second instance has to establish findings on its own. Authorised to carry out only supplementary proceedings, on the basis of Article 136 and Article 138(2) of the Code of Administrative Procedure, the said organ undertakes the actions as an organ of first instance, for "an organ considering appeals may carry out - upon a party's request or *ex officio* - an additional proceedings for the purpose of supplementing evidence and materials in a given case, or it may require that such proceedings be carried out by the organ that has issued the decision" (Article 136 of the Code of Administrative Procedure), as well as "an appellate organ may revoke the appealed decision as a whole and refer the case for re-examination by an organ of first instance, provided that the determination of a given case requires carrying out an inquiry in substantial part or in whole. Referring a given case, the said organ may indicate which circumstances should be taken into account when re-examining the case" (Article 138(2) of the Code of Administrative Procedure).

However, if the organ of first instance has not carried out the inquiry at all or if it determined the case on the basis of proceedings to receive evidence which were carried out only partly, or if it has carried out proceedings in violation of procedural provisions, the appellate organ (recognising grounds for substantive adjudication) should issue a cassation decision and refer the case for examination in first instance proceedings. However, if in such a situation the appellate organ carries out the inquiry in substantial part or in whole, which is not allowed, it infringes the provisions of Article 136 and Article 138(2) of the Code of Administrative Procedure as well as Article 15 the Code of Administrative Procedure, as this would mean carrying out an inquiry at only one stage of proceedings (second instance), and not at two stages, which is required by the principle regulated in Article 15 of the Code of Administrative Procedure (see e.g. the judgment of the Voivodeship Administrative Court in Lublin, dated 18 March 2008, Ref. No. II SA/Lu 29/08, Lex No. 480461 and likewise the judgment of the Voivodeship Administrative Court in Olsztyn, dated 12 September 2007, Ref. No. II SA/Ol 717/07, Lex 420273).

Thus, a decision issued this way by an appellate organ - on the basis of other, than merely supplementary, actions - results in a situation where a party is deprived of two-fold examination of a given case, as the party may learn about factual findings for the first time only from a decision issued after an appeal.

With regard to the allegation concerning Article 32(2) of the Act on the Institute of National Remembrance, the Tribunal stated that the said provision, similarly to Article 31(2), second sentence, allows for refraining from providing substantiation for a decision issued by the President of the Institute of National Remembrance, as a result of appellate proceedings conducted before the said President. In the light of that provision,

there is a restriction of the right to substantiate a decision issued in second instance proceedings. This way the allegation concerning the exercise of the right to appeal is stronger. The Supreme Administrative Court aptly argues that the lack of substantiation for a decision of the organ of second instance, together with the lack of access to the records of a given case, due to refusal to grant access, leads to a situation where a party to administrative proceedings has no way of determining whether the decision issued at first instance has been verified or not.

Both factual and legal substantiation for a decision constitutes an indispensible element of the individual's right to appeal against an administrative decision. The infringement of that right is tantamount to the infringement of Article 78 of the Constitution. The said provision stipulates that exceptions to this principle and the procedure for such appeals shall be specified by statute. However, it should not be overlooked that any restrictions imposed on constitutional rights and freedoms must be justified by Article 31(3) of the Constitution and may not infringe the essence of those rights and freedoms. The scope of those restrictions has to meet requirements set by the principle of proportionality.

Challenged Article 31(2), second sentence, and Article 32(2) make reference to the premiss of "making it possible to implement" the Lustration Act, however, in the opinion of the Constitutional Tribunal, such formulation does not give a possibility of determining whether proper proportion is maintained between the restricted right and the protected one. If the protected right was to be the public order (Article 31(3) of the Constitution), then due to unclear and imprecise formulation of that premiss, it would not be possible to determine whether restricting the right to substantiate an administrative decision, and thus restricting the right to appeal against it, would be proportionate to the protected right.

5.4. Challenged provisions – Article 32(4), (5), (6) and (8) of the Act on the Institute of National Remembrance – concern proceedings before the administrative court of first instance, as well as before the cassation court, thus regulate judicial and administrative proceedings concerning the proceedings regarding a complaint against refusal to grant access to documents held in the archives of the Institute of National Remembrance.

Article 32 reads as follows:

"1. After examining the appeal referred to in Article 31(3), the President of the Institute of Remembrance shall issue a decision in which:

1) the decision referred to in Article 31(1) shall be confirmed;

2) the decision referred to in Article 31(1) shall be revoked and the case shall be referred to the organ of first instance for re-examination".

2. It may be possible to refrain from providing factual substantiation for the decision referred to in paragraph 1 or limit such substantiation, insofar as disclosing information to the applicant makes it impossible to implement the Act of 18 October 2006 on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents.

3. The applicant shall have the right to lodge a complaint against the decision referred to in paragraph 1(1) with an administrative court, within the time limit set out in Article 53 of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts (...).

4. The administrative court shall consider the complaint at a sitting in camera.

5. The provision of Article 106(2) of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts shall not apply.

6. A judgment issued at a sitting in camera shall be substantiated only if the complaint has been considered. A certified copy of the judgment with the substantiation thereof shall be served only on the President of the Institute of Remembrance. The complainant shall be served with a certified copy of the judgment.

7. After issuing the judgment, the administrative court shall forthwith return the records of the case to the Institute of Remembrance.

8. With regard to a cassation appeal, paragraphs 4-6 shall apply mutatis mutandis."

Article 106 of the Law on Proceedings Before Administrative Courts, the application of which excludes Article 32(5) of the Act on the Institute of National Remembrance, reads as follows:

"§ 1. After the case is called, the trial shall begin with the report of the judge who presents in brief, on the basis of files, the state of the case, taking into account in particular the charges contained in complaint.

§ 2. After the report is submitted, the parties – first the complainant, followed by an authority – shall present orally their claims and conclusions and shall give explanations. In addition, parties may also indicate legal and factual grounds for their claims and conclusions. The presiding judge shall permit other parties to speak in a sequence he may fix.

§ 3. The court may, on its own motion or at the request of the parties, request additional documentary proof, if this is necessary to resolve substantial doubts and will not extend excessively the proceedings on the case.

§ 4. The court shall consider commonly known facts, even they are not invoked by the parties.

§ 5. The provisions of the Code of Civil Procedure shall apply as appropriate to the evidentiary proceedings referred to in § 3".

With regard to provisions regulating administrative court proceedings, within which a complaint is examined against a decision issued by the President of the Institute of National Remembrance, which refuses access to the copies of documents concerning an applicant, the Supreme Administrative Court alleges that the following provisions have been infringed: Article 45(1) in conjunction with Article 31(3) of the Constitution (by Article 32(4) and (5) of the Institute of National Remembrance), Article 32(1), Article 45(1) and Article 78 in conjunction with Article 31(3) of the Constitution (Article 32(6) of the Institute of National Remembrance) as well as Article 32(1), Article 45(1) in conjunction with Article 31(3) of the Constitution (Article 32(8) of the Institute of National Remembrance).

5.5. Article 45(1) of the Constitution has been indicated by the Supreme Administrative Court as a higher-level norm for review with regard to all the provisions regulating administrative court proceedings. Pursuant to Article 45(1) of the Constitution, "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". By contrast, Article 45(2) states that: "Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly".

In the judgment of 16 March 1999, the Constitutional Tribunal stated that – inspired by the views of the doctrine, the international standards of human rights contained in Article 14 of the International Covenant on Civil and Political Rights, Article 6(1) of the European Convention on Human Rights as well as the previous jurisprudence of the Constitutional Tribunal - the right to a fair trial comprised the following: 1) the right of access to a court, i.e. the right to institute proceedings before a court – an organ of the state

with particular characteristics (impartial and independent); 2) the right to a proper court procedure which complies with the requirements of a fair and public hearing; 3) the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court as well as the right to have cases examined by the organs of the state with an adequate organisational structure and position (Ref. No. SK 19/98, OTK ZU No. 3/1999, item 36, also in the judgment of the Constitutional Tribunal of 27 May 2008, Ref. No. P 59/07, OTK ZU No. 4/A/2008, item 64).

The Supreme Administrative Court indicates that procedural fairness is infringed by Article 32(4) of the Act on the Institute of National Remembrance, which states that a complaint against a decision of the President of the Institute of National Remembrance in which he refuses access to the copies of documents concerning the applicant shall be considered during proceedings held in camera. As a result, a public hearing, referred to in Article 45(1) of the Constitution, is closed not only to the public, but also in particular to the parties to proceedings. The allegation made by the Supreme Administrative Court with regard Article 32(4) concerns the infringement of an element of the right to a fair trial - the so-called procedural fairness.

The Constitutional Tribunal has explained on a number of occasions the meaning of the constitutional standards of fair court proceedings. Procedural fairness constitutes part of the essence of the right to a fair trial, as the right to a fair trial without maintaining the standard of fairness would be an illusory right (see the judgment of the Constitutional Tribunal of 16 January 2006, Ref. No. SK 30/05, OTK ZU No. 1/A/2006, item 2, pp. 37-38). It also indicated what the procedural fairness involves, even more so that in practice there is no one model of proceedings which could be constructed on the basis of constitutional regulations and which would bind all types of court proceedings. Constitutional regulations contain merely general indication as to certain basic elements and mechanisms, without which it would be impossible to exercise everyone's right to examine a case in the course of fair court proceedings. When assessing the observance of constitutional standards of procedural fairness, one should always take into account the subject and character of given proceedings (cf. the judgments of 28 July 2004, Ref. No. P 2/04, OTK ZU No. 7/A/2004, item 72, p. 915). Attempting to indicate the basic standards of procedural fairness, which set the boundaries of the regulatory freedom of the legislator, the Tribunal indicated that different concepts of procedural fairness share a common core which amounts to the following: 1) the right to a hearing (the right of a party to present its arguments), 2), revealing, in a clear way, the motives of a ruling in a way which makes it possible to verify the reasoning of the court, in order to avoid arbitrariness in the court's actions, 3) ensuring predictability to a participant in proceedings, by the appropriate coherence and internal logic of mechanisms the participant is subjected to (cf. the judgments of the Constitutional Tribunal of: 16 January 2006, Ref. No. SK 30/05, as above, p. 38; 26 February 2008, Ref. No. SK 89/06, OTK ZU No. 1/A/2008, item 7, p. 89, 21 July 2009, Ref. No. K 7/09, OTK ZU No. 7/A/2009, item 113).

In the judgment in the case K 7/09, the Tribunal emphasised that: "Among the mentioned basic standards of procedural fairness, a special role is played by the requirement to guarantee the right to a hearing to parties. The said right, in particular, provides for guaranteeing appropriate rights which enable the parties to effectively defend their interests in court proceedings".

5.6. With regard to Article 32(4) of the Act on the Institute of National Remembrance, in its question of law, the Supreme Administrative Court underlines that the principle of administrative court proceedings are proceedings held in camera. Exceptions to the public nature of hearings, as referred to in Article 45(2) of the Constitution, may

occur in strictly specified situations. A more specific rendering of that provision is reflected in Article 96 of the Law on Proceedings Before Administrative Courts ("§ 1. The court shall, on its own authority, order the whole or part of the session to be held behind closed doors, if public hearing of the case endangers morals, state security or public order, and also when it may lead to disclosure of circumstances comprised of state or official secrets. § 2. The court, at the request of a party, shall rule that the session be heard behind closed doors, if necessary for protection of private life of a party or for other important private interest. The proceedings in relation to that motion shall be held behind closed doors. The order on that matter shall be announced by the court in public").

However, the Supreme Administrative Court draws attention to the fact that exceptions to the public nature of hearings do not mean that the examination of a given case is conducted in camera. Indeed, exceptions to the public nature of hearings regards third parties i.e. the public. However, this does not exclude a party (its proxy, its statutory representative, a prosecutor, and confidants) from participating in proceedings. The Law on Proceedings Before Administrative Courts provides for adjudication in camera, however primarily with regard to formal matters. For the reason, the Supreme Administrative Court indicates the infringement of procedural fairness by Article 32(4) of the Act on the Institute of National Remembrance, which states that a complaint against a decision of the President of the Institute of National Remembrance in which he refuses access to the copies of documents concerning the applicant shall be considered during proceedings held in camera. As a result, a public hearing, referred to in Article 45(1) of the Constitution is no longer available to the public, but also in particular to the parties to proceedings.

Article 95 of the Law on Proceedings Before Administrative Courts, pursuant to which "at an open court session, the court room may be attended, in addition to parties and the persons summoned, only by persons who have attained majority. Sessions held in camera may be attended only by summoned persons", provides for a possibility of summoning certain persons to take part in proceedings in camera, and above all – as the Supreme Administrative Court emphasises – does not guarantee active participation to parties. In such procedural conditions, the court has no possibility of acquiring additional explanations; however, parties have no possibility of providing them. In accordance with Article 90(2) of the Law on Proceedings Before Administrative Courts, when a case is to be heard in camera, the court may designate a trial ("§ 2. The court may refer a case for hearing in open court and may designate a trial also when the case is to be heard in camera"). But this regards cases in relation to which the Law on Proceedings Before Administrative Courts provides for examination in camera. The provisions of special statutes concerning procedures – such as the Act on the Institute of National Remembrance – rules out the possibility of applying the regulations referred to in Article 90(2) of the Law on Proceedings Before Administrative Courts. ("§ 1. Unless a specific provision provides otherwise, court sessions shall be public, and the decision-making court shall hear cases at trial").

Moreover, as the Supreme Administrative Court stressed in its question of law, the practice of the Voivodeship Administrative Court in Warsaw and the Supreme Administrative Court is that the cases which concern matters raised in the questions of law referred by the two Courts are examined in camera. However, designating a trial becomes redundant due to the exclusion - by Article 32(5) of the Act on the Institute of National Remembrance – Article 106(2) of the Law on Proceedings Before Administrative Courts, which enables parties to orally present their claims and conclusions as well as to give explanations. Thus, it may be stated that procedural fairness, which constitutes an element

of the right to a fair trial, as expressed in Article 45(1) of the Constitution, is restricted in Article 32(4) and Article 32(5) of the Act on the Institute of National Remembrance.

Exceptions to the public nature of hearings have been provided for in Article 45(2) of the Constitution; it may be constitutionally admissible, if premisses mentioned in that provision occur, namely for reasons of morality, state security, public order or protection of the private life of a party, or other important private interest. Exceptions to the public nature of hearings, i.e. departure from the principle of a public hearing (Article 45(1) of the Constitution), may only occur in accordance with the rules set out in Article 31(3) of the Constitution.

The Constitutional Tribunal has already drawn attention to the fact in the statement of reasons (in point 4.4.) that the restriction of the constitutional right must be justified by the principle of proportionality (Article 31(3) of the Constitution). Interference with the realm of the individual's rights requires determining whether there is necessity to protect another (constitutional) interest of higher significance than the sacrificed interest of the individual.

In its jurisprudence, the Constitutional Tribunal clearly indicates that restrictions must be necessary, and this means that they must remain directly related to a protected value.

They may not be replaced by other legal measures which may lead to the constitutional restriction of rights and freedoms. They must also take into account the right proportion between a protected interest and an interest which is subject to restriction.

The Constitutional Tribunal has already stressed, in the context of the assessment of constitutionality of Article 31(1)(2)(a) of the Act on the Institute of National Remembrance that the said provision infringes the constitutional right of everyone to have access to official documents and data collections concerning himself/herself, as referred to in Article 51(3) of the Constitution. Such a restriction is excessive and disproportionate, as the essence of the rights and freedoms expressed in Article 51(4) and Article 47 of the Constitution has been infringed.

The Act on the Institute of National Remembrance, in its Article 39, provides for a possibility of restricting access to some documents, provided that they have been singled out and access to them may be granted to some designated persons (paragraph 1). The singled out documents constitute a confidential collection kept in the archives of the Institute of National Remembrance and are subject to special protection (paragraph 2). Limitation on access to such restricted collections of documents must be imposed for reasons of state security (paragraph 1).

In addition, the Act on the Institute of National Remembrance, in its Article 36, ensures access to documents collected by the Institute of National Remembrance for the purpose of carrying out statutory tasks (paragraph 1(1)), conducting research (paragraph 1(2)), and the publication of press material (paragraph 1(3)).

The Tribunal shares the view of the Supreme Administrative Court expressed in the question of law that if any of the documents or data collections does not have a confidential character (Article 39 of the Act on the Institute of National Remembrance), and may be disclosed to other persons than the applicant who is interested in the copies of documents which concern him/her, in order to carry out tasks referred to in Article 36(1)(1)-(3) of the Act on the Institute of National Remembrance, then it is difficult to indicate what value or what interest is to be protected by means of allowing for exceptions to the public nature of hearings.

It does not follow from the records of the cases presented with the question of law referred by the Supreme Administrative Court (also by the Voivodeship Administrative Court) that the documents requested by the complainants were kept in restricted

collections. There would be a different basis of the decision to refuse access to the copies of documents concerning the applicants.

For all these reasons, the Constitutional Tribunal does not find justification for the functioning of a regulation restricting the right to examine the case in public proceedings in the legal order, in particular that the said restriction is disproportionate with regard to the values which are to be protected.

5.7. The Constitutional Tribunal points out that one of the elements of the right to a fair trial and of procedural fairness that sets the limits of the legislator's regulatory freedom is a party's right to a fair hearing and its right to present its arguments. The said right falls within the scope of effective protection of rights in court proceedings and allows for the preservation of an adversarial procedure.

In administrative court proceedings, which are conducted in relation to the judicial review of decisions issued by the President of the Institute of National Remembrance, the right to a fair hearing, arising from Article 106(2) the Law on Proceedings Before Administrative Courts ("After the report is submitted, the parties – first the complainant, followed by an authority – shall present orally their claims and conclusions and shall give explanations. In addition, parties may also indicate legal and factual grounds for their claims and conclusions. The presiding judge shall permit other parties to speak in a sequence he may fix"), has been restricted, on the basis of a general provision, i.e. Article 32(5) of the Act on the Institute of National Remembrance. Indeed, in accordance with Article 32(5) of the Act on the Institute of National Remembrance, "the provision of Article 106(2) of the Act of 30 August 2002 – the Law on Proceedings Before Administrative Courts shall not apply".

In the judgment of 23 October 2006, Ref. No. SK 42/04, the Constitutional Tribunal repeated after the jurisprudence indicated therein that "(…) in the light of the jurisprudence of the Constitutional Tribunal, the constitutional guarantees of the right to a fair trial comprise – apart from the right of access to a court (i.e. the right to institute proceedings before a court) – the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court as well as the right to a proper court procedure which complies with the requirements of a fair and public hearing. A fair court procedure should ensure that parties enjoyed procedural rights which are relevant to the subject of pending proceedings. In accordance with the requirements of a fair trial, participants in proceedings must have a real possibility of presenting their arguments and it is the court's obligation to consider the said arguments (...)" (OTK ZU No. 9/A/2006, item 125).

The right to a fair trial is the right to present arguments, conclusions, evidence, factual and legal grounds, to make demands as well as to argue with the opposing party. Undoubtedly, Article 32(5) of the Act on the Institute of National Remembrance stems from the regulation contained in Article 32(4) – which introduces an exception to the public nature of hearings. However, since the Constitutional Tribunal has found no grounds for declaring that exception to be constitutionally admissible, then – to be consistent – it finds no grounds to regard the restriction arising from Article 32(5) of the Act on the Institute of National Remembrance as compliant with the constitutionally guaranteed right to a fair trial, particularly that the said restriction is not justified by Article 31(3) of the Constitution. Indeed, it is not possible to determine what interest is to be protected by the introduced restriction.

Moreover, the Tribunal states that the restriction imposed on the right to a fair hearing has accumulated due to the restriction arising from the non-application of Article 106(2) of the Law on Proceedings Before Administrative Courts, which is in fact

related to the previous lack of a possibility to know the substantiation for a decision by the President of the Institute of National Remembrance, if the President exercises his/her right to refuse to provide the substantiation.

For the above reasons, the Constitutional tribunal concludes that Article 32(5) is inconsistent with Article 45(1) in conjunction with Article 31(3) of the Constitution.

5.8. Pursuant to Article 32(6) of the Act on the Institute of National Remembrance, "A judgment issued at a sitting in camera shall be substantiated only if the complaint has been considered. A certified copy of the judgment with the substantiation thereof shall be served only on the President of the Institute of Remembrance. The complainant shall be served with a certified copy of the judgment". In the opinion of the Supreme Administrative Court, the said provision is inconsistent with Article 32(1), Article 45(1), and Article 78 in conjunction with Article 31(3) of the Constitution. As it follows from the content of the provision, the only person authorised to receive a judgment of a voivodeship administrative court is the President of the Institute of National Remembrance. Regardless of the outcome of the case, the complainant never has a possibility of obtaining the judgment with substantiation, particularly that the voivodeship administrative court is obliged to prepare substantiation only when the complaint has been considered. If the complaint is not considered, this eliminates the obligation to prepare substantiation of the judgment. In the opinion of the Supreme Administrative Court, the provision formulated in this way infringes the right to a fair trial (Article 45(1) of the Constitution), and the right to appeal against judgments and decisions made at first stage (Article 78 of the Constitution). The restriction of the right to a fair trial is not justified by the premisses of the admissibility thereof (Article 31(3) of the Constitution), and also it infringes the principle of equality of parties by allowing one party to be excessive privileged (Article 32(1) of the Constitution).

In view of the foregoing, the Tribunal points out that, in accordance with a general rule arising from Article 141(1) and (2) of the Law on Proceedings Before Administrative Courts, the voivodeship administrative court *ex officio* prepares substantiation when a complaint has been taken considered. The dismissal of a complaint is substantiated if a party requests so. The rule applies to all judgments, regardless of the fact whether the issue thereof is preceded by a trial or whether it stems from proceedings held in camera. Article 32(6) of the Act on the Institute of National Remembrance constitutes *lex specialis* in relation to general provisions regulating proceedings before administrative courts.

The judgment has legal effects regardless of the fact whether it was prepared with or without substantiation. From the point of view of legal formalism, what matters is the operative part of the judgement which determines a case as to its substance. Parties to proceedings will learn from the operative part of the judgment whether the complaint has been considered or whether it has been dismissed. They will not however learn about legal and factual grounds for such determination. They will not find out the motives of the voivodeship administrative court, when it decided on particular determination. They will not know to what extent the allegations raised in a complaint to the voivodeship administrative court by a party (other than the President of the Institute of National Remembrance) were justified, and to what extent they were misguided. Such a legal solution also has an impact on further court proceedings, i.e. a cassation appeal to the Supreme Administrative Court. In the view of the Supreme Administrative Court, the provision of the Act on the Institute of National Remembrance formulated in this way hinders the functioning of a fair court procedure, and thus infringes the right to a fair trial, in a way which is not justified by the premisses contained in Article 3193) of the Constitution (cf. point 4.4. of the statement of reasons), and is contrary to the principle of

equality expressed in Article 32(1) of the Constitution, by allowing one party to the same proceedings to be excessive privileged

Again the Tribunal states that the right to a fair trial does not have an unconditional and absolute character, that provides eligible persons with the possibility of unlimited protection of their rights in court proceedings, in every type of procedure and proceedings (cf. the judgment of the Constitutional Tribunal of 10 May 2000, Ref. No. K 21/99, OTK ZU No. 4/2000, item 109). Consequently, constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of procedure and proceedings – the same set of procedural instruments which would uniformly specify the position of parties to proceedings and the scope of procedural measures available to them. However, procedural differences may, in some situations, be regarded as a restriction on the right to a fair trial. The freedom of the legislator with regard to devising proper procedures does not entail that it is admissible to introduce arbitrary solutions which excessively (i.e. for no serious reasons) restrict the procedural rights of parties, the exercise of which constitutes a prerequisite for a proper and fair determination of a given case. The constitutional guarantees related to the right to a fair trial would be infringed if a restriction imposed on the procedural rights of a party was redundant, in the context of the pursuit of such goals as enhancing the effectiveness and pace of proceedings, and at the same time it would make it impossible to balance the procedural positions of parties, and thus it would violate the basic requirement of procedural fairness, or it would lead to the arbitrary determination of "a case" (cf. the judgment of 28 July 2004, Ref. No. P 2/04).

When assessing the procedural positions of parties, and their mutual relations within the scope of procedures that bind them and that are relevant to a given type of proceedings, the Tribunal has on a number of occasions used the term "equality of arms". The term should be understood as balancing the procedural positions of parties, which determine the type and scope of available procedural measures for the protection of the rights and interests in court proceedings. Departure from the state of balance in the context of the said procedural positions may result in the infringement of the principle of procedural fairness. Such an infringement will not occur if a restriction imposed on any of the elements of the right to a fair trial is well-founded, e.g. by the nature of proceedings, or is justified, e.g. by the principles of proportionality. Otherwise, the legislator may risk being accused of arbitrariness of his actions and of the enactment of irrational law.

The Tribunal states that the restriction provided for in Article 32(6) of the Act on the Institute of National Remembrance – which refuses the right to substantiation for a judgment or grants the said right, regardless of what has been adjudicated, only to one of the parties to the same administrative court proceedings – fulfil the criteria which allow to state that "the equality of arms" has been maintained. On the contrary, one of the parties is more privileged than the other. That privileged position is maintained from the onset of proceedings. It is already visible at the stage of proceedings before an organ of public administration, and then during proceedings before a voivodeship administrative court, until a cassation appeal is lodged with the Supreme Administrative Court. The privileged position does not arise from the pursuit of such goals as enhancing the effectiveness of proceedings or speeding up their pace.

As the Supreme Administrative Court indicates in its question of law, the substantive content of the right to appeal against judgments and decisions made at first stage is to enable a party to institute review proceedings with regard to a ruling issued by a court of first instance. But the court referring the question does not mean a statutory but a real possibility of lodging an appeal. The exercise of the right to appeal against judgments and decisions made at first stage becomes illusory. The lack of substantiation for the judgment issued in first instance rules out the possibility of assessing the validity of the

conclusions reached by the court. It actually prevents a party from arguing its case, as well as does not allow the complainant to fulfil statutory requirements set for a cassation appeal.

At the same time it should be noted that, pursuant to Article 183(1) of the Law on Proceedings Before Administrative Courts, the Supreme Administrative Court examines a case within the scope of a given cassation appeal. The Supreme Administrative Court has no jurisdiction to have an impact on a cassation appeal, by making it more specific, supplementing it or providing an interpretation thereof. As the Supreme Administrative Court stated in its judgment of 17 December 2009, Ref. No. II FSK 1119/08 (Lex No. 550075): "If a party does not effectively undermine the factual grounds for a voivodeship administrative court then they are binding for the Supreme Administrative Court, in accordance with the above-indicated Article 183(1) of the Law on Proceedings Before Administrative Courts". Consequently, the lack of substantiation for a judgment of the voivodeship administrative court also results in a restriction of a party's right to lodge an appeal against that judgment to the Supreme Administrative Court, and thus it infringes Article 78 of the Constitution.

Assessing the provision of the Law on Proceedings Before Administrative Courts which regulates proceedings commenced by way of a cassation appeal in conjunction with to the provisions of the Customs Code, in the statement of reasons for the judgment of 20 September 2006, Ref. No. SK 63/05, the Tribunal stated that "the right to a fair trial enhances the guarantee of the principle of appeal against judgments and decisions made at first stage as a principle for court proceedings and administrative proceedings. Pursuant to Article 78 of the Constitution, each party (i.e. only participants in proceedings) has the right to appeal against judgments and decisions made at first stage. The subject of a claim based on the provision of Article 45(1) is «the examination of case», but the principle of appeal against judgments and decisions made at first stage regards a decision-making process, i.e. the first ruling in a given case. Therefore, by nature, it refers to a certain stage of examination of the case. Elevated to the constitutional rank, a judicial review involving appeals against judgments and decisions made at first stage is to prevent any mistakes and arbitrariness in first instance. The Tribunal expressed its view on the matter in the case of 27 June 1995, Ref. No. 4/94 (OTK ZU of 1995, Part I, pp. 171-191). In that ruling, the Tribunal stated that ruling out the possibility of lodging an appeal against a ruling in the court of higher instance «restricts the right to a fair trial for interested persons», which is contrary to the principle of a democratic state ruled by law" (OTK ZU No. 8/A/2006, item 108).

As the Sejm has aptly noted, in proceedings that are conducted with the exclusion of a complainant (Article 32(4) of the Act on the Institute of National Remembrance), the substantiation of a court judgment serves the complainant as the only source of information as to both legal and factual motives which weighed in favour of issuing a ruling of certain content by the court. On the other hand, the said substantiation as an element which has to accompany a court ruling, is considered as an essential component, in the light of the right to appeal against judgments and decisions made at first stage and the model of proceedings involving a cassation appeal before the court of second instance.

In the judgment of 16 January 2006, Ref. No. SK 30/05, as well as in the decision of 11 April 2005, Ref. No. SK 48/04 (OTK ZU No. 4/A/2005, item 45), which precedes the said judgment, the Constitutional Tribunal held a clear view that: "As the decisive component of the right to a fair trial, the providing of a reasoning for a judicial decision fulfils several significant functions: it enforces self-control on the part of the court, which must demonstrate that its decision is substantively and formally correct and corresponds to the requirements of justice; it documents arguments in favour of the adopted decision; it is the basis of review by organs of higher instance; it encourages

individual acceptance of the judicial decision; it consolidates the feeling of public confidence in and democratic control over the administration of justice; and it strengthens legal security".

The principle of procedural fairness has been combined with the principle of proportionality (Article 31(3) of the Constitution). In the opinion of the Supreme Administrative Court, the exclusion of the right to substantiation, and the resulting restrictions are not justified by Article 31(3) of the Constitution. Procedural fairness imposes an obligation of introducing such mechanisms of proceedings which would guarantee the transparency of proceedings. In the context of the case under examination, what remains such an instrument is the obligation to substantiate a judgment, at least to the extent it is indispensable to implement the Lustration Act. The restriction introduced in Article 32(6) of the Act on the Institute of National Remembrance, insofar as it does not serve the implementation of the Lustration Act, is not indispensable for the protection of any of the values mentioned in Article 31(3) of the Constitution.

5.9. With regard to the provisions of Article 32(6) and (8) of the Act on the Institute of National Remembrance, the Supreme Administrative Court alleged that they infringed the principle of equality, as expressed in Article 32(1) of the Constitution.

The Constitutional Tribunal draws attention to the fact that what follows from the principle of equality, provided for in Article 32(1) of the Constitution, is the requirement of equal treatment by public authorities as regards all subjects of rights and obligations within a certain category. All subjects of rights and obligations, to the same extent characterised by a certain essential (relevant) feature, should be treated equally, by applying the same criteria, i.e. should be neither favoured nor discriminated against. However, the subjects of rights and obligations that are not characterised by a certain essential feature, shared by all the subjects, are treated differently.

The assessment of every legal regulation, from the point of view of the principle of equality must, therefore, be preceded by a thorough examination of the legal situation of the subjects of rights and obligations and an analysis concerning the shared and differentiating features of the subjects (cf. the statement of reasons for the judgments of: 28 May 2002, Ref. No. P 10/01, OTK ZU No. 3/A/2002, item 35, 17 October 2006, Ref. No. P 38/05, OTK ZU No. 9/A/2006, item 123).

As the Constitutional Tribunal stated in its ruling in the case K 10/96: "Differentiating among the legal situations of similar subjects of rights and obligations is therefore much more likely to be deemed constitutional if it remains consistent with the principles of social justice or serves the implementation thereof. By contrast, it is regarded as unconstitutional discrimination (privileged treatment) if it is not justified by the principle of social justice. In that sense, the principle of equality before the law and the principles of social justice, to a large extent, overlap" (the ruling of 3 September 1996, OTK ZU No. 4/1996, item 33). The view is referred to primarily in the judgments of the Constitutional Tribunal of: 16 December 1997, Ref. No. K 8/97 (OTK ZU No. 5-6/1997, item 70) and 13 April 1999, Ref. No. K 36/98 (OTK ZU No. 3/1999, item 40) as well as a number of rulings issued later on.

Making reference to the allegation that the principle of equality has been infringed, the Constitutional Tribunal states that showing the said infringement by the challenged regulations of the right to a fair trial exempts the Tribunal from the obligation to provide extensive substantiation for the allegation that the principle of equality has been infringed (Article 32(1) of the Constitution). There is no doubt that, in the case under examination, the infringement of Article 45(1) is closely related to the infringement of the constitutional principle of equality before the law. Excluding or restricting the type and scope of

procedurally available measures for the protection of rights and interests of only one party to proceedings or differently –privileging only one party by enabling the party to make use of a certain type and scope of available measures for the protection of rights and interests, the legislator introduced a significant differentiation within the scope of the constitutional right to a fair trial, providing for worse treatment of a certain group of participants in proceedings before an administrative court in the case of a complaint against a decision of the President of the Institute of National Remembrance in which he refuses access to the copies of documents concerning the applicant. In the light of the above considerations, the Tribunal states that there are no convincing grounds for differentiating between the parties to the proceedings. For these reasons, the Tribunal declares that Article 32(6) of the Act on the Institute of National Remembrance is also inconsistent with Article 32(1) of the Constitution.

A procedure before the Supreme Administrative Court concerning cassation appeals has been regulated in Article 32(8) of the Act on the Institute of National Remembrance, which reads as follows: "With regard to a cassation appeal, paragraphs 4-6 shall apply mutatis mutandis". The said provision regards a cassation appeal against a judgment of the voivodeship administrative court –the court of first instance – which sustains the decision of the organs of the Institute of National Remembrance in which they refuse to grant access to the copies of files concerning a person applying for such access.

In accordance with the content of that provision, proceedings commenced by way of a cassation appeal is conducted in accordance with the same principles and rules, as apply in the proceedings before the court of first instance. In the opinion of the Supreme Administrative Court, Article 32(8) of the Act on the Institute of National Remembrance is inconsistent with Article 32(1) and Article 45(1) in conjunction with Article 31(3) of the Constitution. At the same time, with regard to that provision, the allegations about Article 32(4) and (5) of the Act on the Institute of National Remembrance remain adequate. The Constitutional tribunal shares the view presented by the court referring the question. Also, in the context of the examination of a cassation appeal against the Voivodeship Administrative Court, there is no constitutional justification for exceptions to the public nature of proceedings before the Supreme Administrative Court, as well as a restriction on the right to a fair hearing in those proceedings. The said restrictions infringe both the right to a fair trial and the right to procedural fairness, as referred to in Article 45(1) of the Constitution. And, since they are not justified by the principle of proportionality, as it is not known what purpose they are to serve, they also infringe Article 31(3) of the Constitution.

As regards the allegations raised with reference to Article 32(8) in conjunction with Article 32(6) of the Act on the Institute of National Remembrance, the Tribunal states that there is no the infringement of Article 78 of the Constitution, as it was the case with regard to Article 32(6) of the Act on the Institute of National Remembrance, due to the lack of possibility of a further appeal against the rulings of the Supreme Administrative Court issued as a result of the examination of a cassation appeal. Despite that, the allegation related to the ruling of the Supreme Administrative Court remains adequate. As it follows from the content of Article 193 of the Law on Proceedings Before Administrative Courts, the Supreme Administrative Court substantiates all judgments. However, the examination of a cassation appeal and the revocation of part or of whole of the challenged ruling of a voivodeship administrative court, and the referral of the case for re-examination to the court that issued the ruling, lead to the situation that the revoking judgment is served – pursuant to Article 32(6) of the Act on the Institute of National Remembrance – only to the organ. The re-examination of the case by the voivodeship administrative court is distorted in such a way that there is no "equality of arms". The organ of the state will again have a

privileged position, as only it will know the motives of the cassation court, in the course of the examination of the appeal -pursuant to Article 183 of the Law on Proceedings Before Administrative Courts – within the limits of the cassation appeal, and will know the motives on which the new ruling of the voivodeship administrative court will be based, which - in accordance with Article 190 of the Law on Proceedings Before Administrative Courts – is bound by the "interpretation of law made in a case by the Supreme Administrative Court (...). A cassation appeal against a decision issued after rehearing of the case may not be based on grounds incompatible with the interpretation of law set forth in this matter by the Supreme Administrative Court".

Such a privilege of the organ results in the unjustified inequality of parties to proceedings, and consequently in the infringement of Article 32(1) of the Constitution.

6. The conclusion.

The Constitutional Tribunal states that, challenged in the questions of law, Article 31(1)(2), Article 31(2), second sentence, as well as Article 32(2), (4), (5), (6) and (8) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation - in the version in force until 26 May 2010, i.e. prior to the entry into force of the Act of 18 March 2010 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents - infringe the constitutional standards indicated in those questions.

Once again the Constitutional Tribunal draws attention to the fact that the conclusions presented in this judgment remain consistent with the key legislative solution contained in the amending Act of 18 March 2010, which has eliminated – since 27 May 2010 – previous Article 31(1)(2) and has *pro futuro* introduced legal provisions that sanction everyone's access to the copies of documents kept by the Institute of National Remembrance, which are consistent with the present ruling.

In the explanatory note for the Bill of 18 March 2010, the following argumentation has been presented: "The activity of the Institute of National Remembrance has made the problem [of restricting the right to defence in the context of persons accused of cooperation with state security authorities] more serious, by accepting broadening and arbitrary criteria for refusal to grant access to documents. Thus, in accordance with the proposed solution, access to the documents is granted to all interested persons and the Institute of National Remembrance is exempted from the obligation to determine which document may be disclosed and to whom, and which not. The submitted bill also constitutes the enforcement of the ruling by the Constitutional Tribunal (...). The entry into force of the drafted amendments will bring about positive legal effects, as it will facilitate fuller implementation of civil rights" (Sejm Paper No. 2625, 6th term).

The judgment of the Constitutional Tribunal issued in the present case meets the above requirements.

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 20 October 2010, Ref. No. P 37/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 20 October 2010 as a whole in the case P 37/09.

Unlike the Tribunal, I hold the view that the entire proceedings in the present case should be discontinued on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible, due to the lack of a "functional" premiss in the questions of law referred by the two courts.

Pursuant to Article 193 of the Constitution, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution "if the answer to such question of law will determine an issue currently before such court". That premiss is made more specific by Article 32(3) of the Constitutional Tribunal Act, which requires that a question of law should, *inter alia*, indicate the scope within which an answer to the question may influence settlement of the case in relation to which the question has been asked. I have no doubt that in the present case the reply provided by the Tribunal is not necessary for the courts referring the questions to be able to settle the cases pending before them in way which would be consistent with the Constitution

The subject of the constitutional review in the two questions of law was Article 31(1)(2) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws - Dz. U. of 2007 No. 63, item 424, as amended; hereinafter: the Act on the Institute of National Remembrance or the Act). Article 31(1) of the Act – in the version in force until 26 May 2010 – used to stipulate that refusal to grant access to the copies of documents concerning the applicant, due to the fact that: a) the documents have been prepared by the applicant, or with his/her involvement, as part of his/her work or service provided for state security authorities, or as part of his/her tasks carried out as a secret informer or assistant in the operational gathering of information or b) it follows from the content of the documents that the applicant: c) was regarded by state security authorities as a secret informer or assistant in the operational gathering of information d) took on a commitment to provide information to a state security authority or to provide any assistance to that authority as regards operational activities, e) carried out tasks assigned by a state security authority, and in particular provided information to that authority, is in **the form of an administrative decision** [the emphasis is mine – T. L.].

It clearly follows from the substantiation of the questions of law, and in particular from the question of law referred by the Supreme Administrative Court, and from the argumentation of the participants in the proceedings that they have no doubts as to the character of that provision as a procedural provision which does not entrust the Institute of National Remembrance with the right to refuse to grant access to the copies of documents and does not specify substantive premisses of refusing such access, and merely specifies the legal form of refusal (in the form of an administrative decision), the substantive premisses of which have been specified in Article 30(2) of the Act on the Institute of National Remembrance.

On the day Article 30(2)(2) of the Act on the Institute of National Remembrance ceased to have effect, as a result of the judgment of the Constitutional Tribunal of 11 May 2007, Ref. No. K 2/07 (OTK ZU No. 5/A/2007, item 48), the substantive premiss

of refusal to grant access to files from which it followed that the applicant was regarded by state security authorities as a secret informer or assistant in the operational gathering of information, took on a commitment to provide information to a state security authority or to provide any assistance to that authority as regards the operational gathering of information, or privded information or carried out any other tasks assigned by the authority.

However, the subject of the judgment of the Constitutional Tribunal in the case K 2/07 was not – due to the allegation – Article 31(1)(2) of the Act on the Institute of National Remembrance, which was a procedural equivalent of substantive law Article 30(2)(2) of the said Act. In its decision of 28 May 2008, Ref. No. K 2/07, which discontinued proceedings concerning the application of the Marshal of the Sejm of 17 July 2007 submitted to the Constitutional Tribunal for it to dispel doubts as to the content of the judgment in the case K 2/07, the Constitutional Tribunal stated that: "The lack of a ruling in that regard may not justify and substantiate negative administrative decisions issued on the basis of Article 31 of the Act on the Institute of National Remembrance, only for the reason that Article 31(1)(2) has remained due to not being challenged. the Constitutional Tribunal, bound by the scope of the application (Article 66 of the Constitutional Tribunal Act), did not adjudicate on a provision which had not been challenged. Article 31(1)(2) of the Act on the Institute of National Remembrance is functionally related to the content of Article 30(2)(2) of the said Act and may have legal effects as long as it is synchronised in respect of its content with the content of Article 30(2)(2), after the interference of the Constitutional Tribunal as to that last provision (...). It should also be borne in mind that Article 31 of the Act on the Institute of National Remembrance specifies merely the form of refusal to consider an application for providing access to the copies of documents concerning a given applicant; whereas Article 30, which immediately precedes it, provides for a subjective right of access to documents (...). **It is obvious** [the emphasis is mine – T. L.] that a provision which specifies merely the procedural form of adjudication may not be a basis for determining and substantive specifying of the content of the content of right itself, its limits and the terms of exercise thereof" (OTK ZU No. 4/A/2008, item 75, p. 718).

It clearly follows from the quoted passage from the statement of reasons for the decision of the Constitutional Tribunal how one should interpret – in accordance with the Constitution – challenged Article 31(1)(2) of the Act on the Institute of National Remembrance, and the content of the substantiation if the questions of law, in particular the question referred by the Supreme Administrative Court, confirms that the courts share that interpretation, and the only reason why they referred the question is the defective practice of the Institute of National Remembrance, which - making reference to Article 31(1)(2) - refused to grant access to documents; the said practice was also approved of in some rulings of administrative courts.

It should be stressed that, in the light of the well-established jurisprudence of the Constitutional Tribunal, there is no "functional" premiss "when it is possible to determine an issue without resorting to a question of law" (the decision of the Constitutional Tribunal of 15 May 2007, Ref. No. P 13/06, OTK ZU No. 6/A/2007, item 57; see also the decision of 18 February 2009, Ref. No. P 119/08; OTK ZU No. 2/A/2009, item 22). This means that a court may refer a question of law only in a situation where constitutional doubts may not be eliminated by means of interpretation (see, *inter alia*, the decisions of: 22 October 2007, Ref. No. P 24/07, OTK ZU No. 9/A/2007, item 118; Ref. No. P 13/06, Ref. No. P 119/08; as well as: Z. Czeszejko-Sochacki, "Procedury kontroli konstytucyjności norm", [in:] *Studia nad prawem konstytucyjnym*, Wrocław 1997, p. 74 and the subsequent pages;

R. Hauser, A. Kabat, "Pytania prawne jako procedura kontroli konstytucyjności prawa", *Przegląd Sejmowy* No. 1/2001, p. 25 and the subsequent pages).

It should be added that – regardless of some statements – it is not the judgment of the Constitutional Tribunal in the present case allowed for the possibility of access to the files of persons to whom such access was denied, providing as a legal basis Article 31(1)(2) of the Act on the Institute of National Remembrance. In the light of the law, the said persons have had open access to their files, since the change of the content of Article 30 of the Act on the Institute of National Remembrance after the judgment of the Constitutional Tribunal in the case K 2/07; even if the dubious practice of the Institute of National Remembrance and some administrative courts would make it impossible for some of them to exercise their right, then full access was guaranteed to them at least from 27 May 2010, i.e. from the day of entry into force of the Act of 18 March 2010 amending the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation and the Act on the disclosure of information on the documents of state security authorities from the years 1944-1990 and the content of those documents (Journal of Laws - Dz. U. No. 79, item 522), which repealed Article 31 of the Act on the Institute of National Remembrance, challenged in the present case. At the same time, there are no obstacles for those persons who were refused access to documents to re-send the application for access.

As to the other procedural provisions – Article 31(2), second sentence, Article 32(2), (4)-(6) and (8) of the Act on the Institute of National Remembrance – challenged only in the question of law referred by the Supreme Administrative Court, it should be stated that the proceedings before the Constitutional Tribunal concerning the provisions should be discontinued on the same grounds, in opinion, as those on the basis of which

For the above reasons, I have decided to submit this dissenting opinion.