15/2/A/2010

JUDGMENT

of 24 February 2010

Ref. No. K 6/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Bohdan Zdziennicki – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz
Janusz Niemcewicz
Andrzej Rzepliński – Judge Rapporteur
Mirosław Wyrzykowski,

Grażyna Szałygo - Recording Clerk,

having considered, at the hearings on 13 and 14 January and 24 February 2010, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

1) the preamble of the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age

* The operative part of the judgment was published on 10 March 2010 in the Journal of Laws – Dz. U. No. 36, item 204.

Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145) to Article 2, Article 10, Article 30, Article 32 and Article 45 of the Constitution of the Republic of Poland,

2) Article 1 of the Act referred to in point 1 above to Article 2, Article 10, Article 30, Article 31(3), Article 32 and Article 45 of the Constitution,

3) Article 2 of the Act referred to in point 1 above to Article 2, Article 10, Article 18, Article 30, Article 31(3), Article 32 and Article 45 of the Constitution,

4) Article 3 of the Act referred to in point 1 above to Article 2, Article 10, Article 30, Article 31(3) and Article 45 of the Constitution,

5) Article 4 of the Act referred to in point 1 above to Article 2 of the Constitution,

adjudicates as follows:

1. Article 15b of the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 66, No. 121, item 1264 and No. 191, item 1954, of 2005 No. 10, item 65 and No. 130, item 1085, of 2006 No. 104, item 708 and 711, of 2007 No. 82, item 559, of 2008 No. 208, item 1308 and of 2009 No. 24, item 145, No. 79, item 669, No. 95, item 785 and No. 161, item 1278), **added by Article 1 of the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families** (Journal of Laws – Dz. U. No. 24, item 145)**:**

a) is consistent with Article 2, Article 10, Article 30 and Article 67(1) in conjunction with Article 31(3) of the Constitution of the Republic of Poland, and is not inconsistent with Article 42 of the Constitution,

b) to the extent it provides that an old-age pension of a person who used to be a member of the Military Council of National Salvation amounts to 0.7% of the basis of assessment for every year of service in the Polish Military after 8 May 1945 and until 11 December 1981, is inconsistent with Article 32 of the Constitution.

2. Article 13(1)(1) of the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 67, No. 121, item 1264 and No. 191, item 1954, of 2005 No. 10, item 65, No. 90, item 757 and No. 130, item 1085, of 2006 No. 104, item 708 and 711, of 2007 No. 82, item 558, of 2008 No. 66, item 402 and 409 and No. 220, item 1410 as well as of 2009 No. 24, item 145 and No. 95, item 786), **as amended by Article 2(1)(a) of the Act of 23 January 2009, referred to in point 1 above, is consistent with Article 2, Article 10, Article 30, Article 32 and Article 67(1) in conjunction with Article 31(3) of the Constitution, and is not inconsistent with Article 42 of the Constitution.**

3. Article 13(1)(1b) of the Act of 18 February 1994, referred to in point 2 above, added by Article 2(1)(b) of the Act of 23 January 2009, referred to in point 1 above, is consistent with Article 2, Article 10, Article 30, Article 32 and Article 67(1) in conjunction with Article 31(3) of the Constitution, and is not inconsistent with Article 42 of the Constitution.

4. Article 15b(1) of the Act of 18 February 1994, referred to in point 2 above, added by Article 2(3) of the Act of 23 January 2009, referred to in point 1 above, is consistent with Article 2, Article 10, Article 30, Article 32 and Article 67(1) in conjunction with Article 31(3) of the Constitution, and is not inconsistent with Article 42 of the Constitution.

Moreover, the Tribunal decides as follows:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417 and of 2009 No. 56, item 459**), to discontinue the proceedings on the grounds that the pronouncement of a judgment is inadmissible.**

STATEMENT OF REASONS

I

1. In an application dated 23 February 2009, which was received by the Constitutional Tribunal on 24 February 2009, a group of Deputies (hereafter: the applicant) referred to the Tribunal for it to determine that the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145; hereafter: the Act of 23 January 2009) is inconsistent with Article 2, Article 10, Article 31(3) and Article 32 of the Constitution.

1.1. Enacted by the Sejm, the Act of 23 January 2009 has amended the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws – Dz. U. of 2004, No. 8, item 66, as amended; hereafter: the Act on Old-Age Pensions of Professional Soldiers) and the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. of 2004, No. 8, item 67, as amended; hereafter: the Act on Old-Age Pensions of Functionaries). The amendment of both Acts consisted in lowering the old-age pension

benefits of the members of the Military Council of National Salvation (hereafter: the Military Council) and of the persons who were in service in state security authorities indicated in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (Journal of Laws – Dz. U. of 2007, No. 63, item 425, as amended; hereafter: the Act on Disclosure of Information), i.e. the functionaries employed by the following services and authorities:

(…)

In the applicant's view, the Act of 23 January 2009 aims at lowering the old-age and disability pensions of the persons who were in service in state security authorities in the years 1944-1990, and of the members of the Military Council, as well as lowering the family pension benefits of their families. The amendments introduced by the Act entail a drastic lowering of the basis of assessment of an old-age pension for each year of service in the years 1944-1990 from 2.6% to 0.7%, i.e. by 1.9%.

In the applicant's opinion,

(…)

the provisions in force prior to the amendment of 23 January 2009 did not provide for any old-age pension privileges for the members of the Military Council and the functionaries of the incriminated security authorities.

One could speak of old-age pension privileges for the members of the Military Council and the functionaries of the enumerated security authorities if, with regard to these two groups, there were different rules for granting old-age pensions than there were in the case of the other military pensioners and pensioners of various uniformed services. However, this was not the case.

(…)

Still, the issue of different ways of calculating the amount of old-age pensions for the police, the military and other uniformed services was not challenged. The applicant regarded the provision from the preamble that "the functionaries of security authorities performed their duties without risking their health or life" as contrary to the historical truth. Enacted by the

Sejm, the Act of 23 of January 2009 does not deprive the members of the Military Council and the functionaries of some security authorities of the said privileges, but deprives these persons of the right to an old-age pension in the amount set forth in accordance with the general provisions governing old-age pensions of the military and other uniformed services.

1.2. In the applicant's opinion, the Act of 23 January 2009 infringes on the principle of protection of acquired rights, enshrined in Article 2 of the Constitution.

To justify that statement, the applicant mentioned that all former functionaries of state security authorities who had been employed again after 1990 had had to undergo a verification process, as set forth in the Resolution No. 69 of the Council of Ministers of 21 May 1990 on the procedure and requirements for admitting former functionaries of the Security Service to service in the Office for State Protection and in other organisational units subordinate to the Minister of Interior as well as for employing them in the Ministry of Interior (Official Gazette - *Monitor Polski* (M. P.) No. 20, item 159; hereafter: The Resolution No. 69); during that process they were qualified, by regional qualification committees and the Central Qualification Commission as persons able to serve the Republic of Poland.

In the applicant's view, the former functionaries of state security authorities for whom the verification process had a positive outcome and who were then re-employed, and who retired after 1994, were granted the right to old-age pension benefits pursuant to the provisions of the Act on Old-Age Pensions of Functionaries, which were enacted by the sovereign authorities of the Republic of Poland. Therefore, it is unacceptable to claim that any of these persons received a benefit which was an unlawful privilege granted by the authorities of the People's Republic of Poland and was related to working in the state security apparatus. As a consequence, in the applicant's view, the Act of 23 January 2009 does not conform to the principle of protection of acquired rights, enshrined in Article 2 of the Constitution, for it arbitrarily and unjustly deprives persons of their benefits, even though the benefits were granted in accordance with the provisions enacted after 1990 i.e. in independent Poland.

According to the applicant, by employing the former functionaries, the authorities of the Republic of Poland recognised, taking into consideration the functionaries' career history, qualifications and moral conduct, that these persons deserved trust and were useful for enhancing security of the Republic of Poland after 1990. After being enrolled in the service in independent Poland, some of those persons were rewarded, decorated and promoted on a number of occasions. The provisions of the challenged Act undermine these decisions and facts, and lead to the conclusion that they were unjustified and groundless.

1.3. In the applicant's view, the Act of 23 January 2009 infringes on the principle of protection of citizens' trust in the state, enshrined in Article 2 of the Constitution.

In the substantiation, the applicant asserted that verifying and then employing again the former functionaries of state security authorities had been, in a sense, a statement issued by state authorities, on behalf of the Republic of Poland, that these persons would be treated in the same way as the other functionaries of the services established after 1990. The former functionaries in turn pledged to "loyally serve the Nation, protect the legal order established in the Constitution of the Republic of Poland, and protect the security of the State and its citizens".

(…)

In the applicant's opinion, almost 20 years later, the challenged Act of 23 January 2009 infringes on the provisions of that special agreement, as it leads to the unjustified conclusion that the verified functionaries of state security authorities were not useful to the Polish State, that they did not perform their duties with due diligence and dignity, and, most importantly, that their activity before 1990 was detrimental to Poland's aspirations for independence, was against the law and infringed on the rights and freedoms of other persons. As a result, the Polish State rescinds its promise of full, justified and fair social security benefits with regard to the functionaries of state security authorities who performed their duties in these services before 1990.

1.4. According to the applicant, the Act of 23 of January 2009 also infringes on the principle of social justice (Article 2 of the Constitution).

To substantiate this assertion, the applicant argued that, in the Act of 23 January 2009, the legislator referred to collective responsibility and presumption of guilt in the case of the former functionaries of state security authorities.

In the applicant's opinion, the functionaries of state security authorities for whom the outcome of verification was positive, and who were then re-employed, were made equal, as regards their legal status, with the functionaries who avoided verification or for whom the outcome of verification was negative. Simultaneously, the old-age pension benefits granted to them were limited in comparison to the benefits of the functionaries who commenced their service after 1990.

In the applicant's view, the amending Act introduces the presumption of guilt, which results in the inevitable limitation of old-age pension rights of the former functionaries of

state security authorities. Indeed, the legislator explicitly assumed that all the functionaries who had been in service before 1990 were criminals and did not deserve any entitlements. This presumption may be ruled out only if the functionary proves that he/she acted for the sake of Poland's independence.

(…)

The applicant pointed out that the legislator had not made the former functionaries equal with other subjects who enjoyed the right to the universal old-age pension system, and for whom the recalculation coefficient applied was 1.3% of the basis of assessment, which might seem to be a form of "withdrawal of privileges", but in fact downgraded them to a level significantly lower than that of the universal old-age pension system, and as such was downright repression.

1.5. In the applicant's opinion, the Act of 23 January 2009 infringes on Article 10 of the Constitution, as the legislator used it to administer collective punishment to all the persons who were the functionaries of state security authorities before 1990. The decisive factor here is the mere fact of being in service, regardless of the duties performed in the legal authorities of the state which was internationally acknowledged. In this way the legislator entered the realm of authority which is constitutionally restricted to judicial bodies.

(…)

An offence or crime may be committed by individuals, and not by governing bodies or by particular services. The mere fact of being a member of the services which were legally operating in the People's Republic of Poland does not entail that a given person committed a crime and that retaliatory measures should be taken towards this person. In democratic countries, administering justice – and, consequently, administering punishment and imposing sanctions - is restricted solely to independent judicial bodies.

In the applicant's view, the preamble of the challenged Act proves the retaliatory character of the Act. It follows from the preamble that the legislator independently and conclusively determined the criminal character of the activity of the functionaries of state security authorities.

(…)

The Military Council commenced its activity after the imposition of martial law, and it had had no influence on the preparation and implementation thereof. For 5 years, the Sejm Committee on Constitutional Responsibility carried out an investigation into that case, which was concluded by a proposal lodged with the Sejm to dismiss the case. On 23 October 1996, the Sejm adopted the motion of the Committee, and passed a resolution to discontinue the investigation.

1.6. In the applicant's view, the Act of 23 of January 2009 infringes on Article 31(3) of the Constitution.

The applicant argued that the challenged Act constituted a substantial limitation of pension rights of the functionaries who had undergone a verification process and had been re-employed. In this particular case, the actions of the legislator were incomprehensibly intense and excessively severe to some of the addressees to whom the amended provisions applied.

The amendments that have been introduced impose too harsh a sanction on the persons who cannot be accused of any wrongdoing, except for being the functionaries of state security authorities before 1990. However, it needs to be stressed that, during the period of that service, they did not commit an offence, crime, tort or any other act that would deserve condemnation, which was confirmed by positive evaluation of the qualification committees. The lack of any justification and purpose in lowering old-age pensions of the verified and re-employed functionaries leaves no doubt about a glaring infringement on the principle of proportionality.

Moreover, the applicant pointed out that the provisions of the Act of 23 January 2009 were in clear contradiction to the directive resulting from the Resolution No. 1096 (1996) of the Parliamentary Assembly of the Council of Europe, on measures to dismantle the heritage of former communist totalitarian systems, adopted on 27 June 1996 (hereafter: the Resolution 1096), as well as to the relevant "guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state ruled by law", recommending that the process of settling accounts with the communist era should be finished within the period of 10 years since the fall of the communist regime.

1.7. In the applicant's opinion, the Act of 23 January 2009 does not conform to Article 32 of the Constitution, as it differentiates the status of the functionaries who were positively verified and then re-employed, from the status of those who had not been in service in state security authorities before 1990. There is no justification for such differentiation in the

legal status of old-age pensioners, for both groups of functionaries bear the same characteristics and there are no major reasons for differentiating between these groups.

The differentiation in the legal status, with regard to old-age pension benefits, entails that for the first group the old-age pension is 0.7% of the basis of assessment – for every year of service in state security authorities in the years 1944-1990 (Article 15b of the Act on Old-Age Pensions of Functionaries, as amended), whereas for the functionaries employed for the first time after 1990, the basis of assessment of an old-age pension amounts to 40% of the basis of its assessment for 15 years of service and increases by 2.6% of the basis of assessment – for each subsequent year of service (Article 15 of the Act on Old-Age Pensions of Functionaries).

As a consequence, after the same period of service by the verified and re-employed functionary as by the functionary employed for the first time after 1990 – the old-age pension of the former will be much lower than that of the latter. There is no basis nor justification for such differentiation in the legal status of the persons employed in state security authorities.

In the applicant's view, the Act of 23 January 2009 also infringes on Article 32 of the Constitution due to the fact that it treats the subjects that are quite different from each other in the same way. Indeed, the legislator treated all the functionaries of the former state security authorities, who retired before or after 1990, equally, regardless of the fact whether they had been verified positively or whether they had avoided verification, or whether the outcome of their verification was negative.

(…)

2.1. In the substantiation, the Marshal of the Sejm noted that the applicant had not presented any arguments to support the claim from the *petitum* that the provisions of the challenged Act, with regard to old-age pensions of the members of the Military Council, did not conform to Article 2, Article 31(3) and Article 32 of the Constitution.

(…)

2.2. According to the Marshal of the Sejm, the challenged Act does not exclude the functionaries of state security authorities of the People's Republic of Poland from the special old-age pension system of "uniformed services"; nevertheless, its provisions provide for the decreasing of the basis of assessment of their old-age pensions (for every year of service in

state security authorities in the years 1944-1990), which undoubtedly will translate to lower old-age pensions than those which would be paid out to them, in accordance with general rules concerning uniformed services (with the application of a higher basis of assessment). In fact, the amendments introduced by the Act of 23 January 2009 concern the former functionaries of state security authorities who retired before 1990 or after 1990, and their old-age pension benefits are assessed as a whole or in part, taking into consideration the period of service (work) in state security authorities in the years 1944-1990.

(…)

According to the Marshal of the Sejm, the challenged Act represents one of the manifestations of the negative evaluation of infringements on human rights, suppression of aspirations to independence and other activities of state security authorities of the People's Republic of Poland, which in fact played the role of the political police, and *de iure* – the role of the "guards" of the totalitarian regime. The Act of 23 January 2009 does not refer to specific acts committed in the past by the functionaries of state security authorities of the People's Republic of Poland.

(…)

In particular, the Act does not assign guilt to the functionaries, pursuant to Article 42(3) of the Constitution. In fact, the statement regarding the specific institutional character of the authorities, for which the functionaries worked (which they served) and whose aims they carried out is something completely different. The Marshal of the Sejm indicated that each functionary employed by the state security authorities of the People's Republic of Poland, depending on the time of service, had pledged to:

"(...) strive - making all efforts - to strengthen the internal order, based on the social, economic and political principles of the People's Republic of Poland, as well as, with full determination, sparing no efforts, fight its enemies" (the Decree of 6 October 1948 on the Oath Formula for Minister, State Functionaries, Judges and Prosecutors as well as the Functionaries of State Security Authorities; Journal of Laws – Dz. U. No. 49, item 370, as amended), and he also pointed out the requirements that the functionaries had been expected to meet: "(...) pursuant to the people's law, state security authorities conduct an unremitting fight against the agents of imperialism, spies, saboteurs and other individuals plotting against

the people's democracy, and fight against any hostile activity aimed against strengthening socialism in Poland" (the Decree of 20 July 1954 on the Service in State Security Authorities; Journal of Laws - Dz. U. No. 34, item 142); "A functionary of state security authorities (...) may be a Polish citizen of impeccable moral conduct and ethical credentials who has civic and patriotic awareness as well as is ideologically zealous as regards socialism" (the Act of 31 July 1985 on the Service of the Functionaries of the Security Service and the Citizen Militia of the People's Republic of Poland; Journal of Laws – Dz. U. No. 38, item 181, as amended).

According to the Marshal of the Sejm, the Act of 23 January 2009 (including its preamble) does not concern individuals who used "unlawful methods", but deals with the authorities, structures and organisational units related to the use of such methods. Therefore, it is impossible to prove that the Act creates legal consequences in relation to the evaluation of concrete actions by the functionaries. On the contrary, it assumes the institutional perspective of infringements on human rights by state security authorities, *de iure* regarding their practices and aims as important components of protecting and strengthening the totalitarian system, which is unacceptable under the Constitution of 1997 (cf. the Preamble and Article 13 of the Constitution).

(…)

According to the Marshal of the Sejm, the arguments of the applicant referring to the infringements on typical prohibitions of criminal law by the legislator ("collective responsibility" and "overlooking the presumption of innocence") are inadequate in the context of the analysed case, and thus they are not appropriate to be taken into consideration.

As regards the claim that the Act of 23 January 2009 infringes on the principle of protection of citizens' trust in the state, which is enshrined in Article 2 of the Constitution, as it concerns the persons who were "re-employed" in the Office for State Protection and other organisational units subordinate to the Minister of Interior, upon the positive outcome of the so-called qualification process, the Marshal of the Sejm pointed out that the qualification committees (at the voivodeship and central level) had been administrative bodies which had assessed the usefulness of the candidates for the service in state institutions created after 1990 (including the Office for State Protection). A positive evaluation by such a committee meant that a given person (e.g. a functionary of the Security Service) met the statutory requirements for employment in the organisational units of the Third Republic of Poland, which have been responsible for the public order and safety. Despite being issued in the name of the Republic

of Poland, the decisions of the committees may not be regarded as legally valid decisions of courts with their due gravity and significance, made in accordance with the standards of a democratic state ruled by law (the right to a court). Both the proceedings before the committee, as well as their outcome in the form of an opinion, needs to be treated functionally, only as a way of confirming the usefulness for the service in the bodies of the Third Republic of Poland and fulfilling the requirements of the statute which was then in force. The confirmation of the personal qualities of the candidates was carried out solely for the sake of structural transformation of state security authorities, and by no means does it protect the functionaries against individual responsibility for any breach of law otherwise revealed (for instance, from the period of service in the People's Republic of Poland), nor did it exclude, in this context, the legislator's power to allow statutory modifications of the rules for calculating old-age pension benefits.

According to the Marshal of the Sejm, the fact that a given person met the administrative requirements for access to public service in the Third Republic of Poland, should not lead one to draw the conclusion that this is tantamount to "turning a blind eye" to the past, when the given person performed the tasks of state security authorities of the People's Republic of Poland, involving activities regarded as unacceptable in a democratic state. The Act of 23 January 2009 relates the legal consequences, in the form of modification of the old-age pension system of the functionaries, only to the period of service in the state security authorities of the People's Republic of Poland. It does not affect the rights acquired after the positive "verification" by qualification committees.

According to the Marshal of the Sejm, the principle of protection of acquired rights and the related principle of protection of citizens' trust in the state and its laws must give precedence to the principle of social justice (Article 2 of the Constitution), which allows for the restrictions of the rights which were acquired unjustly or wrongfully and the rights which are not accepted in the axiological order of a democratic state ruled by law. When enacting the challenged provisions, the legislator assumed that the Polish State should not guarantee old-age pensions in full amounts to the functionaries of state security authorities of the People's Republic of Poland (in accordance with the general rules for the so-called uniformed services), if they were calculated in such a way that they included the periods of service in the institutions which, in fact, had aimed at fighting the aspiration to independence and violating human rights.

2.3. With reference to the claim that the Act of 23 January 2009 did not conform to Article 10 of the Constitution, the Marshal of the Sejm stated that the challenged Act did not resolve individual cases - did not determine the responsibility and guilt of the functionaries. Its aim was to set out general and abstract criteria indicating a group of subjects, in whose case old-age pension benefits would be lowered.

(…)

In the legal sense, a statute is not an act from the realm of judiciary, just as this was never the case with, for instance, amnesty acts or the Act of 23 February 1991 on Recognising the Judgments on Persons Persecuted for Their Activities Aimed at Restoring the Sovereignty of the Polish State (Journal of Laws – Dz. U. No. 34, item 149, as amended).

For these reasons, in the opinion of the Marshal of the Sejm, Article 10 of the Constitution (the principle of separation of powers), indicated by the applicant, is not an adequate higher-level norm for review in this case.

2.4. With regard to the applicant's claim that the challenged Act did not conform to Article 31(3) of the Constitution, the Marshal of the Sejm indicated that the scale of decreases in old-age pension benefits for the functionaries of state security authorities of the People's Republic of Poland would undoubtedly be significant, in relation to the old-age pensions received before the amendments (on the basis of general rules specified for the so-called uniformed services); nevertheless, those reductions could not be described as "excessive" or "disproportionate", within the meaning assigned to these concepts by the Constitution and the Tribunal's jurisprudence (in particular, in the context of the lowest old-age pension benefits received under the universal system, by, *inter alia*, the persons who had been persecuted and could not work out a pension which would be adequate to their education or qualifications.

(…)

According to the Marshal of the Sejm, the aim of the act is constitutionally legitimate and fully convergent with the axiological order of the Constitution. The challenged provisions are necessary in a democratic state ruled by law for the protection of its order and public morality. The order and public morality may be interpreted as a manifestation of trust in the state, which is represented by and operates through its functionaries, but also as an element of

confidence in the law, which should be established with respect for the principle of social justice and be binding for all citizens, regardless of the duties performed.

In order to comply with the axiology of the Constitution, the legislator may not neglect drawing legal consequences from the events (which affect the current individual rights of the functionaries), which are related to work (service) in the institutions of the People's Republic of Poland that were aimed at fighting the values being the basis of a democratic state ruled by law.

For the above reasons, the Marshal of the Sejm held the view that the challenged Act conformed to Article 31(3) of the Constitution.

2.5. Taking a stance on the applicant's claim that the Act of 23 January 2009 infringed on the principle of equality before the law enshrined in Article 32 of the Constitution, the Marshal of the Sejm argued that the introduced differentiation in the amount of old-age pension benefits was based on the premise that the functionaries of state security authorities of the People's Republic of Poland constituted a separate group of subjects that – from a legal perspective – may be treated according to different, though "internally" unified, rules (with the exclusion of the functionaries supporting the persons or organisations which were for the independence of Poland). At the same time the regulation is based on the premise that the functionaries of state security authorities of People's Republic of Poland who were positively verified by the qualification committees should be equal in their rights to the "new" functionaries of state security authorities who started working after 1990, but only with regard to those periods when they served in the institutions of the Third Republic of Poland.

(…)

3.

(…)

The Public Prosecutor-General argued that, from the point of view of the principle of equity, it was hard to accept that, for the purposes of assessing the amounts of old-age pensions according to the privileged rules (more beneficial than in the universal old-age pension system), the period of service in the state security authorities of the previous political system, including the functionaries of the security service apparatus, for whom the outcome of the verification process was positive and who were re-employed after 1990, should be treated

equally to the service preformed for the authorities of the democratic state, and the periods of service of the members of the Military Council should be assessed according to the rules for professional soldiers.

In the Public Prosecutor-General's view, the old-age pension systems amended by the Act of 23 January 2009 constitute separate systems, based on other rules than the universal old-age pension system. Indeed, the right to benefits from the separate system was related to the requirement for an at least 15-year period of service in a certain uniformed unit (equivalent period), and not to the whole period of employment and attaining a certain biological age. Also, there are different rules for calculating the basis of assessment of an old-age pension. In addition, the coefficient is set at a different level. In the Act on Old-Age Pensions of Functionaries of the Uniformed Services, this coefficient is 2.6% of the basis of assessment for every year of service (Article 15(1)(1)), whereas in the universal system it is 1.3% of the basis of assessment (Article 53(1)(2) of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund; Journal of Laws - Dz. U. of 2009, No 153, item 1227). A different approach to the periods of service in state security authorities in the years 1944-1990, in the different pension systems, may not indicate the unconstitutionality of the solution introduced pursuant to the Act of 23 January 2009.

3.2. In the opinion of the Public Prosecutor-General, the principle of presumption of innocence, enshrined in Article 42(3) of the Constitution, does not constitute an adequate higher-level norm for review of the challenged Act, for the said principle refers to the proceedings which are repressive in character.

(…)

3.3. Taking a stance on the applicant's claim that the Act of 23January 2009 did not conform to Article 31(3) of the Constitution, the Public Prosecutor-General argued that the applicant had not indicated that the change in the rules for calculating the military old-age pensions of the members of the Military Council and the police old-age pensions of the persons who had been in service in state security authorities in the years 1944-1990, led to the infringement of the right to an old-age pension.

3.4. Moreover, the Public Prosecutor-General also noted that the recommendations, arising from the Resolution 1096, which had been quoted by the applicant as soft law acts, did

not separately constitute a higher-level norm for review which would allow for disqualifying a legal act.

3.5. As regards the claim that the legislator infringed on Article 10 of the Constitution, the Public Prosecutor-General stated that the said provision was not an adequate higher-level norm for constitutional review of the Act 23 January 2009, for the act in question did not concern criminal responsibility and was not repressive in character.

(…)

3.6. The Public Prosecutor-General pointed out that, as a criterion for differentiating the legal situation of the functionaries of uniformed services who commenced their service before 2 January 1999, the legislator had chosen - as a critical date - the year 1990. This criterion had been set in relation to the period of political transformation and the changes pertaining to the state security authorities of the former system, i.e. the dissolution of the Security Service and the creation of the Office for State Protection, regardless of the fact whether, after the dissolution of the Security Service, its functionaries met the requirements set for the functionaries of the newly-created service. Therefore, the legislator chose the date of the political transformation as the criterion, regardless of the subsequent legal situation of the particular functionaries of the state security authorities which had been in existence before 1990. At the same time, the service after 1990 was also treated equally, regardless of the fact whether a given functionary previously worked for state security authorities, or not. The said criterion should be regarded as rationally justified, and hence the introduced differentiation should be regarded as fair. Therefore, it may not be concluded that the challenged solutions infringe on Article 32(1) of the Constitution.

3.7. According to the Public Prosecutor-General, the applicant, challenging the constitutionality of the Act 23 January 2009 as a whole, focused on proving the non-conformity of the change in the rules for calculating the amount of military old-age pensions of the members of the Military Council and the police old-age pensions of the persons who were in service in state security authorities in the years 1944-1990. However, the applicant did not justify what he regarded as unconstitutional in the other provisions of the Act 23 January 2009, and thus the Public Prosecutor-General put forward a motion to discontinue the proceedings within that scope, as the pronouncement of a judgment was inadmissible.

4. In the letter entitled “The Applicants’ Reply to the Letters: (A) of the Marshal of the Sejm of 3 April 2009; (B) of the Public Prosecutor-General of 7 April 2009”, which was dated 30 April 2009, the applicant

(…)

not only specified the higher-level norms for constitutional review of the particular provisions of the Act of 23 January 2009, but also indicated new higher-level norms for such review, i.e. Articles 30 and 45 of the Constitution in reference to the preamble, Articles 1 to 3 of the Act of 23 January 2009, and, above all, Article 18 of the Constitution in reference to Article 2 of the Act of 23 January 2009.

4.1. In the substantiation to the letter of 30 August 2009, questioning the opinions of the Marshal of the Sejm and the Public Prosecutor-General, the applicant argued that the legislator had taken it for granted that all the persons who had been employed by the authorities, as referred to in Article 2 of the Act on Disclosure of Information, had acquired their rights to old-age pensions unjustly, being responsible, in particular, for activities aimed at strengthening the non-democratic system.

(…)

In the applicant’s view, the mere fact that someone was a functionary of state security authorities does not entail that this person breached norms and legal rules, violated the rights, freedoms and dignity of others, as well as that he/she fought to counteract the Polish nation’s aspirations to independence. It is also unacceptable to argue that, without even conducting such activity, but by the mere fact of being a functionary of state security authorities, a given person consented to the said activity, which determines that the enactment of the Act of 23 January 2009 was justified.

(…)

It is difficult to explain why the amending Act deals exclusively with the former uniformed staff of various ranks, employed by civil state security authorities, and does not

include the non-uniformed staff working for these authorities, and in particular, why – in the case of the Academy of Home Affairs – this act does not apply to the main originators of the idea for such an academy and, at the same time, the main "perpetrators" of the establishment of the Academy of Home Affairs, who were highly qualified independent Polish scholars, in particular the well-known professors of law who worked at the Academy.

The applicant considers it completely unjustified and incomprehensible that the provisions of the Act of 23 January 2009 should apply to all the members of the Military Council. The legislator recognised that the activity of the Council was criminal and, therefore, should be subject to sanctions.

(…)

4.2. In the applicant's opinion, it is a gross infringement on the principle of social justice to presume that all the non-verified functionaries carried out the activities referred to in the preamble of the Act of 23 January 2009. The legislator has overlooked the fact that the functionaries of state security authorities included the persons who, in particular:

1)acquired the right to an old-age pension or disability pension prior to 1990 and did not need to undergo a verification process, which does not entail that the outcome of their verification would be negative;

2)were office, administrative or teaching staff and did not carry out any investigative and operational activities (e.g. academic teachers, secretaries and car drivers);

3)were involved in combating common crime or business fraud and did not deal with surveillance or fight against the anti-communist opposition.

(…)

4.3. The challenged Act does not conform to Article 32 of the Constitution, as it groundlessly unifies the legal status of several occupational groups of functionaries. In the legislator's view, before 1990 there were groups of persons whose activities were against the law, who violated the rights, freedoms and dignity of other people, and acted with the purpose to sustain the communist regime. Thus, the legislator resorted to collective responsibility, which is inadmissible in a democratic state ruled by law.

(…)

Also, the Act of 23 January infringes on Article 2 of the Constitution, and the principle of social justice arising therefrom, for the legislator should have consistently defined the functionaries to whom the provisions of the challenged Act apply, in such a way that its provisions could not concern the persons and functionaries who did not act against the law.

4.4. The applicant emphasised that he consciously and purposefully challenged the provisions of the Act of 23 January 2009, as such an application could give grounds for issuing a judgment allowing for the so-called revival of the norms. The Constitutional Tribunal's adjudication of unconstitutionality of the Act of 23 January 2009 would entail that the act would lose its legal force, and would not have the legal effects it specified, and the provisions on old-age pensions would be binding as formulated prior to the date of the Act's entry into force.

4.5. In the applicant's opinion, Articles 3 and 4 of the Act of 23 January 2009 set out the provisions specifying the rules for and the dates of entry into force, as well as the legal effects of the legal norms set out in Articles 1 and 2 of the Act. In this way, they constitute a component of the rules of procedure set out in Articles 1 and 2 of the Act of 23 January 2009 and constitute an integral part thereof. Therefore, overlooking Articles 3 and 4 in the application to the Constitutional Tribunal would be illogical and completely unjustified, as well as it would lead to the situation where the provisions deprived of separate (independent) existence, being devoid of meaning and legal sense, would still be binding.

4.6. The applicant argued that in the said case it was inadmissible to depart from the constitutional principle of protection of justly acquired rights, for the Act of 23 January 2009, in an arbitrary way, significantly limited the rights to old-age pensions of the functionaries who had been in service before 1990 and of the members of the Military Council. Since it is the legislator's obligation, as an authority which enacted the challenged Act, to prove that the rights to old-age pensions of the persons affected by the amendments were (and possibly are) wrongfully and unjustly acquired.

(…)

The fact that the members of the Military Council acquired their rights to old-age pension benefits wrongfully and unjustly has also not been proved beyond any doubt. The Military Council was in power for 19 months, whereas, in the legislator's view, the restrictions on old-age pension benefits for the members of the Military Council should be imposed with regard to the whole period of service before 1990. The legislator's statement that the Military Council was a criminal organisation may only justify the restrictions on old-age pension benefits which were acquired in the period from 12 December 1981 to 22 July 1983, i.e. in the period when the Council existed, and only in the course of individual lawsuits.

(…)

In the applicant's view, there is no substantial prerequisite for not applying the principle of protection of acquired rights with regard to the former functionaries of state security authorities as well as members of the Military Council.

(…)

The applicant noted that, by enacting the Act of 23 January 2009, the legislator had unified the status of all former functionaries of state security authorities, regardless of the fact whether the outcome of their verification process was positive or not. Moreover, with regard to the members of the Military Council, old-age pensions were lowered for the whole period of service prior to 1990, despite the fact that the Military Council existed for only 19 months. It is beyond all doubt that such statutory provisions undermine the principle of social justice. Fair treatment means the obligation of the public authorities to treat persons in a way that is adequate and proportional to their conduct, achievements and wrongdoing.

In the applicant's opinion, the principle of social justice, as an argument for departing from the principle of protection of acquired rights, may be applicable only in individual cases, confirmed by the court's decision which is final and binding. However, in the case of the functionaries who were positively verified, the principle of social justice constitutes an argument for the inadmissibility of the changes in their status with regard to old-age pensions.

The applicant observed that the principle of protection of citizens' trust in the state and its laws gave rise to the prohibition of the legislator's unjustified withdrawal from previous commitments and declarations made to citizens. The Act on the UOP, the Resolution No. 69

and the opinions issued on their basis determined that the group of functionaries of the former state security authorities had acted in accordance with the law and had not carried out any activities aimed against the Polish nation's aspirations to independence.

(…)

It is unacceptable, however, to resort to any sanctions with regard to persons who worked or were in service during the period prior to the political transformation in Poland, i.e. before the year 1989. Even if it is assumed that the institutions existing before that transformation operated in a way that is largely legally and morally questionable today, it does not justify the legislator to state that all the employees of those institutions were criminals, or even felons.

(…)

4.7. In the applicant's view, the preamble of the Act of 23 January 2009, to a large extent, refers to the legal categories pertaining to responsibility: "unlawful methods", "crimes were committed and the perpetrators escaped justice", etc. The terms such as "unlawfulness, crime, responsibility" are legal categories from the realm of criminal law. In the light of the above, the statement that the Act of 23 January 2009 does not have a retaliatory (restrictive) character is not true. The institutions and authorities could not and cannot commit crimes and felonies, for these can only be committed by particular functionaries.

(…)

The confirmation of employment in state security authorities or the membership in the Military Council will automatically lead to a lowering of benefits. Social security bodies and courts will not have the competence to examine if a given functionary committed a crime or felony, i.e. if the said functionary carried out activities aimed against the Polish nation's aspirations to independence, since this fact has arbitrarily been determined by the legislator. Indeed, the legislator stated that all the functionaries of state security authorities and the members of the Military Council bear collective responsibility for the unlawful activities of the state security authorities, which were undertaken to sustain and strengthen the communist regime.

4.8. In the applicant's opinion, the amendments to the Act on Old-Age Pensions of Professional Soldiers with regard to the former members of the Military Council are not general and abstract in character. In the case of the Act of 23 January 2009, the amendments are aimed at a particular group of addressees who can be listed by name.

(…)

These are the characteristic features of the acts which apply the law, and not create it.

(…)

The legislative bodies are not established to determine individual responsibility of persons. This exclusively falls within the competence of the bodies appointed to apply the law, and courts in particular.

(…)

The applicant noted that the provisions of the Act of 23 January 2009, and of the amended old-age pension Acts, were not criminal law acts. The unique character and aim of the challenged Act, the peculiar sanction in the form of restrictions on entitlement, determines that, with regard to the former functionaries and members of the Military Council, the principles from criminal law, i.e. presumption of innocence and the right to a court, should be applicable.

(…)

4.9.

(…)

In the applicant's view, the essence of the rights arising from Article 67 of the Constitution is the guarantee of fair living standards, to the persons who attained an age disqualifying them from employment, and the fact that the amount of benefits, although

contingent upon the assessment and will of the ordinary legislator, it should be based on the period and type of work. In the applicant's opinion, by depriving some of their addressees of fair living standards, the provisions of the Act of 23 January 2009 contradict the principle of respect for human dignity, enshrined in Article 30 of the Constitution, and infringe on the right to social security, enshrined in Article 67 of the Constitution.

II

1. The hearing on 13 January 2010 was attended by the representatives of the applicant, the applicant's proxy, the representative of the Sejm and the Public Prosecutor-General. The parties to the proceedings did not submit any formal motions.

1.1.

The applicant maintained his stance presented in the pleadings dated 23 February and 30 August 2009.

(…)

The principle of individual responsibility does not apply only to criminal law. The Resolution No. 1096 (1996) of the Parliamentary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems, adopted on 27 June 1996 (hereafter: the Resolution 1096), as well as the jurisprudence of the European Court of Human Rights in Strasburg (hereafter: the ECHR) state that the revocation of old-age pension rights may be regarded as a kind of punishment. Another requirement is to limit the time of lustration measures. The Resolution 1096 states that lustration measures should end no later than by 31 December 1999. In its judgment of 7 April 2009 in the case of Žičkus v. Lithuania, the ECHR pointed out that the passage of time from the events under investigation should be taken into account, when it comes to the assessement of the adequacy of the measures applied.

(…)

The applicant indicated that the functionaries of the Security Service who had undergone verification and were employed by the Office for State Protection (hereafter: the UOP) or the Police, pursuant to statutory provisions, with the inclusion of the continuity of

service, in accordance with the Act of 23 January 2009, their period of service before 1990 is treated as if the functionaries had not been employed at all.

(…)

This is a striking example of breaching the principle of equality before the law. The conduct of those functionaries after 1990 must be taken into consideration, when assessing the proportionality of the sanctions imposed. For it is repression to lower an old-age pension below the level provided for by the universal old-age pension system.

The applicant also argued that the challenged Act does not conform to the principles of appropriate legislation, as this is probably the only case where a preamble has been added to a four-article amendment.

(…)

Pursuant to Article 10 of the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 66, as amended; hereafter: the Act on Old-Age Pensions of Professional Soldiers), and by analogy with the act concerning the functionaries, the persons sentenced by a criminal court lose their right to privileged old-age pensions for uniformed services, and may acquire old-age pension benefits in accordance with the rules set forth by the universal old-age pension system, with the recalculation coefficient of 1.3. Therefore, they will be in a better position than the functionaries and the members of the Military Council whose old-age pensions will be lowered, pursuant to statutory provisions, according to the recalculation coefficient of 0.7.
(…).

If in 1990 an officer of the Border Reconnaisance Patrol retired, then until today he has been receiving a military pension which will not be lowered. By contrast, his colleague who decided to remain in service, and continue his service in the Border Guard in independent Poland, will see his old-age pension lowered for the whole period of service in the Border Reconnaissance Patrol.

1.2. The Sejm representative maintained the stance presented in the letter of 3 April 2009 and stated that the ban on amending the provisions specifying the legal situation of a person did not arise from the principle of protection of justly acquired rights, as long as the situation did not entail an entitlement to an individual's right; moreover, the protection of acquired rights was not absolute, as it did not encompass the rights acquired in an unjust or wrongful way, as well as the rights which are not provided for in the assumptions of the constitutional order being in force on the day of adjudication. Therefore, the present legislator is authorised to revise the previous way of thinking about the rights acquired during the period of the People's Republic of Poland, or the rights for the acquisition of which the activity during that period was crucial, and, by considering the norms of the Constitution, to limit their scope or abolish their privileged character.

(…)

In the opinion of the representative of the Sejm, the provisions concerning social security may not be regarded as repressive regulations.

(…)

The challenged Act does not concern the old-age pension benefits of the functionaries of state security authorities of the People's Republic of Poland which are obtained from employment after 1990, in other words, during the functionaries' service for the authorities of the Third Republic of Poland.

The Representative of the Sejm stated that the Act of 23 January 2009 did not decide in individual cases, did not determine the responsibility and guilt of the functionaries. On the contrary, its object was to set out general and abstract criteria, singling out groups of subjects whose old-age pensions would be lowered.

(…)

According to the representative of the Sejm, the purpose of the Act is constitutionally legitimate and fully consistent with the axiological order of the Constitution. Since the constitution-maker determined that the basis of the new constitutional order, which did not question the continuity of the Polish State, was constituted by different values, for the source

of which one should look in the best traditions of the Second Republic of Poland, completely overlooking the period of the People's Republic of Poland, and since the constitution-maker indicated that it had not been until 1989 that the nation had gained the power to sovereignly and democratically rule the country, and finally recalled the bitter experiences from the days when the fundamental freedoms and rights had been violated in our country, the ordinary legislator, intending to be consistent with these considerations, may not neglect drawing legal consequences from these events, which regard employment in the institutions of the People's Republic of Poland that were focused on fighting against the values which are fundamental to a democratic state ruled by law.

(…)

Introduced by the challenged Act, the differentiation in the amount of old-age pensions is based on the assumption that the functionaries of state security authorities of the People's Republic of Poland constitute a separate group of subjects that, from a legal point of view, may be dealt with according to different, though "internally" unified, rules. This differentiates them from other persons who receive old-age pensions from the old-age pension system for the so-called uniformed services, as well as from the persons who belong to the universal old-age pension system. At the same time, the regulation is based on the premise that the functionaries of the People's Republic of Poland who were positively verified by the qualification committees should be equal in their rights to the functionaries who started working after 1990, but only with regard to those periods when they served in the institutions of the Republic of Poland.

(…)

1.3

(…)

In the opinion of the Public Prosecutor-General, the modification of *petitum* of the letter of 7 April 2009 did not result in any changes in the argument presented in that letter.

The Public Prosecutor-General pointed out that one of the fundamental rules of old-age pension "provision" system for uniformed services consisted in acquiring old-age pension entitlement not by attaining a certain age, but in relation to the so-called years of service.

Since the old-age pension system for the functionaries of uniformed services constitutes a special kind of statutory privilege - at least from the point of view of the persons belonging to the universal old-age pension system - and the differences which justify regarding the "provision" system as a privilege include the said years of service and the way of calculating concrete benefit, which is contingent upon those years (though the said privilege of the functionaries of uniformed services is justified by the special character of their service), then in order to determine whether the old-age pension system conforms to the axiological basis of the legal order of a democratic state, it is vital which period of the existence of the Polish State these years of service concern. Considering the value system constituting the basis of a democratic state, the legislator introduced a dividing line referring to the date of the system transformation, which causes the situation where the service in the state security authorities of the communist country is regarded completely differently, in the context of old-age pension benefits, than the service in the authorities of the democratic state - with the preservation of the rule that service in each of these periods is treated equally, regardless of the past or the future of a given functionary.

2.

(…)

In the opinion of the applicant's proxy, the challenged Act infringes on the principle of social justice. Fair treatment is the obligation of public authorities and it means treating persons in a way that is adequate and proportional to their conduct, achievements and wrongdoing; whereas the entry into force of the Act leads to absurdities. The killers of Father Popiełuszko were deprived of their rights to police old-age pensions and receive old-age pensions assessed according to general rules, i.e. according to the coefficient of 1.3. Consequently, their service during the period of the People's Republic of Poland is assigned the coefficient of 1.3. By contrast, present at the hearing, the intelligence officers, who duly performed service both during the period of the People's Republic of Poland and later during the period of independent Republic of Poland, who participated in establishing the Office for State Protection, who were promoted to generals during the period of the Republic of Poland, and whose achievements are commonly known, will receive old-age pensions calculated with the coefficient 0.7, as if they had not worked during that period.

Leaving the provisions of Act of 23 January 2009 in force may result in one more absurdity; namely, in 1990 four and a half thousand of former functionaries of the Security Service, having been verified, took up employment in the authorities of the sovereign Republic of Poland. Some of they are still in service today. In 1990, the qualifications committees stated that these persons had not broken the law and deserve being the functionaries of the Office for State Protection. Pursuant to the Act of 6 April 1990 on the Office for State Protection (UOP) (Journal of Laws - Dz. U. of 1999, No. 51, item 526, as amended; hereafter: the Act on the UOP), a functionary of these authorities could only be a person of impeccable moral and patriotic conduct. Therefore, these persons who, in accordance with the Act had and have impeccable moral and patriotic conduct, and who retired later or are still in service today, are aware of the fact that when they retire, pursuant to the Act they will be deprived of the attribute of impeccable moral and patriotic conduct. Such a statutory solution has nothing in common with the principle of social justice.

(…)

In the opinion of the applicant's proxy, the challenged Act enters the realm of law application, since, firstly, the Act holds a large number of people collectively responsible, and secondly, in some aspects, it displays characteristics that a statute should not possess. Indeed, a statute is a general and abstract act, whereas a statute is not an administrative act which has two diverse characteristics, namely it is individual and concrete. With regard to the members of the Military Council, the Act is of an individual and concrete character:
a) individual, as we can indicate the names of all the living members of the Military Council, and so the scope of the Act remains unchanged as regards its addressees; b) concrete, as it does not concern different situations, which are recurrent, but refer solely to the service and activity of these people for 19 months, between 13 December 1981 and 22 July 1983. Moreover, these persons have their old-age pensions lowered not only for the period when they were involved in the activities of the Military Council, but for the whole period of their military service.

2.1. The representative of the applicant also referred to the argument of the representative of the Sejm, and stated that, in order to deprive a person of a privilege, it is necessary first to determine two things: where is the borderline of a privilege and where does repression start? According to the applicant's representative, downgrading to the universal

old-age pension system would be revocation of a privilege. By contrast, going below the level of the universal old-age pension system, is sheer repression.

(…)

2.2. The representative of the Sejm referred to the arguments of the applicant's representative and proxy, and stated that in that case there was no situation where the Constitutional Tribunal could assess the provisions of the Act of 23 January 2009, as the applicant did not question the procedure of passing the Act nor did he indicate the breach of competence provisions.

The representative of the Sejm pointed out the circumstance that in the course of the proceedings before the Constitutional Tribunal, the Act enjoyed the presumption of constitutionality. The burden of proof of non-conformity of the provisions to the Constitution does not lie with the Sejm, but with the applicant.

(…)

3.

(…)

In the opinion of the applicant's proxy, if the Tribunal adjudicates that Articles 1 to 4 of the Act of 23 January 2009 are inconsistent with the Constitution, and in particular this refers to Article 1 - hence the said Article, in conjunction with the others, as a whole act, will be derogated from the legal system - then there will be restitution of the provisions which were in the two acts previously, and the amending Act of 23 January 2009 will be deemed as null and void. At the same time, the applicant's proxy confirmed that the applicant did not claim that a breach of the legislative procedure had taken place.

In the opinion of the proxy, Articles 3 and 4 of the Act of 23 January 2009 are inextricably related to Articles 1 and 2 of the said Act. By contrast, the preamble to the challenged Act is unconstitutional, for it has been placed in the amending Act and it contains evaluative statements, on the basis of which collective or individual responsibility is then assigned to some categories of persons.

(…)

3.1. Replying to the questions, the Public Prosecutor-General stated that the Military Council had been an illegal institution. The membership in the Military Council first required an appropriate career in the military, as the persons who were its members were in the top military ranks. And the promotion to those ranks required complete acceptance of the rules of the political system and the actions of the authorities. The goal of the Military Council was to maintain the socialist system and the socialist state, which was jeopardised by social movements, in particular by "Solidarity". At the time of establishing the Military Council and the imposition of martial law, there was a peculiar shift in executive power of the communist state, from the bodies of the Communist Party to this military and governmental body. It was the Military Council that really exercised the power in the state.

(…)

In the opinion of the Public Prosecutor-General, the qualification proceedings in 1990 opened the opportunity for employment in the state security authorities of the democratic state. At that time, the government had two options to choose from: the first one – a "zero" option, i.e. to completely eliminate the authorities and establish them anew, and the second one – to impose a democratic control on the existing services, ensure their continuity and the gradual staff turnover. The second option was chosen. The outcome of the qualification proceedings was neither the ultimate moral assessment of the functionaries of state security authorities nor the assessment that would undermine the negative assessment of these authorities.

(…)

3.2. Replying to the questions, the representative of the Sejm explained that the legislator had not formulated any legal norms in the preamble.

(…)

In the opinion of the representative of the Sejm, the aim of the challenged Act is bring the amounts of old-age pensions of the members of the Military Council and those of the

functionaries of state security authorities of the People's Republic of Poland closer to the amounts of old-age pensions under the universal social security system. Old-age pension benefits are guaranteed by the state for the work performed, and disability pensions compensate the loss of health. Therefore, disability pensions have not been included in the Act, as they are paid out for totally different reasons than old-age pension benefits.

3.3. Replying to the questions, the representative of the applicant stated that the rights and privileges which had been unjustly acquired might be revoked, but this had to be done in accordance with some fundamental requirements of a state ruled by law. These requirements are set out in the jurisprudence of the Constitutional Tribunal and the ECHR, and in international law. The challenged Act, by supposition, places the old-age pensions of the members of the Military Council and of the functionaries of state security authorities of the People's Republic of Poland not at the level of the universal system, but below the universal system.

3.4.

(…)

In the opinion of the applicant's proxy, if the legislator recognised that there was a need to curb the excessive privileges of the functionaries of state security authorities of the People's Republic of Poland, then the legilator should have regulated the provisions of the amending Act in such a way that these persons could receive old-age pensions under the universal system. If the functionaries were included in the universal system, then one could speak of elimination of the privileged status. At the same time, the applicant's proxy emphasised that the principles of equality and social justice had been infringed upon, in particular in the case of the verified functionaries.

3.5. The representative of the applicant stated that the challenged Act concerned typists, secretaries, doctors and the medical staff of the departmental health service, if these persons were the functionaries of state security authorities. In order to prove that people were forced to work for the state security authorities of the People's Republic of Poland, the applicants have attached to the case files the following: certified photocopies of employment order No. 35 of 6 October 1952, issued by the State Commission for the Allocation of

Employment for the Graduates of the Faculty of Law of the Jagiellonian University in Cracow, and the changes to the employment order No. DU-I-7c-63/55/PA of 2 March 1955, issued by the Minister of Higher Education, as well as the Act of 7 March 1950 on Planned Employment of Graduates of Vocational Secondary Schools and Higher Education Institutions (Journal of Laws - Dz. U., No. 10, item 106).

(…)

In the opinion of the applicant's proxy, in the 1950s, there were cases when people were delegated to work in the Ministry of Public Security on the basis of an employment order. Indeed, after the lapse of the period of service specified by statute, some of the employees put in their resignations – managed to resign. There were some persons who maybe stayed there voluntarily, because they liked their jobs. But there were also those who wanted to resign, but were not dismissed.

3.6. The Public Prosecutor-General stated that, considering the circumstances and the difficulties related to documenting the remuneration of particular functionaries of state security authorities of the People's Republic of Poland for the years that were required for the calculation of benefits under the universal social security system, it would have been unrealistic to assign these functionaries to the universal old-age pension system. The Public Prosecutor-General was of the opinion that the Act did not fully implement the preamble as it overlooked military old-age pensioners who used to be in service in state security authorities.

3.7. The applicant's proxy pointed out that the persons falling within the scope of the Act of 23 January 2009 had procedural safeguards, arising from the Code of Civil Procedure, but the taking of evidence is in the case of these persons was hindered by the lack of documents. The applicant's proxy confirmed that Article 67 of the Constitution might also be infringed upon by the challenged Act, and the mechanism of weighing principles, as expressed in Article 2 of the Constitution, is more liberal than that expressed in Article 31(3) of the Constitution.

3.8. The representative of the applicant acknowledged that the Military Council had not been a constitutional body, and that there had been no legal basis for its establishment. However, from the indictment filed by the Institute of National Remembrance (IPN)

(hereafter: the IPN) against General Wojciech Jaruzelski and other persons, from the proceedings before the Sejm Committee on Constitutional Responsibility in the 1990s, it follows that the Military Council made no decisions. Moreover, it convened only symbolically, and, as it seems, only a few times during the 19 months of its existence. Even in the indictment, drawn up by the IPN, the Council is called "a phony institution". There is no evidence that it made a single decision. And the speech of 13 December 1981 by General Jaruzelski was a typical propaganda speech and it is hard to regard it as a source of law or as evidence that the Military Council had some competence. It had no competence and it made no decisions. Nobody proved that, and this was the object of investigation by, *inter alia*, the Sejm Committee on Constitutional Responsibility.

3.9. According to the representative of the Sejm, the members of the Military Council were soldiers whose conduct, throughout their service, involved the protection of all the institutions which had been established by the communist state during the period of the People's Republic of Poland. Therefore, there is a link between lowering the benefits for the entire period of service in the Polish Military and the activity within the Military Council. The legislator could single out the members of the Military Council from the entire group of professional soldiers of the Military of the People's Republic of Poland, and, due to that, could lower their old-age pensions.

3.10. The applicant's proxy stated that the qualification of the functionaries had been carried out pursuant to a provision of the Act on the UOP, and the details of that process were set out in a regulation of the Council of Ministers. Receiving positive evaluation was not tantamount to acceptance into service, but employment meant continuity of work. In the opinion of the representative of the applicant, this was a testimony to moral conduct.

(…)

3.11. According to the representative of the Sejm, the certificates that were issued by the verification committee enabled a functionary to apply for service in the newly-formed services.

(…)

3.12.

(…)

In the opinion of the Public Prosecutor-General, the Preamble of the Constitution contains certain evaluation of the past situation and should constitute a directive for the interpretations of concrete constitutional norms. If has been declared in Article 2 of the Constitution that the Republic of Poland is a democratic state ruled by law, therefore that means it has an obligation to establish such an order that would take into consideration the evaluation expressed in the Preamble, as the said evaluation led to the adoption of such a principle. Therefore, the point is that such a democratic state ruled by law should on no account tolerate the heritage of the system that has been so negatively evaluated in the Preamble. A democratic state guarantees the freedom of ideas, but at the same time it has the obligation to enact laws which are compliant with a democratic order.

(…)

In its jurisprudence, the Constitutional Tribunal maintained that the sole existence of the "provision" system constituted, in relation to the universal old-age pension system, a kind of privilege for the persons assigned to the "provision" system. From the point of view of constitutional axiology, one can speak of an unjustly acquired right, when it comes to including the period of service in the authorities which are negatively evaluated as the authorities of an undemocratic state into the period of service which entitles persons to another – privileged – way of calculating a particular benefit. Unjust acquisition of a right should be assessed in each case separately, taking into consideration the matter a given right pertains to, what realm, in what circumstances it was acquired, as well as the current circumstances and presently acceptable value system.

(…)

3.13. The representative of the applicant stated that the amount of old-age pensions of the former functionaries who had undergone verification and had been employed by the UOP or the Police, and who had worked there several or over a dozen years, would be lowered, pursuant to the challenged Act, for the period of service in the People's Republic of Poland.

(…)

As regards their moral conduct, according to the evaluation of the qualification committee, they were all the same.

(…)

4. On 14 January 2010 the Constitutional Tribunal started its proceedings in camera and adjourned the hearing indefinitely for procedural reasons.

5. The hearing on 24 February 2010 was attended by the representatives of the applicant, the applicant's proxy, the representative of the Sejm and the Public Prosecutor-General. The parties to the proceedings did not submit any formal motions and maintained their stances presented in the pleadings and at the hearing on 13 January 2010.

III

The Constitutional Tribunal considered the following:

1. The object of review.

1.1. A group of Deputies (hereafter: the applicant) has lodged an application requesting to determine that the Act of 23 January 2009 on the Amendment of the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws - Dz. U. No. 24, item 145; hereafter: Act of 23 January 2009) as a whole does not conform to Article 2, Article 10, Article 31(3) and Article 32 of the Constitution.

In a letter dated 30 August 2009, which was received by the Constitutional Tribunal on 25 September 2009, the applicant has specified that the Tribunal is requested to establish that:

1) the preamble of the Act of 23 January 2009 does not conform to Article 2 of the Constitution, in particular to the principles of protection of justly acquired rights, of protection of citizens' trust in the state and its laws, and the principle of social justice stemming therefrom, and does not conform to Article 10 of the Constitution and to the principle of separation and balance of powers stemming therefrom, as well as to Articles 30, 32 and 45 of the Constitution;
2) Article 1 of the Act of 23 January 2009 does not conform to Article 2 of the Constitution, in particular to the principles of protection of justly acquired rights, of protection of citizens' trust in the state and its laws, and the principle of social justice stemming therefrom, and does not conform to Article 10 of the Constitution and to the principle of separation and balance of powers stemming therefrom, as well as to Article 30, Article 31(3), Articles 32 and 45 of the Constitution;
3) Article 2 of the Act of 23 January 2009 does not conform to Article 2 of the Constitution, in particular to the principles of protection of justly acquired rights, of protection of citizens' trust in the state and its laws, and the principle of social justice stemming therefrom, and does not conform to Article 10 of the Constitution and to the principle of separation and balance of powers stemming therefrom, as well as to Article 18 of the Constitution and the principle of protection of the family stemming therefrom, as well as to Article 30, Article 31(3), Articles 32 and 45 of the Constitution;
4) Article 3 of the Act of 23 January 2009 does not conform to Article 2 of the Constitution, in particular to the principles of protection of justly acquired rights, of protection of citizens' trust in the state and its laws, and the principle of social justice stemming therefrom, and does not conform to Article 10 of the Constitution and to the principle of separation and balance of powers stemming therefrom, as well as to Article 30, Article 31(3) and Article 45 of the Constitution;
5) Article 4 of the Act of 23 January 2009 does not conform to Article 2 of the Constitution and to the principle of the rational lawmaker stemming therefrom.

1.2. The Constitutional Tribunal recalls that the legal review of statutes is founded upon the assumption of rationality of the legislator and the presumption of conformity of the

examined norms to the Constitution. It is within the competence of the legislator to enact law in accordance with the assumed political and economic goals and to adopt such legal solutions, which, in the legislator's opinion, will best suit the fulfilment of these goals. The interference of the Constitutional Tribunal becomes permissible only when the legislator exceeds the limits of freedom of action and infringes on a specific constitutional norm, principle or value (cf. the decision of 24 February 1997, Ref. No. K 19/96, Official Collection of the Constitutional Tribunal's Decisions - OTK ZU No. 1/1997, item 6). The Constitutional Tribunal may interfere within the domain restricted for the legislator only in cases, where the examined statutory provisions encroach in an obvious manner on constitutional norms, principles or values. Then again, there is no basis for interference when the legislator has chosen one of constitutionally possible options regarding the regulation of a given matter, even if questions may arise whether this regulation is the best possible (cf. the judgment of 3 November 1998, Ref. No. K 12/98, OTK ZU No. 6/1998, item 98).

According to Article 32 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereafter: the Tribunal Act) a application directed to the Constitutional Tribunal should include both a formulation of the allegation of non-conformity with the Constitution, with a ratified international agreement or a statute of the challenged normative act, as well as a substantiation of the raised allegation, and a bringing forth of evidence for its support. The applicant's obligation based upon Article 32 of the Tribunal Act of proper substantiation of the allegation of unconstitutionality of the challenged provisions determines thus the burden of proof in the legal review procedure before the Constitutional Tribunal. Until the subject initiating the legal review provides specific and convincing legal arguments supporting his or her thesis, the Constitutional Tribunal will consider the reviewed provisions as constitutional.

In line with Article 66 of the Tribunal Act, the Tribunal while adjudicating is bound by the scope of the application, of the judicial question or of the complaint. A consequence of the norm expressed in Article 66 of the Constitutional Tribunal Act is thus both the impossibility of an independent determination by the Constitutional Tribunal of the object of review, and the impossibility of replacing the subject initiating review in the obligation to substantiate the brought forth allegation of non-conformity with the Constitution, a ratified international agreement or a statute of the challenged normative act. This also concerns situations where the applicant limits himself to the indication and quotation of the content of a provision of the Constitution, however without specifying the arguments to confirm the allegations presented in the application.

1.3. The Act of 23 January 2009 is a statute amending two acts: the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 66, as amended; hereafter: the Act on Old-Age Pensions of Professional Soldiers) and the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 67, as amended; hereafter: the Act on Old-Age Pensions of Functionaries).

1.3.1. The challenged Act consists of a title, a preamble and four articles. The first two articles contain provisions adding new provisions (Article 1, Article 2(1)(b), Article 2(2) and (3)) or amending the wording of the previous provisions (Article 2(1)(a), the third one contains adaptation provisions, and the fourth one is a provision on the entry into force. Although the applicant, in the *petitum* of the first application, challenged "the whole Act", and subsequently specified the allegations regarding particular provisions, in the substantiation of both applications the applicant did not indicate any essential arguments for the unconstitutionality of Article 2(1)(b) of the Act of 23 January 2009 insofar as it adds to Article 13 of the Act on Old-Age Pensions of Functionaries, point 1a; of Article 2(2) of the Act of 23 January 2009 insofar as it adds to the Act on Old-Age Pensions of Functionaries Article 13a, Article 2(3) of the Act of 23 January 2009 insofar as it adds to the Act on Old-Age Pensions of Functionaries Article 15b(2), Article 15b(3) and Article 15b(4), as well as the adaptation provisions (Article 3) and the provision on the entry into force of the Act (Article 4). In particular, what may not be considered is the reasoning of the applicant on the "inseparable link" of Article 3 and Article 4 of the Act of 23 January 2009 with its other provisions.

1.4. Reconstructing the object of review, the Constitutional Tribunal states that a correctly formulated application requires not only an indication of the provision of the Constitution which is to constitute a higher-level norm for review, but also a presentation of essential arguments indicating the non-conformity of the content of the challenged provision to the content of the norm enshrined in the constitutional provision. In the examined case, the applicant has not indicated any arguments substantiating the allegations of non-conformity to the Constitution of Article 2(1)(b) of the Act of 23 January 2009 insofar as it adds to

Article 13 of the Act on Old-Age Pensions of Functionaries, point 1a; Article 2(2) of the Act of 23 January 2009 insofar as it adds to the Act on Old-Age Pensions of Functionaries Article 13a; Article 2(3) of the Act of 23 January 2009, insofar as it adds to the Act on Old-Age Pensions of Functionaries Article 15b(2), Article 15b(3) and Article 15b(4), as well as Articles 3 and 4 of the Act of 23 January 2009.

For this reason, the Constitutional Tribunal decides to discontinue the proceedings within this scope, owing to the inadmissibility of the pronouncement of a judgment.

1.5. The applicant has neither presented substantive arguments to support the allegation that the preamble of the Act of 23 January 2009 included normative content not being in conformity with the Constitution. In particular, general statements referred to in the application that the content of the preamble testifies of the retaliatory character of the challenged Act and contains an assertion contrary to the historical truth that "functionaries of the security authorities performed their functions without taking the risk of losing health or life" may not be considered as such arguments.

1.6. The Constitutional Tribunal states that the preamble of the Act of 23 January 2009 plays an instructive role in the interpretation of the articles of the Act. The applicant did not demonstrate whether and what normative content had been encoded by the legislator in the preamble of the Act of 23 January 2009, and in which way it infringed on the Constitution.

For this reason the Constitutional Tribunal decides to discontinue the proceedings in the scope of the allegation of non-conformity of the preamble of the Act of 23 January 2009 with the Constitution.

1.7. However, the applicant has provided arguments for the allegations of non-conformity of Article 1, Article 2(1) and (3) of the Act of 23 January 2009 with the Constitution and in this scope the Constitutional Tribunal reviews their constitutionality.

1.8. Article 1 and Article 2(1) and (3) of the Act of 23 January 2009 contain amending provisions (adding new provisions or giving new wording to the amended provisions).

The applicant, however, questioned neither the procedure of enacting those provisions, nor the method of their implementation. The manner of formulating allegations in the substantiation of the application and the quoted arguments brought up in their support show

that in reality the applicant questions the content of the amended provisions (norms) as a result of the enactment of the amending provisions.

The Constitutional Tribunal stresses at this point that the principle *falsa demonstratio non nocet*, according to which decisive importance is assigned to the essence of the matter and not to its designation, is well established in the European legal culture. The Constitutional Tribunal, more than once, took the position that an application consists of the whole content expressing it, and the *petitum* is only a systematisation of reservations and an indication of main higher-level norms for review in this regard. For the object of the application is determined both by the content expressed in the *petitum*, as well as by that, which is found in the substantiation of the application (cf. the decision of 3 December 1996, Ref. No. K 25/95, OTK ZU No. 6/1996, item 52).

1.8.1. From the content of the application it follows, that the aim of the applicant is to question the conformity with the Constitution of those regulations, which foresee a lowering of Old-Age Pensions of the members of the Military Council of National Salvation (hereafter: the Military Council) and of functionaries of state security authorities mentioned in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (Journal of Laws - Dz. U. of 2007, No. 63, item 425, as amended; hereafter: the Act on Disclosure of Information). In connection with this, taking into account the allegations indicated in the application and the way of their substantiation, the Constitutional Tribunal states that the object of its review are the legal norms expressed in:

- Article 15b of the Act on Old-Age Pensions of Professional Soldiers, added by Article 1 of the Act of 23 January 2009;

- Article 13(1)(1) of the Act on Old-Age Pensions of Functionaries, in the wording given by Article 2(1)(a) of the Act of 23 January 2009;

- Article 13(1)(1b) of the Act on Old-Age Pensions of Functionaries, added by Article 2(1)(b) of the Act of 23 January 2009;

- Article 15b(1) of the Act on Old-Age Pensions of Functionaries, added by Article 2(3) of the Act of 23 January 2009.

This statement has also influenced the way of formulating the conclusion of the judgment.

The indicated provisions read as follows:

“In the case of a person, who was a member of the Military Council of National Salvation, the old-age pension amounts to 0.7% of the basis of assessment for every year of

service in the Polish Military after 8 May 1945 (Article 15b of the Act on Old-Age Pensions of Professional Soldiers, added by Article 1 of the Act of 23 January 2009).

"1. The following shall be considered as equivalent to the service in the Police, the Internal Security Agency, the Foreign Intelligence Agency , the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service:

1) periods of service as a functionary of the Office for State Protection;

(…)

1b) periods of service as a functionary of state security authorities, as referred to in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (…), according to principles set in Article 15b, except for the service defined in paragraph 2" (Article 13(1)(1) and (1b) of the Act on Old-Age Pensions of Functionaries, amended by Article 2(1)(a) and (b) of the Act of 23 January 2009).

"In the case of a person, who performed service in state security authorities, as referred to in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents, and who remained in service before the day of 2 January 1999, the old-age pension amounts to:

1) 0.7% of the basis of assessment – for every year of service in state security authorities in the years 1944-1990;

2) 2.6% of the basis of assessment – for every year of service or periods equivalent with the service, as referred to in Article 13(1)(1), 13(1)(1a) and 13(1)(2)-(4)" (Article 15b(1) of the Act on Old-Age Pensions of Functionaries, added by Article 2(3) of the Act of 23 January 2009).

1.9. The subjective and objective scope of the regulations introduced by the Act of 23 January 2009.

1.9.1. By Act of 23 January 2009 the legislator lowered old-age pension benefits for the members of the Military Council (Article 15b of the Act on Old-Age Pensions of Professional Soldiers, added by Article 1 of the Act of 23 January 2009) and for persons who were in service in state security authorities indicated in Article 2 of the Act on Disclosure of Information (Article 13(1)(1b) of the Act on Old-Age Pensions of Functionaries, amended by

Article 2(1)(b) of the Act of 23 January 2009, and Article 15b of the Act on Old-Age Pensions of Functionaries added by Article 2(3) of the Act of 23 January 2009).

According to Article 2 of the Act on Disclosure of Information:

"1.Within the meaning of the Act, the following shall be state security authorities:

1) the Department of Public Security of the Polish Committee of National Liberation;
2) the Ministry of Public Security;
3) the Committee for Matters of Public Security;
4) organisational units subordinate to authorities, as referred to in points 1-3, and in particular units of the Citizen Militia in the period until 14 December 1954;
5) central institutions of the Security Service of the Ministry of Interior and the subordinate field units in regional, district and equivalent headquarters of the Citizen Militia and in regional, district and equivalent Offices of Home Affairs;
6) the Academy of Home Affairs;
7) the Border Reconnaissance Patrol;
8) the Main Administration of the Internal Service of military units of the Ministry of Interior and the cells subordinate to it;
9) the Military Information;
10) the Military Internal Service;
11) the Administration of the 2nd General Headquarters of the Polish Military;
12) other services of Military Forces conducting operative, reconnaissance or investigative activity, also in types of military formations and in military districts;

3. The units of the Security Service, within the meaning of the Act, are those units of the Ministry of Interior, which *de iure* were subject to dissolution at the moment of the organisation of the Office for State Protection, and the units which were their predecessors".

On the other hand, Article 3 of the Act of 23 January 2009 stipulates:

"1. With regard to persons being the members of the Military Council of National Salvation, the old-age pension authorities, competent according to the provisions of the Act as referred to in Article 1, shall *ex officio* conduct a renewed assessment of the right to benefits and the amount of the benefits (…)".

2. In the case of persons, in relation to whom it follows from the information set forth in Article 13a of the Act, as referred to in Article 2, that they were in service during the years 1944-1990 in state security authorities, as referred to in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents, and who on the

day of entry into force of the Act receive benefits accorded under the Act, as referred to in Article 2, the old-age pension authority competent according to the provisions of the Act, as referred to in Article 2, initiates *ex officio* proceedings relating to the renewed assessment of the right to benefits and the amount of the benefits (…)".

It follows from the content of the indicated provisions that the legislator has lowered the old-age pension benefits for the members of the Military Council and for the persons who were in service in state security authorities in:

1) the Department of Public Security of the Polish Committee of National Liberation;
2) the Ministry of Public Security;
3) the Committee for Matters of Public Security;
4) organisational units subordinate to authorities, as referred to subparagraphs 1-3, and in particular units of the Citizen Militia in the period until 14 December 1954;
5) central institutions of the Security Service of the Ministry of Interior and the subordinate field units in regional, district and equivalent headquarters of the Citizen Militia and in regional, district and equivalent Offices of Home Affairs;
6) the Academy of Home Affairs;
7) the Border Reconnaissance Patrol;
8) the Main Administration of the Internal Service of military units of the Ministry of Interior and the cells subordinate to it

– (hereafter: functionaries of state security authorities of the People's Republic of Poland).

Such a result of the interpretation of the amended provisions of the Act on Old-Age Pensions of Professional Soldiers and the Act on Old-Age Pensions of Functionaries and of Article 3 of the Act of 23 January 2009 finds confirmation in verbatim records from legislative works (Bulletin No. 1575/6th term of office of the Sejm, p. 4; verbatim record from the 32th sitting of the Sejm of 16 December 2009; pp. 17-18; Bulletin No. 1655/6th term of office of the Sejm, p. 6; verbatim record from the 25th sitting of the Senate of 14 January 2009, pp. 60-61).

1.9.2. Thus the old-age benefits remain at an unchanged level, in the case of:

1) all employees not being functionaries, who were employed in the state security authorities indicated in Article 2 of the Act on Disclosure of Information, and

2) the soldiers of the Military Information;

3) the soldiers of Military Internal Services;

4) the soldiers of the Administration of the 2nd General Headquarters of the Polish Military and other services of the Armed Forces conducting operative, reconnaissance or investigative activity, also in types of military formations and in military districts.

1.9.3. Before the amendments introduced by the Act of 23 January 2009, the members of the Military Council being professional soldiers and functionaries of state security authorities of the People's Republic of Poland were, as a rule, entitled to an old-age pension in the amount of 40% of the basis of its assessment for 15 years of service, which accrued by 2.6% of the basis of its assessment for every subsequent year of service, up to the amount of 75% of the basis of its assessment.

1.9.4. The aim of the Act of 23 January 2009 was to lower the old-age pensions to 0.7% of the basis of their assessment for the members of the Military Council for every year of service in the Polish Military after 8 May 1945 and for the functionaries of state security authorities of the People's Republic of Poland (see the substantiation of the bill, 6th term of office of the Sejm, Sejm Paper No. 1140, p. 1).

1.9.5. Except for the lowering of old-age pension benefits for the members of the Military Council and the functionaries of state security authorities of the People's Republic of Poland, the legislator has not changed the other basis of their acquisition, increase and valorisation.

Also, the Act of 23 January 2009 does not concern benefits other than old-age pensions for the members of the Military Council and for the functionaries of state security authorities of the People's Republic of Poland, as provided for in the Act on Old-Age Pensions of Professional Soldiers and the Act on Old-Age Pensions of Functionaries, i.e. the benefits derived from a disability pension, a family pension, from supplements to old-age pensions and disability pensions, as well as from allowances and pecuniary benefits.

2. Higher-level norms for review.

2.1. In the *petitum* of the first application, the applicant has indicated Article 2, Article 10, Article 31(3) and Article 32 of the Constitution as higher-level norms for constitutional review of the challenged Act. However, it follows from the content of the substantiation of this application that the applicant alleges that the challenged provisions infringe on the principle of protection of citizens' trust in the state and its laws, the principle of protection of acquired rights and the principle of social justice (Article 2 of the Constitution), the principle of separation of powers (Article 10 of the Constitution), the

principle of equality before the law and the prohibition of discrimination (Article 32 of the Constitution) as well as the proportionality of limitations of freedoms and rights of the individual (Article 31(3) of the Constitution) in the context of the right to social security (Article 67(1) of the Constitution). In addition, in the substantiation of the application, the applicant has also mentioned the principles of criminal responsibility and a fair criminal procedure enshrined in Article 42 of the Constitution, as the higher-level norm for constitutional review of the challenged regulation.

2.1.1. In turn, in a letter dated 30 August 2009, which was lodged with the Constitutional Tribunal on 25 September 2009, the applicant additionally indicated new higher-level norms for review, i.e. Articles 30 and 45 of the Constitution with reference to the preamble and Articles 1 to 3 of the Act of 23 January 2009, and also Article 18 of the Constitution with reference to Article 2 of the Act of 23 January 2009. The Constitutional Tribunal states that the applicant's letter entitled "The Applicants' Reply to the Letters: (A). of the Marshal of the Sejm of the Republic of Poland of 3 April 2009, (B). of the Public Prosecutor-General of 7 April 2009" essentially led to an extension of the initial application of 23 February 2009 by adding new higher-level norms for review.

The Constitutional Tribunal recalls that the principle *falsa demonstratio non nocet* applies not only to the norms being the object of review, but also to the legal norms being the basis thereof (see the judgment of 8 July 2002, Ref. No. SK 41/01, OTK ZU No. 4/A/2002, item 51; the judgment of 6 March 2007, Ref. No. SK 54/06, OTK ZU No. 3/A/2007, item 23; the judgment of 2 September 2008, Ref. No. K 35/06, OTK ZU No. 7/A/2008, item 120).

In conclusion, the Constitutional Tribunal states that the higher-level norms for constitutional review of the challenged provisions in this case are Articles 2, 10, 30, 32, 42 as well as Article 67(1) read in conjunction with Article 31(3) of the Constitution.

2.2. With regard to the fact that the applicant did not substantiate the allegation that the challenged provisions of the Act of 23 January 2009 infringed on Articles 18 and 45 of the Constitution, the Constitutional Tribunal decides to discontinue the proceedings in this scope, owing to the inadmissibility of the pronouncement of a judgment.

The majority of allegations of non-conformity with the Constitution made by the applicant regarding Article 15b of the Act of Old-Age Pensions of Professional Soldiers and regarding Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on Old-Age Pensions of Functionaries are linked with the right to social security. For this reason, the Constitutional Tribunal shall examine in the first place the conformity of the challenged provisions to

Article 67(1) read in conjunction with Article 31(1) of the Constitution, and subsequently with the other higher-level norms for review indicated by the applicant.

2.3. Before proceeding to the examination of constitutionality of the challenged regulations, the Constitutional Tribunal has deemed it necessary to reconstruct the axiological basis and standards of a democratic state ruled by law, which determine the limits within which the legislator may enact law in order to settle accounts with the functionaries of the communist regime.

3. Parliamentary assessment of former communist regimes.

3.1. The process of coping with the heritage of communism in parliamentary work.
In our part of Europe, the problem of the heritage of the legal, economic and political regime in power for at least 45 years – until the years 1989-1991 – is an object of public debates, political conflicts and various legal solutions which have been introduced gradually, although they are essentially similar and have been going in a similar direction. On numerous occasions, not only the parliaments of the states of our region, but also the parliamentary assemblies functioning in Europe, have expressed the need to permanently overcome the heritage of communism.

The Assessment of former communist regimes has been expressed in numerous resolutions of the Sejm and the Senate of the Republic of Poland, and also in the documents of the Parliamentary Assembly of the Council of Europe, the European Parliament and the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe.

3.1.1. Resolutions of the Sejm of the Republic of Poland. The Sejm has many times assessed the former communist regime imposed on Poland after the II World War by the Soviet Union. Among the resolutions adopted for this purpose, one should quote the following excerpts from them:

"The Sejm of Poland states that the structures of the Security Office, the Military Information, the military prosecution and military judiciary, which in the years 1944-1956 were intended to combat organisations and persons acting for the sake of the sovereignty and independence of Poland, are responsible for the sufferings and death of many thousands of Polish citizens. The Sejm condemns the felonious activity of those institutions" (the Resolution of the Sejm of the Republic of Poland of 16 November 1994 on Felonious Activities of the State Security Apparatus in the Years 1944-1956, M. P. No. 62, item 544);

"We deem it necessary to punish all responsible for the communist crimes committed in the years 1944-1989 on the Polish land, including traitors who made decisions submitting Poland to a foreign power, acting against liberty, independence and democracy" (the Resolution of the Sejm of the Republic of Poland of 18 June 1998 on the Condemnation of Communist Totalitarianism; M. P. No. 20, item 287);

"On the 60th anniversary of the forgery of the first post-war parliamentary elections in January 1947, the Sejm of the Republic of Poland wishes to recall those dramatic events. They constitute one of the darkest pages of modern Polish history. The hopes for a democratic order in our Homeland, which was waking to a new life after the nightmare of the II World War, were then ultimately let down. The Sejm of the Republic of Poland pays homage to all those who, until the end, fought for a free and democratic Poland, to those who - despite a brutal propaganda battue and a rising terror - protested with their ballot paper against the communist enslavement. In particular, we wish to commemorate those who for their attitude suffered imprisonment, or even paid the price of death" (the Resolution of the Sejm of the Republic of Poland of 25 January 2007 on the Condemnation of Electoral Forgeries of 1947 and Paying Homage to Victims of Communist Terror; M. P. No. 6, item 71).

In this context, the content of the *Report of the Etraordinary Commission for the Examination of the Activity of the Ministry of Interior* adopted on 14 September 1991 (Sejm Paper No. 1104) should also be noted. The Report reveals the great extent of impunity of activity that the Security Service of the People's Republic of Poland had, and that this was guaranteed by the system (see in particular: part V point 2 of the Report).

3.1.2. Council of Europe Resolutions.

Among the so-called soft international law acts, one should mention the Resolution No. 1096 (1996) of the Parliamentary Assembly of the Council of Europe on measures to dismantle the heritage of former communist totalitarian systems, adopted on 27 June 1996 (hereafter: the Resolution 1096). Point 14 of this resolution recommends to the Member States of the Council of Europe that:

"employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights (*droits financiers*). In exceptional cases, where the ruling elite of the former regime awarded itself pension rights (*droits à pension*) higher than those of the ordinary population, these should be reduced to the ordinary level" (point 14).

The condemnation of former communist regimes and an emphasis that those regimes brought about genocide, crimes against humanity and war crimes, an infringement of human

rights and personal freedoms is expressed in the Resolution No. 1481 of the Parliamentary Assembly of the Council of Europe of 26 January 2006 on the need for international condemnation of crimes of totalitarian communist regimes, in which it is stated that:

"The totalitarian communist regimes which ruled in central and eastern Europe in the last century, and which are still in power in several countries in the world, have been, without exception, characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism" (point 2).

3.1.3. The standpoint of the European Parliament. The European Parliament resolution on European conscience and totalitarianism was adopted on 2 April 2009. According to the content of this resolution, the European Parliament:

"(…) 1. Expresses respect for all victims of totalitarian and undemocratic regimes in Europe and pays tribute to those who fought against tyranny and oppression;

(…)

3. Underlines the importance of keeping the memories of the past alive, because there can be no reconciliation without truth and remembrance; reconfirms its united stand against all totalitarian rule from whatever ideological background;

(…)

5. Underlines that, in order to strengthen European awareness of crimes committed by totalitarian and undemocratic regimes, documentation of, and accounts testifying to, Europe's troubled past must be supported, as there can be no reconciliation without remembrance;

6. Regrets that, 20 years after the collapse of the Communist dictatorships in Central and Eastern Europe, access to documents that are of personal relevance or needed for scientific research is still unduly restricted in some Member States; calls for a genuine effort in all Member States towards opening up archives, including those of the former internal security services, secret police and intelligence agencies, although steps must be taken to ensure that this process is not abused for political purposes;

7. Condemns strongly and unequivocally all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes; extends to the victims of these crimes and their family members its sympathy, understanding and recognition of their suffering;

(…)

15. Calls for the proclamation of 23 August as a Europe-wide Day of Remembrance for the victims of all totalitarian and authoritarian regimes, to be commemorated with dignity and impartiality;

16. Is convinced that the ultimate goal of disclosure and assessment of the crimes committed by the Communist totalitarian regimes is reconciliation, which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal (…)".

Attention should also be drawn to the Declaration of the European Parliament on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism:

"– having regard to the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,

– having regard to the following articles of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms: Article 1 - Obligation to respect human rights; Article 2 - Right to life; Article 3 - Prohibition of torture, and Article 4 - Prohibition of slavery and forced labour,

– having regard to Resolution 1481 (2006) of the Council of Europe Parliamentary Assembly on the need for international condemnation of crimes of totalitarian communist regimes (…)".

3.1.4. The standpoint of the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe. On 3 July 2009, in Vilnius, the Parliamentary Assembly of the Organisation for Security and Co-operation in Europe (hereafter: the OSCE) adopted the Resolution on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21st Century, being a part of the Vilnius declaration adopted there:

"3. Noting that in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about genocide, violations of human rights and freedoms, war crimes and crimes against humanity,

(…)

5. Reminding the OSCE participating States of their commitment «to clearly and unequivocally condemn totalitarianism» (1990 Copenhagen Document),

(…)

7. Aware that the transition from communist dictatorships to democracy cannot take place in one day, and that it also has to take into account the historical and cultural backgrounds of the countries concerned (…)".

3.2. The quoted resolutions of the Sejm, the Parliamentary Assemblies of the Council of Europe, the OSCE and the European Parliament from the previous and current decade refer to the genesis of the communist political system, its basic principles and its serious negative civilisation consequences, as well as indicate the need to gradually and effectively overcome these consequences, in accordance with the principles of a democratic state ruled by law. The Constitutional Tribunal shares the evaluation expressed therein.

4. A democratic state ruled by law in the face of settling accounts with functionaries of former communist regimes.

4.1. The regulation introduced by the Act of 23 January 2009 is another sign of the process of coping, by the democratic legislator, with settling accounts – within the limits of democratic state ruled by law – with the communist regime in power in Poland in the years 1944-1989. The Preamble of the Constitution is an axiological substantiation of this type of legislation, in which the constitutional lawmaker refers to the "best traditions of the First and the Second Republic" (failing to mention the period of communist rule) and reminds the "bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland".

4.2. In the model of overcoming the communist heritage adopted in the countries of our region of Europe, legal regulations are of fundamental importance, next to education. The statutes relating directly to this heritage concern – to a different extent: 1) the fate of communist parties and their members and the liberty to propagate political and system principles of communism in a democratic society; 2) reprivatisation; 3) redress to harmed individuals for the crimes committed by the state; 4) punishment of those responsible for the crimes of the state; 5) dissolution of secret political (civilian and military) police and proceedings against their former functionaries, who in the overwhelming majority may not be appointed to newly formed secret security police; 6) proceedings against secret collaborators of the said former police; 7) formation of institutes/offices/centres whose task is to gather documents from this period and/or diffusion of knowledge, and/or pursuing perpetrators of crimes of the state.

4.3. The Polish statutes enacted so far, the regulations of which concern the dismantling of communist institutions and settling accounts with their past.

Since the date of the universal elections of 4 June 1989, the Polish legislator has regulated, in many statutes, a majority of matters related to the overcoming of the heritage of the communist past, enumerated in point 4.2. of the reasoning of this judgment. Some of those statutes were devoted exclusively to this goal –which suggests the titles of those normative acts, in the case of others – only some of their provisions concerned this goal. Here are some examples:

- the Act of 23 November 1989 on the Dissolution of the Voluntary Reserve of the Citizen Militia (Journal of Laws - Dz. U. No. 64, item 388),

- the Act of 7 December 1989 on the Amendment of the Act on Special Competence of Certain Persons to Re-establish Labour Relationships (Journal of Laws - Dz. U. No. 64, item 391),

- the Act of 22 March 1990 on the Amendment of the Act on the Public Prosecutor's Office of the People's Republic of Poland, the Code of Procedure in Criminal Matters Concerning Petty Offences and the Act on the Supreme Court (Journal of Laws - Dz. U. No. 20, item 121),

- the Act of 6 April 1990 on the Office for State Protection (UOP) (Journal of Laws - Dz. U. of 1999, No. 51, item 526, as amended; hereafter: the Act on the UOP),

- the Act of 24 May 1990 on the Amendment of Certain Provisions on Old-Age Pensions (Journal of Laws - Dz. U. No. 36, item 206, as amended),

- the Act of 25 October 1990 on the Return of Property Lost by Trade Unions and Social Organisations due to the Imposition of Martial Law (Journal of Laws - Dz. U. of 1991, No. 4, item 17, as amended),

- the Act of 9 November 1990 on the Seizure of Property of the Former Polish United Workers' Party (Journal of Laws - Dz. U. of 1991, No. 16, item 72, as amended),

- the Act 24 January 1991 on Veterans and Certain Other Persons Being Victims of Repression during the War and in the Post-war Period (Journal of Laws - Dz. U. No. 17, item 75, as amended; hereafter: the Act on Veterans),

- the Act of 23 February 1991 on the Acknowledgement of Nullity of Decisions Rendered with regard to Persons Persecuted for Activity for the Sake of Independent Existence of the Polish State (Journal of Laws - Dz. U. No. 34, item 149, as amended),

- the Act of 4 April 1991 on the Amendment of the Act on the Chief Commission for the Investigation of Hitlerite Crimes in Poland – the Institute of National Remembrance (Journal of Laws - Dz. U. No. 45, item 195),

- the Act of 2 September 1994 on Pecuniary Benefits and Entitlements Vested in Soldiers of Recruit Service Employed Under Constraint in Coal Mines, Quarries and Uranium Ore Extraction Facilities (Journal of Laws - Dz. U. No. 111, item 537, as amended),

- the Act of 12 July 1995 on the Amendment of the Penal Code, the Executive Penal Code and on the Increase of Lower and Upper Limits of Fines and Supplementary Payments to the Injured or for a Public Purpose in Criminal Law (Journal of Laws - Dz. U. No. 95, item 475),

- the Act of 11 April 1997 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),

- the Act of 24 April 1997 on the Amendment of the Act on Veterans and Certain Persons Being Victims of Repression During the War and in the Post-war Period (Journal of Laws - Dz. U. No. 64, item 405),

- the Act of 17 December 1997 on the Amendment of the Act on the Structure of the Common Courts and Certain other Acts (Journal of Laws - Dz. U. of 1998, No. 98, item 607, as amended),

- the Act of 3 December 1998 on the Disciplinary Responsibility of Judges, who in the Years 1944-1989 Surrendered their Judicial Independence (Journal of Laws - Dz. U. of 1999, No. 1, item 1, as amended),

- the Act of 18 December 1998 on the Institute of National Remembrance (IPN)– the Chief Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws - Dz. U. No. 155, item 1016, as amended, hereafter: the Act on the IPN),

- the Act of 18 December 1998 on Civil Service (Journal of Laws - Dz. U. of 1999, No. 49, item 483, as amended) – Article 82(3), Article 83(3) and Article 87(3) stipulating that the periods of time taken into account while assessing certain rights "shall not include periods of employment in the communist party (Polish Workers' Party and Polish United Workers' Party), as well as in state security authorities within the meaning of Article 2 of the Act of 11 April 1997 on the Disclosure of Work or Service in State Security Authorities or the Cooperation Therewith in the Years 1944-1990 of Persons Performing Public Functions (Journal of Laws - Dz. U. of 1999, No. 42, item 428) in the period from 22 July 1944 to 1 July 1989". The binding Act of 21 November 2008 on Civil Service (Journal of Laws - Dz. U. No. 227, item 1505) contains similar regulations in Article 90(3), Article 91(3) and Article 94(3). Additionally, similar regulations may be found in the Act of 24 July 1999 on Customs Service (Journal of Laws - Dz. U. of 2004, No. 156, item 1641, as amended) –

Article 53(4) and Article 54(3) and in the Act on the State Treasury Sollicitors' Office (Journal of Laws - Dz. U. No. 169, item 1417, as amended) – Article 44(3),

- the Act of 4 March 1999 on the Amendment of the Act on Veterans and Certain Persons Being Victims of Repression during the War and in the Post-war Period (Journal of Laws - Dz. U. No. 77, item 862),

- the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and on the Content of those Documents (Journal of Laws - Dz. U. No. 218, item 1592, as amended),

- the Act of 7 May 2009 on the Compensation of Families of Victims of Mass Libertarian Movements in the Years 1956-1989 (Journal of Laws - Dz. U. No. 91, item 741).

The extent of statutory regulations, the pace of their enactment is determined to a considerable extent by the will of the voters, which shapes the approach to this matter, which is natural in a parliamentary democracy. One should share in this respect the standpoint represented in the legal doctrine concerning Poland:

"There was no durable majority, necessary for shaping common legislation, let alone a constitutional majority". Polish "partial regulations were a product of compromise, possible thanks to a determined arrangement of parliamentary forces. In the case of a change of constellation conditioning the existing solutions, the efforts of respective correction of legislation were sometimes made. Another factor which led to the «blunting» of legal regulations, aimed at settling accounts with the communist past, and their application was a relatively mild and evolutionary character of the transition from the communist system to the government system of a democratic state ruled by law. (…) The legal-state order has kept an evolutionary continuity. The changes in the political system were conducted by a method of successive steps and as a rule they did not take a shape of radical negation. (…) The idea of a state ruled by law favours, and sometimes even requires settling accounts with totalitarian lawlessness in a consistent way. At the same time those standards, with the protection of legal security and citizens' trust in the state as well as the protection of fundamental rights of every individual at the forefront, constitute a corset limiting the freedom of the legislator in forcing radical solutions and reaching for such methods, for which used to reach the *ancien régime*, infringing on human rights and acting arbitrarily. The above dilemma constantly accompanies the jurisprudence of the Polish Constitutional Tribunal in the cases related to «settling accounts» regulations (B. Banaszkiewicz, *Rozrachunek z przeszłością komunistyczną w polskim ustawodawstwie i orzecznictwie Trybunału Konstytucyjnego*, "Ius et Lex" 2003, No. 1, p. 444).

4.4. Jurisprudence of the Constitutional Tribunal.

In decisions from the beginning of the transformation of the system of government the Constitutional Tribunal, examining challenged statutes which concerned settling accounts with the communist past stated that:

"… the principle of acquired rights does not cover rights established unjustly. (…)

The citizens who were deprived of unjustly established privileges may not allege that this was an infringement on the principle of equality before the law, only because others were not deprived of such privileges" (the decision of the Constitutional Tribunal of 22 August 1990, Ref. No. K 7/90, the Constitutional Tribunal's Decisions - OTK of 1990, item 5 point VI).

"The Constitutional Tribunal fully appreciates the need to make accountable, including criminal responsibility, perpetrators of crimes against humanity. Perpetrators of such crimes were undoubtedly functionaries of communist state authorities. (…)

The totalitarian state laid claims to the right to administer all domains of life, including e.g. the economic domain and the distribution of consumption goods. (…).

However, the Constitutional Tribunal notices a complete historical uniqueness of the achieved transformations. It perceives also the contradiction arising between the conclusions resulting from the application of the *lex retro non agit* in relation to the perpetrators of Stalinist crimes and the fundamental sense of justice in those cases, where the communist authorities introduced legal obstacles in the form of amnesty or abolition of pursuing crimes committed in its name (the procedural decision of the Constitutional Tribunal of 25 September 1991, Ref. No. S 6/91, OTK of 1991, item 34).

"The cooperation with repression authorities which were aimed at combating Polish independence movement must be assessed negatively and without regard to what positions and what character of employment in those authorities is concerned. This relates to both the repression apparatus of foreign states and the communist repression apparatus in Poland. Thus taken alone, the criterion of exclusion from the group of people, who are entitled to special rights, of those who collaborated with the repression apparatus set for combating independence movements should be considered accurate and not infringing on the principle of justice.

(…)

Not allocating special rights in the meaning of Article 21(2) of the Act on Veterans (…) may not be identified with criminal responsibility and a judicial sentencing" (decision of the Constitutional Tribunal of 15 February 1994, Ref. No. K 15/93, OTK of 1993, item 4).

Several years later, in the judgment of 28 April 1999, Ref. No. K 3/99 (OTK ZU No. 4/1999, item 73), the Constitutional Tribunal stated:

"Democratic transformations in Poland, of which an important stage was the proclamation of the Republic of Poland as a democratic state ruled by law, which meant a radical in its content retreat from the formula of a socialist state. This clearly arises from the Preamble of the Constitution of the Republic of Poland, which mentions the «bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland». The disapproval of totalitarian methods and activities of the communist party and security apparatus became a foundation of the binding statutory regulations concerning the seizure, by the state, of the property of the former Polish United Workers' Party, the dissolution of the Security Service and the verification of its former functionaries, the consequences for judges who during the period of the People's Republic of Poland surrendered their judicial independence, the lustration of persons holding important public offices in the state, finally the establishment of the Institute of National Remembrance. Apart from the fact that the goals and content of those contemporary legal regulations are diverse, their common axiological denominator is undoubtedly the disapproval of those methods and practices".

In turn, in the judgment of 11 May 2007, Ref. No. K 2/07 (OTK ZU No. 5/A/2007, item 48), the Constitutional Tribunal stated:

"The means of dismantlement of the heritage of former totalitarian communist systems may be reconciled with the idea of a democratic state ruled by law only when – remaining in accordance with the requirements of a state ruled by law – they will be aimed at threats endangering fundamental human rights and the process of democratisation. (…) In eliminating the legacy of former communist totalitarian systems, a democratic state ruled by law must implement formal-legal measures that have been adopted by such a state. It must not apply any other measures, since this would resemble activities undertaken by the totalitarian regime, which is to be completely dismantled. A democratic state ruled by law possesses all necessary means to guarantee that justice will be done and the guilty will be punished. It must not, and should not, satisfy the thirst for revenge, rather than serve justice. It must respect such fundamental human rights and freedoms as the right to a fair trial, the right to be heard or

the right to defence, and apply such rights also to persons who failed to apply them when they were in power".

4.5. Regulations in other countries of our region of Europe.

Except for the Czech Republic, the Federal Republic of Germany and the three Baltic States, in other states overcoming the heritage of the communist *ancien regime*, there was no coherent approach to the past in the field of legal regulation.

The statutes adopted in the process of overcoming the heritage of communist *ancien régime* are, which is natural, an object of statements of constitutional courts of states of our region of Europe and of the European Court of Human Rights.

In the context of settling this case, the Constitutional Tribunal regards as relevant the standards, and the principles underlying them, elaborated by the judicature. Because of the object of the present case, the Tribunal focuses its attention on those foreign regulations and decisions, which concern old-age pension benefits of the functionaries of former state security authorities.

The Tribunal gained access to information on provisions regulating old-age pension benefits of the functionaries of former state security authorities in the countries of Central and Eastern Europe with the help of the Institute of National Remembrance.

4.5.1. German regulations and the standpoint of the Federal Constitutional Court.

4.5.1.1. The standpoint of the German Federal Constitutional Court (hereafter: the FCC) is worth noting in the context of the present case. The Court inquired into the conformity of regulations limiting the amount of old-age pension benefits paid from a special system of social security to functionaries of the former Ministry of State Security/Office of National Security of the German Democratic Republic (*Ministerium für Staatssicherheit/Amt für Nationale Sicherheit*) with the Fundamental Law of 1949.

4.5.1.2. The treaty concluded on 18 May 1990 between the Federal Republic of Germany (hereafter: the FRG) and the German Democratic Republic (hereafter: the GDR) on Creation of a Currency, Economic and Social Union (BGBl. II, p. 537, hereafter: Treaty on the Union) provided for a recalculation of the amount of benefits from estimated old-age pensions paid in GDR marks to DM in a 1:1 ratio, a convergence of the amount of old-age pension benefits to the federal value (*Angleichung an das bundesdeutsche Rentenniveau*), and a liquidation of supplementary and special social security systems of the GDR by 1 July 1990. The claims and expectations derived from those systems of social security were to be transferred to the federal old-age pension insurance with the reservation of a verification of

claims and rights and a reservation of a possibility of liquidating unjustified benefits and a lowering of extortionate benefits (Article 20 of the Treaty on the Union).

On the basis of provisions of the Treaty on the Union, on 20 July 1990 the People's Chamber of the GDR enacted the Act on the Abolition of the Old-Age Pension Security System of the Ministry of State Security/Office of National Security (*Gesetz über die Aufhebung der Versorgungsordnung des ehemaligen Ministerium für Staatssicherheit/Amt für Nationale Sicherheit*, GBl. I, p. 501; hereafter: the Act on the Abolition or *Aufhebungsgesetz*). § 2.1 of the Act on the Abolition provided for a limitation of old-age pensions and disability pensions by half in the part exceeding 495 marks, to a maximal amount of 990 marks, and also a payment of transitory old-age pensions under the same conditions until 31 December 1990. The 495 marks was a sum of 330 marks (the statutory minimal old-age pension of the GDR) and a social allowance in the amount of 165 marks. The Act on the Abolition also provided for a valorisation of old-age pension benefits in the future, and a possibility of limiting or refusing payment of old-age pension benefits, if the entitled person committed a grave abuse of his or her position for his or her own benefit or for the detriment of another person. The limitation of the amount of old-age pension benefits on this basis could not, however, lead to a situation where the amount of the benefit falls below the amount of the minimal old-age pension.

In turn, the Unification Treaty between the FRG and the GDR of 31 August 1990 (hereafter: the Unification Treaty) provided for a five-year transitory period after the coming into force of the agreement, in which the principle of protection of trust shall apply to people who needed only several years to acquire rights to social security (*Angehörige rentennaher Jahrgänge*). The Unification Treaty also provided for a liquidation of additional and special social security systems of the GDR by 1 July 1990, postponed the term by which the transition of claims and expectations from additional and special social security systems to the federal social insurance was about to take place until 31 December 1991, and reserved a possibility of verification, and even liquidation of unjustified benefits and decrease of extortionate benefits. Additionally, the Unification Treaty contained, *inter alia*, a guarantee of a determined amount of benefits (*Garantie eines bestimmten Zahlbetrags*, the so called *Zahlbetragsgarantie*) for people who needed only several years to acquire the right to an old-age pension and for people receiving estimated old-age pensions (*Angehörige rentennaher Jahrgänge, Bestandsrentner*). Claims from the liquidated social security systems of the GDR could be subject to an adjustment, consisting of a refusal to grant unjustified benefits or lowering extortionate benefits, in order to eliminate the privileged character of those claims

and expectations in relation to comparable claims and expectations from other public social security systems. According to the provisions of the Unification Treaty, in the cases of persons who acquired the right to social security benefits on 3 October 1990, the amount of the benefit after adaptation could not be lower than the amount of benefit to be paid from social insurance and social security system in July 1990; in the case of persons who acquired the right to social security benefits between 4 October 1990 and 30 June 1995, the amount of benefits after adaptation could not be lower than the amount of benefits for July 1990, if the circumstances initiating the payment of the benefit occurred on 1 July 1990. The Unification Treaty provided for a possibility of decrease of the amount of or refusal to acknowledge the claims and expectations from the liquidated social security systems, if the entitled person infringed on the principles of humanity, legality or committed a grave abuse of his or her position for his or her own benefit of to the detriment of another person.

The unification of both states occurred on 3 October 1990. Despite a relatively low amount of the paid benefits, old-age pension benefits from the additional and special social security systems of the GDR were excluded from a twofold, fifteen-percent, valorisation of benefits under ordinances on the adaptation of old-age pensions.

4.5.1.3. The Act on Unification of Provisions of Statutory Old-Age and Accident Insurance of 25 July 1991 (*Gesetz zur Herstellung der Rechtseinheit in der gesetzlichen Renten- und Unfallversicherung*; BGBl. I pp. 1606-1677; *Renten-Überleitungsgesetz*; hereafter: *RÜG*) has expanded the binding force of provisions of Book VI of the Social Code of the Federal Republic of Germany (*Sozialgesetzbuch VI*; hereafter: *SGB VI*) to the territory of the former GDR.

4.5.1.4. In turn, the Act of 25 July 1991 on the Transition of Claims and Expectations (*Gesetz zur Überführung der Ansprüche und Anwartschaften aus Zusatz- und Sonderversorgungssystemen des Beitrittsgebietes*; BGBl. I, p. 1606; *Anspruchs- und Anwartschaftsüberführungsgesetz*; hereafter: *AAÜG*) read in conjunction with the provisions of the *SGB VI* determined the details of the transition of claims and expectations derived on the basis of provisions of the social security system of the former GDR. The *AAÜG* introduced *inter alia* the so-called temporary limitation of benefits paid within the framework of the special social security system of the former Ministry of State Security, in the amount of DM 802 for old-age pensions. Thus, this led to another, temporary limitation of the amount of paid benefits, until the time when the revalorised old-age pension benefits under § 307 b *SGB VI* exceed this value. At the same time there was no guarantee of a determined amount of benefits for certain insured persons (*garantierte Zahlbetrag*), there appeared, however, an

upper limitation of benefits (*Höchstbetrag*). Additionally, according to § 7(1) *AAÜG,* the remuneration for work received during the period of belonging to the system of social security of the former Ministry of State Security was to be taken into consideration for the sake of the assessment of the amount of old-age benefits only to the amount determined in Appendix 6 to the Act (a maximum of 70% of every average remuneration in the former GDR).

4.5.1.5. The FCC stated that the first sentence of § 7(1) *AAÜG* read in conjunction with Appendix 6 (limitation of the upper amount of yearly income – the remuneration being the basis of calculation of the old-age pension benefit) does not conform to the principle of equality before the law (Article 3(1) of the Fundamental Law) and to the principle of protection of property (Article 14 of the Fundamental Law); the first sentence of § 10(2) No. 1 *AAÜG* (limitation of the upper amount of the benefit to the amount of DM 802) does not conform to the principle of protection of property (Article 14 of the Fundamental Law); a lump sum limitation of benefits on the basis of the Act, kept in force, on the Abolition of the Old-Age Social Security System of the former Ministry of State Security/Office of National Security conforms to the Fundamental Law.

Substantiating the judgment, the FCC stated that the discrimination of former functionaries of the Ministry of State Security/Office of National Security consists in particularly disadvantageous assessment of remuneration for work. This leads to a situation where people covered by the obligatory social insurance are in a more advantageous position, obtaining a remuneration lower than the average, before the acknowledgement of the right to benefits from social security. This effect is strengthened by the exclusion of provisions of *SGB VI* on the minimum amount of benefits in case of low remuneration for work. This unequal treatment does not find sufficient legal justification. The goal of limiting of the amount of benefits is justified. The group of people whom the provision concerned is determined without infringement of Article 3(1) of the Fundamental Law. However, in the period during which the legislator limits remuneration for work for the sake of the assessment of old-age pension benefits to a level below the amount of single average remuneration on the territory of the former GDR, this provision infringes on Article 3(1) of the Fundamental Law.

The aim of the regulation was to revoke privileges of persons covered by the special system of social security with regard to persons covered by the other systems of social security. The aim of the regulation does not justify such a far-reaching limitation. The value of old-age pension benefits determined on the basis of the challenged provision is so low that they do not let themselves compare with the value of the benefits paid to persons pursuing in the past various professions and holding various offices, unless the legislator decided that the

people working in the Ministry of Security held qualifications far below the average (which is not mentioned in the legislative process).

The FCC noticed that the remunerations of functionaries of the Ministry of State Security/Office of National Security significantly surpassed the average remunerations of citizens of the GDR. Additionally, the functionaries received bonuses of various kinds, which placed them in a more beneficial position than other social groups of the GDR. The system of excessively high incomes of functionaries, although formally not differing from other systems in force in the GDR, was in consequence of a system of privileges. The amount of income translated into the amount of benefits from the social security system. The legislator could thus enact a regulation, according to which the extent and value of income taken into account for the sake of the assessment of benefits from the social security system for functionaries shall be lower than in the case of others insured in the GDR. Nevertheless, the legislator has transgressed constitutional limits of its freedom, limiting the basis of assessment of the benefits for the functionaries below the average of income in the GDR.

The first sentence of § 7(1) *AAÜG* also infringes on Article 14 of the Fundamental Law. The claims and expectations acquired in the GDR from the additional and special social security systems are covered by the constitutional protection of property rights. Therefore, after the transition of the claims and expectations to the statutory old-age pension insurance there must remain a residue of the benefit, which plays the role of a guarantee of independence from material aid after having paid contributions during the whole period of insurance. A limitation of the old-age pension benefits below this borderline constitutes a disproportionate limitation of property rights. The challenged provision did not guarantee to the persons covered by it such old-age security which would secure independence from material aid. Those persons were, thus, referred to use other social benefits. From the constitutional point of view, a just goal, which is a pretermission of extortionate benefits within the statutory old-age insurance, may be realised by a lowering of the paid benefits, although to an amount of average remuneration on the territory of the former GDR. A benefit paid in such an amount makes the entitled independent from other social benefits.

The first sentence of § 10(2) No. 1 *AAÜG* infringes on a right covered by the constitutional guarantee of property rights. For since 1 August 1991 benefits of functionaries have been lowered to a monthly amount of DM 802, and thus their amount has been limited in relation to the amount of benefit guaranteed in the Unification Treaty by DM 188, that is 19%. This restrictive solution is of significant importance, since the amount of the benefit also has a negative impact in social benefits. Additionally, a perceivable limitation of the amount

of the benefit is already regulated in § 7 *AAÜG*. The controlled norm strengthens this limitation. The severity of the reviewed regulation is not changed by the inclusion of functionaries to the general system of insurance, with a dynamically modelled benefit, which every year is subject to a recalculation and as a consequence an augmentation of its amount takes place. Despite this, in the adaptation period, the application of the controlled norm influences, to a significant extent, the economic dimension of life of the benefit recipient – the former functionary. Already in the adaptation period, the functionaries' benefits limited on the basis of GDR law to 990 marks were losing their purchasing power. If in 1990 the benefit amounted to the double of the minimum old-age pension, in January 1993 its amount was below the average amount of an old-age pension, and in 1994 it constituted only 75% of such an old-age pension. By an additional lowering of the maximum amount of the old-age pension benefit, there occurred a further perceivable limitation of social security with regard to old-age. As a result of this, the functionaries had to recourse to social assistance.

The aim of the controlled norm does not fulfil the requirements set by Article 14(2) of the Fundamental Law. The function of the controlled norm indicated by the legislator consists of a preventive diminution of the amount of the benefit, before the recalculation of its value taking into consideration the limitations stemming from § 7 *AAÜG*. The introduction of the controlled norm was, according to the legislator, necessary, since the maintenance of benefits at the level prevailing beforehand, already limited by GDR law, would lead to an unjust and unacceptable result. It should be stressed that although a limitation of the amount of the benefit on the basis of the *Aufhebungsgesetz* led to disadvantageous changes from the viewpoint of the functionaries, it did not lead a reduction of their benefits to the level of social assistance. However, a reiterated limitation of the benefit, to a level of DM 802, might have lead to the dependence of functionaries from social assistance, which constitutes a disproportionate worsening of situation of those concerned by the limitation. Keeping in force of a limitation of the amount of the benefit to 990 marks does not lead, on the other hand to a privilege of functionaries, despite the fact that until 1993 this sum exceeded the average old-age pension benefit on the territory of the former GDR, however it was far from reaching the amount of the maximum old-age pension on this territory.

§ 2 of the Act on the Abolition of the Old-Age Social Security System of the former Ministry of State Security/Office of National Security conforms to the Fundamental Law. Decisions and judgments issued on its basis do not infringe on the principle of protection of property rights (Article 14 of the Fundamental Law), neither do they infringe on the principle of equality before the law (Article 3(1) of the Fundamental Law).

In the adaptation period the legal position of functionaries has been shaped less advantageously than the situation of other insured from the territory of the former GDR. For old-age pensions of functionaries have been excluded from the adaptation of old-age pension benefits of other insured from the territory of the former GDR both in July 1990 (settlement of the legislator of the GDR), and in January and July 1991 (settlement of the legislator of the FRG), consisting of an increase of the amount of the benefits. The legal situation of functionaries has also been regulated less advantageously with regard to old-age pensioners belonging to other special old-age pension systems or additional systems of the GDR.

4.5.1.6. The differentiation of the legal position of functionaries is, however, justified according to the FCC. The legislator of the GDR has decided already in 1990 on the less advantageous shaping of the legal position of functionaries, also with regard to other participants of special social security systems. The goal of the significant limitation of the amount of old-age pension benefits was to level structurally excessively high remunerations of functionaries. However, with regard to other participants of special social security systems or additional systems the limitation was kinder, since the amount of earnings of participants of those systems was not so flagrantly high, but only insignificantly exceeded the standard remunerations. The goal of limitations of the benefits was to level the amount to the average level. The other insured persons were paid old-age pension benefits without changes. The legislator of the FRG had the right to take over a mechanism shaped that way, without infringing on the principle of equality. The exclusion of old-age pension benefits of functionaries from the increases of benefits in 1991 was justified. For it led only to their levelling, since before the 1991 increases the functionaries' benefits exceeded the average benefit from the general system (cf. the judgment of 28 April 1999, Ref. No. 1 BvL 11/94, 1 BvL 33/95, 1 BvR 1560/97; cf. also the judgment of 28 April 1999, Ref. No. 1 BvL 22/95, 1 BvL 34/95).

4.5.2. The Czech regulation.

In the Czech Republic – according to Article 224(4) of the Act No. 361/2003 on Conditions of Service of Functionaries of the National Security Corps – *Sbor národní bezpečnosti*; hereafter: the SNB): "The following periods of service of functionaries of the SNB are not included in the pensionable service: a) the service in StB in a counter-intelligence or intelligence unit or holding the function of investigation officer or head of division or a higher organisational unit; b) the service in military counter-intelligence; c) the service in intelligence, unless the service was effectuated in a division of technical security; d) the service in the political-educational department (division) of the Federal Ministry of

Interior; the Ministry of Interior of the Czech Republic or the Ministry of Interior of the Slovak Republic, if the work there consisted of a direct political-educational activity; holding the function of deputy head (commander) of political-educational work; f) the service in the Penitentiary Corps as deputy head of a department or section of political-educational work and g) a soldier of the Czechoslovak People's Army of the Main Political Administration of the Czechoslovak People's Army, who pursued direct political-educational activity or who pursued the function of deputy head of political-educational work or propaganda". Retired functionaries of the SNB receive, similarly to other retired public functionaries, higher old-age pension payments (Article 157 and following of the Act No. 155/1993 on Old-Age Pension Insurance (Based upon information of the Director of the Czech Institute for the Study of Totalitarian Regimes' Crimes of 10 September 2009, Č.j.: UST – 282/2009).

4.5.3. The Slovak regulation.

According to information provided by the Slovak Head of the Board of Directors of the Institute of National Remembrance of 19 August 2009 (Č.sp. DR/2009/01139), the functionaries of former security authorities receive old-age pensions according to the provisions of the Act No. 328/2002 on Social Security of Policemen and Soldiers according to the years of service. In the year 2005, the Minister of Labour, Social Matters and the Family has initiated work on the lowering of the amount of old-age pension payments for the functionaries of former security authorities. Those works have not been finished.

4.5.4. The Romanian regulation.

According to information provided by the President of the Institute for the Study of Communist Crimes in Romania of 5 August 2009 (No. 1385), in 2008 a preliminary version of a statute was drafted on old-age pensions of functionaries of the communist regime participating in repression on political grounds. In the second half of the year 2009, the draft was sent by the Government to the Parliament. The Government draft assumes a limitation of old-age pensions of such functionaries and secret collaborators of the *Securitate* to the level of the lowest old-age pension.

4.5.5. The Bulgarian regulation.

According to the information provided by the Chairman of the Committee for Cases of Disclosure of Cooperation of Citizens of Bulgaria with State Security and with Intelligence Services of the Bulgarian People's Army of 29 July 2009 (Izh Nr KI-P-09-19667), functionaries of former security authorities receive old-age pensions according to the provisions of the Code of Social Security and there is currently no public discussion taking place regarding the lowering of old-age pension payments.

4.5.6. The Estonian regulation.

According to the information provided by the Board of the Estonian Historical Remembrance Institute of 30 October 2009, according to the agreement of 26 July 1994 between the Governments of Estonia and the Russian Federation on Social Guarantees for Old-Age Pensioners of the Armed Forces of the Russian Federation permanently living on the territory of the Estonian Republic, the Ministry of Defence of the Russian Federation pays old-age pensions, *inter alia,* to functionaries of the former KGB. Those old-age pensioners may choose an Estonian old-age pension. They are, however, much lower than the Russian ones, so the choice of an Estonian old-age pension by the functionaries of the former KGB occurs very rarely.

4.5.7. The Latvian regulation.

According to information provided by the Chairman of the Latvian Historians' Commission attached to the Chancellery of the President of Latvia of 12 October 2009, according to the Act of 13 November 1995 on State Old-Age Pensions the periods of service in the KGB of the USSR are not included, beginning from 1 January 1996, in the pensionable service.

4.6. It follows from the acquired information that in the countries of our region of Europe various legal regulations are adapted with regard to old-age pension benefits of former functionaries of security authorities of a communist state. As time passes there are more regulations limiting old-age pension privileges of those functionaries. There are countries, in which these old-age pensions are subject to serious limitations (the Czech Republic, Estonia, Latvia, Germany) with regard to all functionaries (Estonia, Latvia, Germany) or with regard to groups indicated by the legislator (the Czech Republic). The adopted statutory solutions tend to reduce the amount of old-age pensions to the country average, taking into consideration individual professional careers (the Czech Republic) or the setting of an alike old-age pension on a level similar to the statutory minimum in the universal old-age pension system (Germany). In the latter case these regulations were corrected by the Federal Constitutional Court, which has led in result to an individual assessment of old-age pensions for the former functionaries of the STASI and has brought them nearer to the country average of the new *Länder*. In Estonia old-age pensions are paid to former KGB functionaries by another state; they are much higher than national old-age pensions for such functionaries. In some countries of the region a legislative process is pending in order to reduce old-age

pensions of the functionaries of former state security authorities (Romania) or legislative works have been suspended (Slovakia), or this matter has not been under scrutiny (Bulgaria).

4.7. The jurisprudence of the European Court of Human Rights.

In the judgment of 27 July 2004 in the case Sidabras and Dziautas v. Lithuania (applications No. 55480/00 and 59330/00) concerning the access to public service and the freedom of economic activity of former functionaries of secret political police the European Court of Human Rights (hereafter: the ECHR) stated that:

"The Court must have regard in this connection to Lithuania's experience under Soviet rule (…) that the activities of the KGB were contrary to the principles guaranteed by the Lithuanian Constitution or indeed by the Convention. (…) It is to be noted also in this context that systems similar to the one under the KGB Act, restricting the employment prospects of former security functionaries or active collaborators of the former regime, have been established in a number of Contracting States which have successfully emerged from totalitarian rule.

In view of the above, the Court accepts that the restriction on the applicants' employment prospects under the KGB Act, and hence the difference of treatment applied to them, pursued the legitimate aims of the protection of national security, public safety, the economic well-being of the country and the rights and freedoms of others" (§§ 54-55).

This Court decided similarly in the judgment of 7 April 2009 in the case Žičkus v. Lithuania (application No. 26652/02, §§ 28-30). Additionally, the ECHR noticed that "the fact of the Law's belated timing, although not in itself decisive, may nonetheless be considered relevant to the overall assessment of the proportionality of the measures taken" (§ 33). This point of view was formulated by the ECHR in the context of access of secret collaborators of the KGB to the practicing of the profession of an advocate and other professions of this type in the private sector.

The European Commission of Human Rights had decided three times, and the ECHR has more than once rendered decisions in cases of applications of former Polish functionaries of "public security apparatus or military information" from the years 1944-1956 relating to Article 21(2)(4a) and Article 26 of the Act on Veterans. Those provisions have deprived them of the so called "Veteran Supplement". In a decision of 16 April 1998, the European Commission of Human Rights has acknowledged an application for the declaration of non-conformity of this provision with Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Paris on 20 March 1952 and

done at Strasbourg on 16 September 1963 (Journal of Laws - Dz. U. of 1995 No. 36, item 175; hereafter: Protocol No. 1 to the Convention) as manifestedly inadmissible in the case of Styk v. Poland (application No. 28356/95). The Commission stated that:

"In the present case the applicant lost only his entitlement to the social insurance benefits due to veterans, but (…) he retained his rights to the ordinary retirement benefits due under the general social insurance system. Thus, it was only the special privileged status which the applicant lost, his principal social security entitlements having remained intact. The Commission observes that the February [January] Act on Veterans and Persecuted Persons was partly intended as a condemnation of the political role which the communist security services had played in establishing the communist regime and in repression of political opposition thereto. This legislation was based on the consideration that the members of these services, whose function was to combat the political or armed organisations fighting for the independence of Poland in the 1940s and 1950s, did not merit the special privileges which were accorded to them by the 1982 Veterans Act. The Commission considers that such considerations of public policy (of the 1991 legislator), even if the operation of laws resulting therefrom entails a reduction in social insurance benefits, do not affect the property rights stemming from the social insurance system in a manner contrary to Article 1 of Protocol No. 1. (…) It follows that this part of the application is manifestly ill-founded".

In two subsequent cases, decided on the basis of objectively identical applications, the European Commission of Human Rights issued same decisions (of 1 July 1998 in the Case Szumilas v. Poland, application No. 35187/97 and of 9 September 1998 in the case Bieńkowski v. Poland, application No. 33889/96). In the latter case the Commission defined the "Internal Public Security Service" in Poland of the years 1944-1990 as:

"State authorities, partly comprising special armed forces and political police, patterned on the NKVD and the KGB, established on 21 July 1944 with a view to combating, suppressing and eliminating groups of political opposition, including the post-war underground resistance against Communism. These authorities were also competent to conduct criminal investigations under the rules of criminal procedure. They were, depending on political circumstances, called variously (…)".

Similarly, the ECHR acknowledged as inadmissible an application, identical with those three applications presented above (procedural decision of 15 June 1999 in the case Domalewski v. Poland, application No. 34610/97). The applicant raised, *inter alia*, the inconsistency of the provisions of the Act on Veterans quoted above with Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on

4 November 1950 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended, hereafter: the Convention).

The ECHR stated, referring to the judgment of 16 September 1996 in the case of Gaygusuz v. Austria (*Reports* 1996-IV, p. 1141, § 36) that "A difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a «legitimate aim» or that there is no «reasonable proportionality between the means employed and the aim sought to be realised». Moreover, in this respect the states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. In the present case, the Court observes that (…) the applicant lost the special and privileged «veteran status», which had entitled him to an extra allowance in addition to his normal pension (…) to which other retired persons were not entitled. The applicant did, however, retain all the rights attaching to his ordinary pension under the general social insurance system. Consequently, the applicant's pecuniary rights stemming from the contributions paid into his pension scheme remained the same. (…)

In that regard, it observes that, under the Law of 24 January 1991 on Veterans and Other Victims of War and Post-war Repression, the applicant, in the same way and on the same conditions as all other persons who had previously been employed or had served in the former communist authorities of the public security service, was excluded from the privileged group of «veterans» in view of the political role played by those authorities in preserving totalitarian rule and combating and eliminating political opposition to the former regime.

The Court moreover points out that the statutory measures taken by the Polish State in respect of such persons were primarily aimed at an objective verification of whether those who had served in authorities commonly regarded as a machinery of repression satisfy the present statutory conditions for being awarded a special honourable status. Therefore, the means employed by the Polish authorities had an objective and reasonable justification in Poland's historical experience during the Communist period, and they realised a legitimate aim, which was to regulate the operation of the existing system of exceptional privileges" (§ 75-76).

In the judgment of 28 April 2009 in the case Rasmussen v. Poland (application No. 38886/05), the ECHR stated that the deprivation of the applicant of the status of a retired judge and the privileged old-age pension allowances linked thereto as a result of a final judgment on the so called lustration lie did not amount to an infringement on her right to protection of property determined in Article 1 of Protocol No. 1 to the Convention. Stating the

similarity of the examined case to cases resulting from applications against Poland from the years 1995-1997 of persons, who under statute have been deprived of the veteran status and lost the rights to social security linked with it due to the collaboration with communist secret services, the ECHR stated that Article 1 of Protocol 1 to the Convention "could not be interpreted as conferring a right to a pension of a particular amount. The Court finds that (similarly to the applicant challenging the Act on Veterans beforehand) the loss of the applicant's status as a retired judge and of the special retirement pension attached to that status, as a result of the submission of a false lustration declaration, did not amount to an interference with the property rights of the applicant under Article 1 of Protocol No. 1" (§ 75).

5. The Military Council as a public institution.

5.1 The Military Council was founded and acted as an extra-constitutional institution. Neither the Constitution of the People's Republic of Poland of 1952 (Journal of Laws - Dz. U. of 1976, No. 7, item 36, as amended; hereafter: Constitution of the People's Republic of Poland), nor any sub-constitutional legal act did not provide for the existence of the Military Council, and the more for any of its competences. It follows from unquestionable findings of historians that:

"According to the auto-presentation, included in the *Proclamation* of the WRON of 13 December, the Council was convoked during the night between the 12 and 13 December. It was not written however who convoked it. Kept in the archives and unpublished at that time, the *Resolution on the Creation of the Council* is dated 12 December and includes a statement that WRON was founded as a result of a decision of «a team of officers of the Polish People's Military», who under the chairmanship of Gen. Jaruzelski reunited «from the initiative of the Military Council of the Ministry of National Defence». (…)

The most important problem, both regarding the time and procedure of foundation, and the whole activity of the WRON, is legality of this body. As follows from preserved documents, reports and the entire documentation of the Council – and, obviously, from press releases on its works and decisions taken – it usurped power for itself, transferred orders to the state administration and gave orders to the military forces, not having legal foundations for this. The Council is not mentioned in any of the acts which constitute a formal basis for the imposition and functioning of martial law. What is more, even *post factum* it did not strive for a formal «legalisation» by the Sejm or the Council of the State by means of a decree, a statute or even a resolution. Thus, there should be no dispute regarding the fact that it was an

institution acting outside the legal order. Or rather above it" (A. Paczkowski, *Wojna polsko-jaruzelska*, Warsaw 2007, pp. 44-46).

The historians of state and law, presenting the imposition during the night between 12 and 13 December 1981 of the martial law on the motion of the Prime Minister of that time, note: "Quite universally this situation was qualified as a *sui generis coup d'état* or a military overturn" (A. Lityński, M. Kallas, *Historia ustroju i prawa Polski Ludowej*, Warsaw 2001, p. 185; cf. also the document: "Posiedzenie Biura Politycznego KC PZPR, 10 December 1981, [in:] *Przed i po 13 grudnia. Państwa bloku wschodniego wobec kryzysu w PRL 1980-1982*, (selection and editing) Ł. Kamiński, vol. 2, Warsaw 2007, pp. 694-700.

As results from the findings of the Sejm Committee on Constitutional Responsibility, the strategic goals of the Military Council were, according to the assessments of that time, *inter alia*:

"a strengthening of the socialist state, a reconstruction of its international authority, a consolidation and education of the society in the spirit of construction of a socialist system of government, a restoration of bonds of power with people of labour, a strengthening of the national economy through the implementation of economic reform, a deepening of content and form of cooperation with COMECON countries and a disrupting of imperialist economic blockade, an elaboration and implementation of new principles of personnel policy". The excerpt of the internal collaborative study "The Polish People's Military in the Period of Threat of the Socialist State and Martial Law" quoted in the report of the Committee (*O stanie wojennym w Sejmowej Komisji Odpowiedzialności Konstytucyjnej, Sprawozdanie Komisji i wniosek mniejszości wraz z ekspertyzami i opiniami historyków*, Warsaw 1997, p. 210).

In a report adopted on 28 May 1996, the Sejm Committee on Constitutional Responsibility stated that the Military Council "did not come into being based upon a legal provision, enacted by authorities qualified for this, neither as a result of an adequate legal procedure, but according to the content of the Proclamation of the Military Council of National Salvation – during «the night between 12 and 13 December 1981, it constituted itself»" (*ibidem*, p. 208). The Military Council "had the right", according to the Committee, to express opinions with regard to state authorities (*ibidem*, p. 209). TheCommittee stated that the actions of the Military Council "were not contrary to the legal order binding at that time", to which is supposed to bear testimony *inter alia* the fact that "in a resolution of the Sejm of the People's Republic of Poland of 25 January 1982 the Sejm expressed «support for the standpoint presented by the president of the WRON, the President of the Council of Ministers, General Wojciech Jaruzelski»" (*ibidem*, pp. 212-213). In the opinion of the minority of

theCommittee, the Military Council "did not have full powers in the binding law. Despite this, as results from the minutes of WRON sittings, (Archives Ref. No. 257a), or even from its proclamations published at that time, declarations and communiqués – it exercised a general supervision over the execution of martial law and gave dispositions and recommendations to state authorities, including the Armed Forces" (*ibidem*, p. 254).

5.2. The group of generals and senior officers of the Polish People's Military constituted itself thus without any legal basis, proclaiming itself before the imposition of martial law as the Military Council of National Salvation in a more or less unspecified moment in December 1981. It was thus an unconstitutional and illegal institution of power. It is also unknown more closely, whether it consisted from the beginning of 22 members – 17 generals and 5 colonels, or whether it was first set in a narrower circle, which encompassed at that time only generals, at the same time members of Government bearing responsibility because of that reason for the observation of the provisions of the Constitution of the People's Republic of Poland. And they were the then: President of the Council of Ministers and at the same time Minister of National Defence, Minister of Interior and the Head of the Office of the Council of Ministers. As members of Government they had a special duty to observe the provisions of the Constitution of the People's Republic of Poland. This last matter is significant for the settlement of this case.

It is a notoriously known fact that the supreme goal of the imposition of martial law in Poland was the destruction of the Independent Self-governing Labour Union "Solidarity" (hereafter: Solidarity). Solidarity assembled about 10 million workers. About a million of them were at the same time members of the Polish United Workers' Party. Together with the members of families, Solidarity constituted thus a significant majority of citizens of Poland. Solidarity was a peaceful social movement, which pursued an institutional guarantee of respect by the state of fundamental rights determined in the Universal Declaration of Human Rights of the UN of 1948, the so called third basket of the Final Document of the Conference on Security and Cooperation in Europe of 1975, the International Covenant on Civil and Political Rights, open for signature in New York on 19 December 1966 (Journal of Laws - Dz. U. of 1977, No. 38, item 167; hereafter: the Covenant on Civil and Political Rights of the UN) and, what is particularly important, the Constitution of the People's Republic of Poland.

Solidarity accepted two principles of the system of government of that time: state/social property in the industry, finance and to a greater extent, such property in services and agriculture (Article 5(4) of the Constitution of the People's Republic of Poland) and in

the foreseeable future the Polish United Workers' Party as the "leading political force of the society in constructing socialism" (Article 3(1) of the Constitution of the People's Republic of Poland). Solidarity has been registered on 24 October 1980 on the basis of the law binding at that time with a final judicial decision of the Voivodeship Court in Warsaw (cf. on this matter J. Kuisz, *Charakter prawny porozumień sierpniowych 1980-1981*, Warsaw 2009, pp. 163-195). In December 1981, or prior to that, not even one investigation was pending, on the basis of the Code of Criminal Procedure, against Solidarity or a group of its activists, on the grounds that there were plans to overthrow, by force, the political-legal system of government of that time. In such a state of things, Solidarity had the right to expect that it would not be disturbed by any secret political police operations and that, as the biggest organisation in Poland at that time, an organisation of 10 million workers, it would be treated by the Government at least neutrally. The Prime Minister and other Ministers of the Government of that time were obliged to take such a standing by the following provisions of the Constitution of the People's Republic of Poland:

- "In the People's Republic of Poland the power shall be vested in the working people of the cities and the land" (Article 1(2));

- "The People's Republic of Poland in its policy: 1) follows the interests of the Polish Nation, its sovereignty, independence and security, the will of peace and cooperation between nations (Article 6(1));

- "A strict observance of the laws of the People's Republic of Poland is a fundamental duty of every authority of the state (…)" (Article 8(2));

- "The People's Republic of Poland, preserving and multiplying the acquisitions of the working people, strengthens and expands the rights and freedoms of the citizens" (Article 67(1));

- "The People's Republic of Poland guarantees the citizens the freedom of speech, print, assemblies and rallies, marches and manifestations (Article 83(1));

- "Trade unions, (…) bring together citizens for the sake of an active participation in political, social, economic and cultural life (Article 84(2)).

Instead of this the Military Council came into being in a precisely undetermined time, but surely before the adoption of the decree of 12 December 1981 on Martial Law (Journal of Laws - Dz. U. No. 29, item 154, as amended). It either did not document its activity, or these documents were destroyed on its command.

The Military Council consisted of professional soldiers, and its creators had dominant position in the composition of state authorities of that time and in the communist party,

threatened by the progressing in a peaceful manner process of growing civic awereness of society. A majority of the other members of the Military Council held functions of commanders in different types of military formations or military districts. In several cases, the members of the Military Council included officers whose qualities were supposed to weaken the negative social reception of the Council's usurped power.

5.3. The members of the Military Council did not choose obedience to the abovementioned provisions of the Constitution of the People's Republic of Poland and the order stemming from Article 2 of the Act of 21 May 1963 on Military Discipline and the Responsibility of Soldiers for Disciplinary Infractions and Infringements on Honour and Dignity of the Soldier (Journal of Laws - Dz. U. of 1977, No. 23, item 101), which stipulated that "the soldier as a citizen of the People's Republic of Poland should in an exemplary way observe the provisions of law (…)".

The Military Council effectively prevented, for a period of over 8 years, free expression of the will of Polish citizens in free elections, which are the founding act of the rule of law and fundamental human rights in every country. In this sense, in the view of the peaceful character of Solidarity bringing together 10 million workers, including one million members of the communist party, the Military Council committed an act of extreme lawlessness, violating not only one of the fundamental political human rights, which is the right to free elections, but – as a consequence – other fundamental rights and freedoms. The authorities of the People's Republic of Poland committed themselves to observance of those rights and freedoms, ratifying the International Covenant on Individual and Political Rights of the UN in 1977.

5.4. Due to the supreme supervision of the Military Council over the imposition of martial law and its administration, the communist regime in Poland maintained its power, "once gained" for it by the Soviet Union in the years 1944-1945, after 13 December 1981 for at least 8 more years. It was gradually losing it in the subsequent years, gradually facing the advancing disorganisation of the planned economy and the refusal of legitimisation on the part of society, the high rate of emigration of young educated citizens and the progressing social demoralisation advancing from the imposition of martial law. Anyway, similar processes of erosion and agony of the communist regime took place in the period preceding the 1989 Autumn of Nations, in all other satellite countries of the Soviet Union, and in the empire itself (cf. J. Gajdar, *Anomalie wzrostu gospodarczego*, Warsaw 1999, pp. 93-112; A.

Burakowski, P. Ukielski, *Wprowadzenie*, [in:] A. Burakowski, A. Gubrynowicz, P. Dukielski, *1989 – Jesień Narodów*, Warsaw 2009, pp. 19-38; V. Sebestyen, *Rewolucja 1989. Jak doszło do upadku komunizmu*, Wrocław 2009, pp. 123-424). An inevitable alternative for those regimes was the existence in the world, called free, of political democracy, of the respect for human rights, of the rule of law and of the market economy.

5.5. The Military Council in Poland had the attributes known in doctrinal literature as those of a military junta (cf. S.P. Huntington, *Trzecia fala demokratyzacji*, Warsaw 1995, pp. 118-120; M. Gulczyński, *Panorama systemów politycznych świata*, Warsaw 2004, pp. 323-374). A military junta is a self-appointed group of officers who take over dictatorial power in a state. Its appearance and acting constitutes a form of a revolution, it may be a constitutional *coup d'état*. Depending on the particular situation, a given military council may have as its goal: 1) preserving the power of a weakening dictatorship, in view of the claims of the democratic opposition, in which an important role is played often by several supreme commanders of the armed forces; 2) overthrowing the power having a democratic mandate and introducing dictatorship; 3) overthrowing a dictatorship; 4) preventing a constitutional revolution by a party aiming at instituting dictatorship; 5) regaining independence from a foreign state. In the last three cases the goal of the military *coup d'état* is an immediate assignment of state power to civilian authorities of power appointed as a result of free elections. The goal of the Military Council in Poland was to preserve, in view of the claims of the democratic opposition, the power of a weakening dictatorship.

Undoubtedly, every member of the Military Council knew that it is an institution having no legal foundation in the binding Constitution of the People's Republic of Poland and the binding legislation, and as a consequence realised that, by participating in its sittings and taking decisions, he exercised an extra-constitutional supreme supervision over the activity of con-stitutional bodies of the state at that time.

It is not a task of the Constitutional Tribunal to examine in detail the career paths of servicemen, which led every one of its twenty two members to the role of creator of the Military Council or its member. It is however without a doubt both from the perspective of that time as well as from the today's perspective that every one of them gave full guarantee not only of loyalty to the principles and values of a non-sovereign communist state, which was Poland at that time, but also to the readiness to actively defend exactly such a state from freedom and civilisation aspirations of its own society. One should observe however that such careers and standpoints characterised the majority of the superior personnel of the Armed

Forces of the People's Republic of Poland. It should also be noted that some of the members of the Military Council, the oldest by age, took part in the war with the Third Reich, which was known and taken into consideration by the legislator in the case of the challenged Act – preserving the prevailing, privileged yardstick of counting in every started month of "performing service on the front during a war or in the zone of war activity", as raising the basis of assessment of the old-age pension by 0.5% (Article 15(3) of the Act on Old-Age Pensions of Professional Soldiers).

5.6. During the hearing before the Tribunal on 13 January 2010 the applicant's proxy characterised the Military Council as a consultative/consultation body. It is difficult to share this opinion which suggests a marginal character of the Military Council. It is necessary to refer to the "Proclamation of the Military Council of National Salvation" announced on 13 December 1981 in a special issue of the *Tribune of the People* and to the radio and television speech of the Council's creator, delivered that day early in the morning, in which he referred several times to resolutions of the "constituted" Council.

It follows from these documents that the Military Council, already at the dawn of its activity during night between 12 and 13 December 1981, as the Council alleged, due to unsuccessful efforts of the Sejm of the People's Republic of Poland, the Government and state administration authorities: 1) took upon itself the task of protecting the legal order in the state, creating executive guarantees for the reestablishment of order and discipline and the saving of the state from disintegration; 2) determined in detail norms of public order for the time of duration of the martial law; 3) cautioned that no one should count on its weakness or hesitation; 4) ordered preventive internment of a group of persons, threatening the security of the state, and a group of people, on which weighed personal responsibility for the bringing about in the 1970s to a deep crisis of the state; 5) obliged itself to a consequent purification of Polish life of evil and to an assurance of conditions for an absolute tightening of the combat with criminality and abuses of power. As a consequence, according to the "Proclamation": "It shall be a task of the Council to prevent the assault on the state, to stabilise the situation, to assure and enforce, within the limits of law, a swift acting of administration authorities and economic units". It was impossible to disregard, at that time, information on such decisions made and on such action programme publicly proclaimed. It was not an opinion expressed by the Military Council; nobody knew in detail to whom and nobody knew for what reason. The Military Council thus was not a consultative/consultation body. It was an institution taking

strategic decisions on the fate of citizens of Poland without asking them on their opinion in free elections during the period from its establishment until the end of martial law.

5.7. Having regard to the content of the application, the Constitutional Tribunal considers that in the examined case the answer to the question whether the legislator had the right to lower old-age pensions for the members of the Military Council is of significant importance and, if so, then to what extent the legislator could achieve this. Examining this matter in detail below, the Constitutional Tribunal wishes to draw attention in this place to the content of the Resolution of the Sejm of the Republic of Poland of 15 December 1995 on the Commemoration of Victims of Martial Law (M. P. No. 67, item 753):

"The Sejm of the Republic of Poland pays homage to the victims of martial law considering that all those, who have opposed the assault on liberty, have served the Homeland well.

The Sejm of the Republic of Poland at the same time condemns the perpetrators of the martial law and expresses hope that their illegal action shall be justly judged".

In the light of those findings, the Constitutional Tribunal states that the generals and colonels of the Armed Forces of the People's Republic of Poland, who established the Military Council or subsequently became its members in December 1981, and participated in its actions, differ significantly, with regard to that characteristic, from other professional soldiers of the Armed Forces of the People's Republic of Poland.

To sum up, in December 1981 there was a link between the previous professional career and the position in the Armed Forces of the People's Republic of Poland and the membership in the illegal Military Council. The legislator could thus take a decision on the introduction by the Act of 23 January 2009 of Article 15b to the Act on Old-Age Pensions of Professional Soldiers. The legislator, adopting the challenged provision, acted within the limits of freedom he had been granted. The adopted solution with regard to old-age pension rights of the members of the Military Council is in its essence similar to the regulation of the Act of 24 January 1991 on Veterans quoted above, which deprived soldiers taking part in fights "For the preservation of people's power" of veteran privileges also if they previously had veteran merits during fights with occupants. The legislator in this manner draws a conclusion from the negative assessment of an even temporary engagement in institutional support of power of the communist regime.

6. Security authorities of the communist regime.

6.1. Essence of a communist regime. The essence of this regime was determined by the following features: 1) monopolist power of the communist party in every domain of public life, including the political subordina-tion of authorities of the legislative, executive and judicial power; 2) nationalisation without compensation of all private property, or at least of all large and mid-sized property in agriculture, industry and finance; 3) replacement of market economy with central planning of all domains of economic life; 4) economic dependence of citizens on the state; 5) rigorously enforced prohibition of the existence of parties other than the communist one or a possible admission of groupings intended to constitute the so-called political transmission of the power to certain milieus; 6) lack of freedom of expression and other fundamental rights and freedoms; 7) in the case of a conflict with the regime, the lack of legal means to assert individual and political rights and freedoms

6.2. The tasks of security authorities of the People's Republic of Poland. The Constitutional Tribunal states that the guards of communism regime in Poland in the years 1944-1989 - the guards of the reality where Poland was deprived of liberty and democracy, market economy and our relations with the Western world, a direct consequence of which was a civilisation degradation of the country, manifesting itself *inter alia* in a deep disintegration of the economy and finance – were the security authorities of the People's Republic of Poland and their functionaries.

This system was founded on an organisationally and excessively elaborated apparatus of secret political police. The main goal of this apparatus was the maintenance and support of the communist regime. For the fulfilment of this goal the functionaries of security authorities of the People's Republic of Poland, during the first period, applied terror, and then, as a routine, humiliation, surveillance of innocent people, fabrication of proof; they breached fundamental human rights and freedoms. The methods of action, their scale and intensity changed in time, but their essence was the same – a support of the legal-political regime hostile to human rights. In return, the ruling communist party provided those functionaries with actual impunity for abuses of power, promotions faster than in other uniformed services, a high remuneration for service, as well as other numerous additional economic and social privileges and high old-age pension benefits.

6.3. The Tribunal does not assess individual motivations of the yet voluntary choice of service by tens of thousands of people, mostly young men, in security authorities of the

People's Republic of Poland. It is probable that purely professional motivations (service in the secret police) do not differ from those which occur today. A significant difference is made by the object of the choice. In any case did the choice of service in the secret political police of the communist state merit approbation, independently from the organisational cell and the grade of the functionary. The Tribunal shares the legislator's viewpoint that only taking a bold attempt of granting the victim of political repression help by the functionary merits approbation. This positive appraisal has found its expression in Article 13a(4)(3), added to the Act on Old-Age Pensions of Functionaries by the Act of 23 January 2009.

At the twilight of the People's Republic of Poland in all its security authorities served about 30 thousand functionaries. Today they are in total about 10 thousand. This is not just a simple 3 times less. The security authorities of the People's Republic of Poland instead of serving the protection of political, social and economic aspirations of Poles, constituted a highly specialised net of institutions combating these aspirations. The "product" which remained after those security authorities, is over 86 km of current records produced by these authorities, of which only 850 current metres, having significance for national security today, are in the restricted repertory of the Institute of National Remembrance (hereafter: the IPN). We must also remember that an unknown in detail, but undoubtedly considerable part of documents produced by those authorities was intensively destroyed in the second half of 1989.

6.4. The question of qualification proceedings with regard to functionaries of the Security Service in 1990. Although the object of the examined case is not the control of constitutionality of the provisions of the Act of 6 April 1990 on the Office for State Protection (Journal of Laws - Dz. U. No. 30, item 180, as amended; hereafter: Act on the UOP), it should be noticed *en marge* that as a result of democratic transformations in Poland the Security Service (Służba Bezpieczeństwa, hereafter: the SB) was – exactly as a result of its essence – dissolved. An already sovereign Polish State needed new services, which would provide it with security, and at the same time would act according to the standards of a democratic state ruled by law. Of the two possible options: 1) constructing such services from scratch, taking into account exclusively persons not serving in the SB, with the perspective of a long period of their preparation for the performance of tasks or 2) appointing a new state protection police fast, in such a case with unavoidably large numbers of former functionaries of the dissolved SB, the legislator chose the second option. It meant that former functionaries of the SB could

be admitted to service in the Office for State Protection (Urząd Ochrony Państwa, hereafter: the UOP).

6.4.1. The goal of the qualification proceedings was not to issue morality certificates to functionaries of particular departments of the SB. It was not in any way a new verification of functionaries of the SB remaining in service on the day of the dissolution of this formation (i.e. on 10 May 1990 – Article 131(1) read in conjunction with Article 137 of the Act on the UOP) or militia officers who, until 31 July 1989, were the functionaries of the SB (Article 131(2) of the Act on the UOP).

At the moment of establishing the UOP, the SB was dissolved (Article 129(1) of the Act on the UOP). The Minister of Interior had the duty to hand over documents, property and regular posts at the disposal of the SB until that time to the UOP and to other newly created central authorities, according to their competences (Article 129(2) of the Act on the UOP). As a result of the enacting of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency (Journal of Laws - Dz. U. No. 74, item 676, as amended; hereafter: the Act on the ABW/AW), the functionaries of the UOP became *ex lege* the functionaries of the ABW (functionaries of the Administration of the Intelligence of the UOP – functionaries of the AW). On the other hand, the functionaries of the SB did not become *ex lege* the functionaries of the UOP. In the Act on the UOP there was no ruling on the institutional continuity between the SB and the UOP, which was an entirely conscious decision of the legislator (cf. in this regard Articles 224 to 226 of the Act on the ABW/AW on the preservation of institutional continuity with the UOP). It was within the tasks of the Minister of Interior to organise the Office for State Protection within 3 months from the day of entry into force of the Act on the UOP (Article 130) and he fulfilled this task.

Functionaries appointed to the new service – the UOP – both those who came there from the outside (before they were most often activists of the democratic opposition), as well as those who have served before in the SB, kept their previous old-age pension rights resulting from the continuity of work or service. The previous old-age pensioners of the SB or those functionaries of the dissolved SB, who did not undergo the qualification proceedings to the UOP or have been assessed negatively in these proceedings – have kept their old-age pensions or acquired them on the previous conditions (Articles 133 and 134 of the Act on the UOP).

6.5. The qualification proceedings of the former functionaries of the SB in 1990. The content of the decision on the manner and date of formation of the civilian security police of

the already sovereign Poland forejudged that the basis of UOP personnel were functionaries of the dissolved SB.

Article 132(1) of the Act on the UOP authorised the Council of Ministers to establish by regulation the procedure and conditions of admitting candidates to service in the UOP. In addition, the Council of Ministers, within 10 days from the Act on the UOP coming into force, was supposed to establish the procedure and conditions of admitting former functionaries of the SB to service in the UOP and in other organisational units subordinate to the Minister of Interior (Article 132(2) of the Act on the UOP).

The qualification proceedings accompanying the formation of the UOP were regulated in two legal acts: in the Regulation of the Council of Ministers of 9 July 1990 on the Procedure and Conditions of Admitting Candidates to Service in the Office for State Protection (Journal of Laws - Dz. U. No. 47, item 278; hereafter: the Regulation of 1990) and the Resolution No. 69 of the Council of Ministers of 21 May 1990 on the procedure and requirements for admitting former functionaries of the Security Service to service in the Office for State Protection and in other organisational units subordinate to the Minister of Interior as well as for employing them in the Ministry of Interior (M. P. No. 20, item 159; hereafter: Resolution No. 69). This first act regulated the qualification proceedings with regard to "civilian" candidates to the UOP, other than former functionaries of the dissolved SB. § 3 of the Regulation of 1990, due to the need of a quick formation of the UOP, admitted a simplification of the procedure of the thorough verification of every candidate – it results therefrom that "In particularly justified cases" the Head of the UOP could "shorten the qualification proceedings through the refraining from activities" 1) consisting of an interview with the candidate permitting a recognition of his personal features and predispositions for service and motivations to take up service and 2) conducing environmental enquiries concerning the candidate and if possible, obtaining recommendations (§ 2(1)(2) and (4) of the Regulation of 1990). This second act (the Resolution No. 69) regulated the qualification proceedings with regard to former functionaries of the dissolved SB, candidates to the UOP.

For the conducting of "qualification proceedings" with regard to the functionaries of the dissolved SB, the Council of Ministers appointed - on the basis of the Resolution No. 69 - the Qualification Commission for Matters of Central Personnel and regional qualification committees. Their tasks involved "conducting qualification proceedings and formulating opinions in the case of candidates (…) applying for admission to service in the Office for State Protection, the Police or another organisational unit subordinate to the Minister of Interior or for employment in the Ministry of Interior", on the basis of a motion of the

candidate, previous personal documents and documents concerning the course of service and other documents presented to them (§ 5-6). The committees could also conduct a supplementary interview with the candidate, on their own initiative or upon a motion of the candidate (§ 7(1)). Regional qualification committees gave positive opinions on the candidate when they stated that he or she fulfilled the requirements provided for a functionary of the given service or an employee of the Ministry of Interior, determined by statute, and when they recognised that he or she displayed certain moral conduct, in particular that:

1) in the course of previous service he or she did not commit an infringement of the law,
2) he or she performed his or her service duties in a manner not infringing on the rights and dignity of other people,
3) he or she did not use his or her professional position for extra-service purposes (§ 8 (1)).

Among the former functionaries of the Security Service, the committees gave positive opinions on 10 349 persons, and negative – on 3 595. Acquiring a positive opinion did not however guarantee employment, since the reorganisation of the Ministry, and above all an exclusion of tasks characteristic for a political secret police resulted in a fivefold reduction of permanent posts, from about 25 thousand posts in the former SB to about 5 thousand in the newly appointed UOP. Although the qualification proceedings of former functionaries of the SB were not judicial proceedings, and only proceedings of an administrative nature, and its goal was to create a new, depoliticised security police of a state ruled by law, the Resolution No. 69 guaranteed to functionaries of the SB, which were given negative opinions the right to appeal to the Central Qualification Commission (§ 5). "Civilian" candidates to the service in the UOP did not have such a possibility. The Tribunal observes *en marge* that even today – the proceedings on admission of a candidate to service in the ABW or AW is of single-instance nature and does not provide for any possibility of appeal to a court the refusal of admission to those services (Article 46 of the Act on the ABW/AW).

In qualification proceedings in 1990 candidates from the dissolved SB from Department I (intelligence) and Department II (counter-intelligence) were generally treated leniently, and candidates from Department IV (surveillance of churches and confessional associations) were generally treated negatively. Persons of more than 55 years of age could not as a rule undergo qualification proceedings. The work itself of qualification commissions, which for the whole operation had less than three months, was conducted fast. An examination of a motion of an SB functionary for the admission to service in the UOP

sometimes took less than 20 minutes. This may be confirmed, *inter alia*, by the example of the conducting of qualification proceedings by the regional commission in Opole: during 3 days it qualified positively 101 among 255 of the former functionaries of the SB who had submitted motions. The fact that mistakes occurred during the evaluation of candidates by qualification committees may be proven by the fact that local Commissions for the Prosecution of Crimes against the Polish Nation until today in eight cases have submitted indictments against functionaries of the former SB, positively verified in 1990, and in additional four cases prosecution proceedings are pending against such functionaries. It results from the letter of the President of the IPN that those data "are not complete, since part of the conducted qualification proceedings the fact of a positive verification of functionaries in 1990 was not documented due to the lack of evidential significance for the conducted investigation proceedings" (the letter of the President of the IPN of 30 July 2009, Ref. No. SP-0241-14(16)08).

In this context decisions of the qualification committees that a former functionary may be "useful" in the new service may not be treated as a state certificate of morality for the period of service in the SB, and all the more one may not treat those opinions as equivalent to a judicial decision on innocence.

Moreover, the Tribunal observes that unlike policemen or firemen, among which in the years 1980-1981 arose a movement favouring the pursuit of democratic reforms, functionaries of security authorities of the People's Republic of Poland were at that time reasonably regarded as a milieu uniformly hostile to the rule of law and democracy in Poland. Also, in this sense they differ significantly from functionaries of the other so-called uniformed services from the period prior to 1990, e.g. the Citizen Militia (cf. W. J. Mikusiński, *Milicjant w opozycji*, Karta 2002, No. 35, pp. 81-117) or the State Fire Service. The former functionaries of security authorities of the People's Republic of Poland did not a single time, after 1990, issue a declaration, individually or at least in a smallest group, referring to, if not clearly critically, then at least distancing with regard to the institution, in which they served.

6.6. In conclusion, the UOP did not constitute in any degree a legal, or an ideological continuation of the SB. The complete rupture of this link in the moment of the dissolution of the SB was finally expressed in the provisions of the Act on the IPN, in which the legislator decided on the transfer, to the IPN, of archives of documents, data collections, registers and records produced and collected by the security authorities of the People's Republic of Poland (Article 25(1)).

The Tribunal states that the legislator had the right, stemming from constitutional values, to a negative evaluation of state security authorities of the People's Republic of Poland. It enabled the legislator to adopt regulations which would have the goal of eliminating unjustly acquired privileges of functionaries of those authorities, covered by the special old-age pension security system, with regard to other persons covered by this system.

7. Old-age pensions in the old-age pension system of professional soldiers and functionaries of uniformed services and in the universal system of social insurance.

Military/police old-age pensions.

7.1. The legislator has decided that professional soldiers and functionaries of the Police, the Internal Security Agency , the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service discharged from service shall be entitled to old-age pensions from the state budget on similar principles, determined accordingly by the Act on Old-Age Pensions of Professional Soldiers and by the Act on Old-Age Pensions of Functionaries. The military old-age pension is an element of the old-age pension security system of soldiers, and the police old-age pension is an element of the old-age pension security system of functionaries of uniformed services.

The Act on Old-Age Pensions of Functionaries has replaced the Act of 31 January 1959 on Old-Age Pensions of Functionaries of the Citizen Militia and their families (Journal of Laws - Dz. U. of 1983, No. 46, item 210, as amended). In this statute the old-age pensions of functionaries acquired on the basis of service in the secret political police in the years 1944-1989 have been equalised "With the service in the Police, the Office for State Protection, the Border Guard, the State Fire Service and in the Penitentiary Service" (Article 13(1) of the Act on Old-Age Pensions of Functionaries). It should be noted that the legislator in 1994 did not enumerate the names of the authorities of state security, order and public security of the People's Republic of Poland. This was done by the legislator in the challenged Act of 23 January 2009, indicating the "periods of service as a functionary of state security authorities, mentioned in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and on the Content of those Documents". The legislator decided in 1994 that an old-age police

pension would not be provided for a former functionary who served "in the years 1944-1956 as a functionary of the authorities of state security, order and public security, if in the course of performing service activities, the functionary committed a crime against the administration of justice or infringed on personal rights of the citizen and for that reason was disciplinarily dismissed, the criminal proceedings were discontinued with regard to him/her due to the minimal or inconsiderable degree of social danger of the deed or was convicted of intentional fault with a final court judgment (Article 13(2) of the Act on Old-Age Pensions of Functionaries). This provision was supposed to be the proof that none of the functionaries of security authorities from the years 1944-1956, who committed acts called at that time "applying impermissible methods in the investigation", will take advantage of the privileged system of old-age pensions. In this context, the Tribunal must note that until the time of enactment of the Act in 1994 none of those functionaries had been convicted. It should also be noted that in the legislative proceedings in 1994 on the adoption of the Act on Old-Age Pensions of Functionaries, the Deputies and Senators of the opposition proposed in vain to widen the time scope of Article 13(2) of the Act until the end of 1989.

7.2. Achieving in 1999 a reform of social insurance, the legislator aimed at creating a uniform old-age and disability pension system, encompassing a possibly widest group of people. From 1 January 1999 until 30 September 2003 the right to the so called old-age pensions from the old-age pension security system was enjoyed by professional soldiers and functionaries of uniformed services, which joined the forces before 2 January 1999. The persons who took up service after 1 January 1999 enjoyed benefits from the universal system of social insurance. This situation has changed, since from 1 October 2003, after the coming into force of the Act of 23 July 2003 on the Amendment of the Act on the System of Social Insurance and Certain Other Acts (Journal of Laws - Dz. U. No. 166, item 1609, as amended), all professional soldiers and functionaries of uniformed services, without regard to the moment when they started service, have been covered by a uniformed old-age pension system, i.e. a social security system regulated in the Act on Old-Age Pensions of Professional Soldiers and in the Act on Old-Age Pensions of Functionaries.

7.3. A professional soldier and a functionary of a uniformed service are entitled to an old-age pension after 15 years of this service. A condition for the acquisition of the right to an old-age pension in the social security system for uniformed services is thus an adequate period of service, and not the reaching of a certain age. The right to an old-age pension from

the system of old-age pension security of professional soldiers or functionaries of uniformed services is not linked with a requirement to pay contributions by the concerned person, since it is financed from budgetary means.

The pensionable service of an old-age pensioner entitled to an old-age pension from the system of social security for uniformed services shall also include, upon his motion, the following periods falling after the discharge from service: 1) employment before 1 January 1999 on a working time basis of at least half of the full working time; 2) paying contributions for the sake of old-age and disability pension insurance after 31 December 1998 or a period of non-payment of contributions because of having exceeded during the calendar year the yearly amount of the basis of assessment of contributions for that insurance. Those periods were included in the pensionable service, if the old-age pension amounts to less than 75% of the basis of assessment and the old-age pensioner attained 55 years of age (man) and 50 years of age (woman) or has become disabled. The periods of employment indicated above are included in the pensionable service after their recalculation to a period of employment on a full-time basis. For every year of the periods included in the pensionable service, the old-age pension is augmented by 1.3% of the basis of its assessment.

The basis of assessment of the old-age pension is the remuneration due to the professional soldier or functionary of a uniformed service on the last held position. The old-age pension of a functionary of a uniformed service, who remained in service before 2 January 1999 amounts to 40% of the basis of assessment for 15 years of service and accrues by: 1) 2.6% of the basis of assessment – for every further year of this service; 2) 2.6% of the basis of assessment – for every year of contributory periods preceding service, however, no more than for three years of those periods; 3) 1.3% of the basis of assessment – for every year of contributory periods exceeding the three year contributory period, as referred to in point 2 4) 0.7% of the basis of assessment – for every year of non-contributory periods preceding service. The old-age pension is increased also for special periods of service (e.g. service as divers and scuba divers, in combating terrorism, as parachutists and sappers, on the front during a war or in the zone of war activity) or when the disability is linked with the service. The amount of the old-age pension without taking into account of the supplements, allowances and pecuniary benefits indicated in statutes may not exceed 75% (80% – if the old-age pension has been raised by 15% of the basis of assessment in the case of an old-age pensioner, whose disability is linked with the service) of the basis of assessment of the old-age pension and may not be lower than the amount of the lowest old-age pension. The old-age pensions of professional soldiers and functionaries of uniformed services and the basis of

their assessment are subject to revalorisation on rules and time limits provided for in the Act of 17 December 1998 on Retirement and Disability Pensions from the Fund of Social Insurance (Journal of Laws - Dz. U. of 2009, No. 153, item 1227; hereafter: the Act on Old-Age and Disability Pensions from the Fund of Social Insurance (Fundusz Ubezpieczeń Społecznych, hereafter: the FUS).

With certain exceptions, those rules apply equally to professional soldiers and functionaries of a uniformed service who were admitted to service for the first time after 1 January 1999.

The system of calculating an old-age pension is set here in such a way that in the moment of retirement the military/police old-age pensioner reaches 75% of the remuneration on the last held position. As a rule 25 years are enough in order to reach such a maximum old-age pension. As a result, despite a shorter period of required employment, military old-age pensioners and police old-age pensioners – taking advantage of several more advantageous rules of calculating the paid old-age pension at a time – receive significantly higher old-age pensions than an old-age pensioner in the universal system.

In such a situation statutory indicators which are applied in the calculation of the amount of an old-age pension in the universal system and in the systems for uniformed services, including those counted for the non-contributory periods (0.7% of the basis of assessment for every year of work/service) have a significantly different gravity – what in the examined case is particularly important. Especially if one takes into account that the legislator preserved the right to 1) the highest indicator for every year of contributory periods preceding service, no more, however, than for three years of those periods – 2.6% of the basis of assessment (Article 15(1)(2) of the Act on the Old-Age Pensions of Functionaries); 2) to the yardstick of 1.3% of the basis of assessment – for every year of contributory periods exceeding the three-year contributory period, as referred to in point 2 of this provision. Additionally, the old-age pension is raised: 3) by 2% or by 1% for every year of service performed directly in special conditions determined in Article 15(2)(1) and (2) of this Act; 4) by 0.5% of the basis for every year of service performed in conditions particularly threatening life or health; 5) by 0.5% of the basis of assessment for every started month of service on the front during war or in a zone of war activity (Article 15(2)(3) and Article 15(3) and (3a) of this Act). Military/police old-age pensioners also have more advantageous – than old-age pensioners in the universal system – possibilities of benefiting from additional income from activity covered by the obligation of social insurance (Article 40 of the Act on Old-Age

Pensions of Professional Soldiers and Article 41 of the Act on Old-Age Pensions of Functionaries).

The old-age pension in the universal insurance system.

7.4. Under the Act on Old-Age Pensions and Disability Pensions from the FUS, an old-age pension in the universal insurance system may be assessed according to the formula of a predefined benefit – for persons born before 1 January 1949 or according to the formula of a predefined contribution – for persons born after 31 December 1948. The legislator has provided for that persons who were born after 31 December 1948 and before 1 January 1969 are entitled to an old-age pension assessed according to the formula of a predefined benefit, if they fulfilled conditions for the acquisition of an old-age pension according to the previously prevailing principles until 31 December 2008, or according to the formula of a predefined contribution, with the reservation that the insured person from this age group could decide on their own if a fraction of their contribution shall be transferred to the open old-age pension funds, or whether the entire contribution shall remain on their individual account in the ZUS.

The insured person born before 1 January 1949 are entitled to an old-age pension, if they fulfilled jointly the following requirements: 1) attained the pensionable age of at least 60 years for women and of at least 65 years for men; 2) have a contributory and non-contributory period amounting to at least 20 years for women and 25 years for men. The amount of this old-age pension is dependent on the amount of the basis of assessment, the contributory and non-contributory period taken into account and the base amount, applying on the day of acquisition of the right to an old-age pension. The basis of assessment of the old-age pension is the basis of assessment of contributions to the old-age pension insurance or to social insurance, according to the provisions of Polish law, from a period of subsequent 10 calendar years, chosen by the given person from the past 20 calendar years preceding directly the year, in which the motion for an old-age pension was filed. Upon the motion of the insured person, the basis of assessment of the old-age pension or of a disability pension may be the average basis of assessment of the contribution to social insurance or old-age pension or disability pension insurance during 20 calendar years falling before the year the motion was filed, chosen from the entire period of being covered by the insurance.

The base amount is equal to 100% of the average remuneration diminished by deducted contributions from the insured person to the social insurance, determined in the [Act] on the Social Insurance System, in the previous calendar year. The base amount is

determined each year and applies from the day of 1 March of every calendar year until the end of February of the following calendar year. Since 1 March 2009 the base amount was equal to PLN 2 578.26.

An old-age pension according to the formula of a predefined benefit amounts to: 1) 24% of the base amount and 2) 1.3% of the basis of assessment for every year of contributory periods including full months, 3) 0.7% of the basis of assessment for every year of non-contributory periods including full months.

In turn, the insured person born after 31 December 1948 are entitled to an old-age pension after attaining pensionable age, amounting to at least 60 years for women and at least 65 years for men. The insurance seniority is not a condition for the acquisition of the right to an old-age pension according to the formula of the predefined contribution, but having no insurance seniority results in the lack of guarantee of payment of an old-age pension in the minimal amount. The amount of the old-age pension paid by the ZUS to persons covered by the new system shall depend in the sum of the contributions paid in, the indices of valorisation during the period before the acquisition of the right to and old-age pension, the retirement age and the amount of the initial capital.

The procedure of calculating of an old-age pension in the universal system is set in such a way that at the moment of retirement the insured person obtains an average 40% of the remuneration from "Subsequent 10 calendar years, chosen by the given person from the past 20 calendar years directly preceding the year", in which he or she filed the motion for an old-age pension or a disability pension – in such a case taking into account contributory and non-contributory periods (Article 15 of the Act on Old-Age Pensions and Disability Pensions from the FUS). Moreover, what is essential, the longer the insured person works, the higher an old-age pension he or she shall receive. In practice it means a pensionable service of at least 30 years in order to receive an old-age pension in the amount of approximately one half of the average remuneration from the chosen ten years. The average pay of insured persons in the universal system is lower by half in comparison to functionaries of uniformed services and the lower than the pay of functionaries of secret services. An old-age pensioner in the universal system receives thus an old-age pension in the amount of about 40% of the average remunerations from the last best ten subsequent contributory and non-contributory years for a seniority twice as long than a police or military old-age pensioner, who in addition has the right to an old-age pension in such an amount after already 15 years of service. A person, whose old-age pension is regulated by the Act on Old-Age Pensions and Disability Pensions

from the FUS, may after 15 years of work, until the attainment of 25 years of service, apply at best for a social allowance.

7.5. The privilege of professional soldiers and functionaries of security authorities during the period of the People's Republic of Poland also manifested itself in that they benefited from a system of healthcare created for them, received housing without having to wait, they bought scarce commodities in designated shops, spent holiday in special resorts, etc. Higher remunerations and various social facilities of professional soldiers and functionaries of security authorities in this period in comparison to the rest of the Polish society determined the privileged position of the indicated group of subjects.

7.6. In spite of the assertions of the applicant, the social security system of professional soldiers and the social security system of functionaries of uniformed services constitute a special kind of a privilege. More advantageous principles of acquiring old-age pension rights and the assessment of their amount in relation to professional soldiers and functionaries of uniformed services are most often substantiated by special conditions of the performance of the service by them. However, an obligation of the legislator – after balancing concurring constitutional values – to provide the same old-age pension benefit to every professional soldier or functionary without regard to circumstances characterising the beneficiaries, does not follow therefrom. The legislator, acting within the limits of the freedom set for him in the Constitution, may determine in what situations and according to what principles the lowering of old-age pension benefits, to which one may be entitled in those systems, shall apply.

7.7. To sum up, in practice differences between the analysed old-age pension systems boil down to the fact that in order to receive an old-age pension which is lower, on average, by 2/5 than that of a police old-age pensioner, a person under the universal old-age pension system must additionally work for it for at least five more years.

The Constitutional Tribunal states that the conditions of acquiring of a police old-age pension as well as a military old-age pension and the principles of their assessment are significantly different from the conditions of acquiring an old-age pension paid by the ZUS. With the established differences in mind it is hard to rationally suppose that the same recalculation coefficient of the basis of assessment of the old-age pension – 0.7% for every year of service or work – has the same gravity in the two diverse old-age pension systems. For

old-age pensioners from uniformed services such a recalculation coefficient weighs still more for the finally assessed old-age pension than a recalculation coefficient of 1.3% for an old-age pensioner in the universal old-age pension system. The figures from the Old-Age and Disability Pension Institution of the Ministry of Interior and Administration (hereafter: ZER MSWiA) quoted by the Tribunal in point 8 of this part of the reasoning of the judgment is convincing.

This conclusion is further confirmed in the previous jurisprudence of the Constitutional Tribunal, indicated below.

Military and police old-age pensions in the jurisprudence of the Constitutional Tribunal.

7.8. In the previous jurisprudence, the Constitutional Tribunal many times drew attention to the privileges of the functionaries of uniformed services, with regard to conditions of acquisition of old-age and disability pension rights and their amounts.

In the decision of 23 September 1997, Ref. No. K 25/96 (OTK ZU No. 3-4/1997, item 36) the Constitutional Tribunal stated that

"Separate, and at the same time more advantageous principles of acquiring old-age and disability pension rights and the assessment of their amount with regard to uniformed services are most often justified by special conditions of performing service. The essential elements of this service is full flexibility and dependence on the official authority, performing tasks on open-ended working time basis and in difficult conditions, frequently posing a risk to one's life and health while carrying out operations to defend the country or while protecting the security of the public, great physical and mental perseverance, required during the whole period of service, little possibility of performing additional work and having other sources of income, a limited right of participation in political life and involvement in associations. The privileged principles of granting and establishing the amount of benefits for the discussed category of entitled persons are also an expression of a particular importance assigned by the state to the service performed by them (…) and may also be imposed by reasons of personnel policy. Since this service may end at any time and not always due to reasons dependent on the given functionary".

In the same decision, the Constitutional Tribunal stressed:

"Approving thus as a rule the differentiation of social security systems, one should, however, recognise that the discrepancies existing from this point of view should not be

excessive in the meaning of being deprived of a rational substantiation. For special working conditions in a given profession (branch) should be taken into account above all in a more advantageous regulation of payment conditions and remuneration, whereas their «transfer» to social security benefits (their amount and formula) should take place mostly through the basis of assessment (remuneration) of the benefit".

An equivalent standpoint was taken by the Constitutional Tribunal in the judgment of 19 February 2001, Ref. No. SK 14/00, OTK ZU No. 2/A/2001, item 31, and in the judgment of 12 February 2008, Ref. No. SK 82/06, OTK ZU No. 1/A/2008, item 3).

The standpoint taken by the Constitutional Tribunal, presented in the judgment of 29 April 2008, Ref. No. P 38/06 (OTK ZU No. 3/A/2008, item 46), is particularly important in the context of this case; it follows from it that: "the «provision» system for the functionaries of uniformed services constitutes a special type of a statutory «privilege» – at least from the point of view of the persons under the social insurance system (…). The discrepancies concern both the way of determining premises conditioning the acquisition of the right to an old-age pension (…), the estimation of the basis of assessment of an old-age pension (…) and the so called pensionable service (…). These are more advantageous solutions from those previously binding in the insurance system, and justified (…) by the special character of the service. (…) It does not mean, however, that the ordinary legislator had the duty to «guarantee» a coverage of every functionary and in any case by old-age and disability pension benefits from the system for uniformed services – including persons whose service did not run in an irreproachable way, in particular those condemned for common crimes committed out of sordid criminal motives or for serious crimes. Such behaviour of a functionary is contrary to the essence of his service, so its logical consequence is the deprivation of the functionary of the «privileges» linked with this service".

The Constitutional Tribunal in the examined case supports these previous findings.

7.9. The applicant's proxy during the hearing of 13 January 2010 has raised the issue that the challenged provisions of the Act of 23 January 2009 put in a worse position functionaries of security authorities of the People's Republic of Poland in comparison to these functionaries of these authorities, who have lost the right to a police old-age pension as a result of a condemnation by a final decision of a court for an intentional crime determined in Article 10 of the Act on Old-Age Pensions of Functionaries. This should result, in the applicant's opinion, from a simple juxtaposition of the recalculation coefficient of the basis of assessment of the old-age pension: 0.7% for each year of service of functionaries of security

authorities of the People's Republic of Poland covered by the provision of the Act of 23 January 2009, with 1.3% for every year of service in these authorities with regard to a functionary condemned for an intentional crime by a final court decision. Apart from juxtaposing the two indicators, the applicant had not provided any arguments. Suffice it to say that both the former functionary of state security authorities, as well as any former functionary of uniformed services determined in the Act on Old-Age Pensions of Functionaries loses the entire privileged basis having influence on the amount of the old-age social security indicated above, after a final court decision has been given. In the first place he or she loses the right to retire already after 15 years of service. This means that in order to retire in the universal system he or she will have to prove at least 25 years of service, and loses the right to an old-age pension in the amount of the remuneration due at the last held position. If such a convicted former functionary had the period of service shorter than 15 years, then as a rule this will not transpose itself at all on the final assessment of the old-age pension. Independently from the number of years of service, the functionary convicted with a final judicial decision also loses the right to the supplementary recalculation coefficient for every year of service in special circumstances – which the Tribunal has already indicated above. Finally, what is not the least important, it is impossible to compare the legal and social situation of the functionary convicted by a final court decision for an intentional crime with the situation of a functionary of a security authority of the People's Republic of Poland, who in connection with the fact of having commenced service has a lowered old-age pension, although it is still a police old-age pension with all the remaining basis of assessment of its amount and still higher than an old-age pension paid from the universal old-age pension system. Such a reasoning is the more unauthorised in relation to a functionary of security authorities of the People's Republic of Poland, who in 1990 in sovereign Poland gained the possibility of service in the UOP and its legal successors on entirely equal principles with persons, who began service in the security police at that moment for the first time in life. Thus the applicant has in this regard reached an unfounded conclusion on the better situation of the former functionary of security authorities of the People's Republic of Poland, who as a result of a conviction with a final judicial decision for an intentional crime loses all rights to a police old-age pension, than the one who is an addressee of the challenged provisions.

8. The matter of conformity of Article 15b of the Act on Old-Age Pensions of Professional Soldiers and Article 13(1)(1) and(1b), as well as Article 15b(1) of the Act on

Old-Age Pensions of Functionaries with Article 67(1) read in conjunction with Article 31(3) of the Constitution.

8.1. In the applicant's opinion, the challenged provisions infringe on Article 67(1) read in conjunction with Article 31(1) of the Constitution. The applicant claims that the challenged provisions are not necessary in a democratic state ruled by law and that they do not find justification in values enumerated in Article 31(3) of the Constitution, and additionally they infringe on the essence of the right to an old-age pension. The challenged provisions constitute, in the applicant's opinion, a very serious limitation of old-age pension rights of verified functionaries and subsequently employed again. The introduced changes constitute an excessive sanction in relation to the persons who may not be to blame for having committed any offences, except for the fact that they were functionaries of state security authorities before 1990. The lack of any substantiation and purposefulness of the lowering of old-age pensions for verified and reemployed functionaries forejudges the flagrant infringement of the principle of proportionality.

Article 67(1) of the Constitution sets forth one of the social rights – the right to social security: "a citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute". The second sentence of Article 67(1) of the Constitution leaves no doubt that the constitutional lawmaker recognises the ordinary legislator as legitimised to set the foundations of the social security system, including the old-age pension system.

8.2. According to the well-established jurisprudence of the Constitutional Tribunal, a constitutional right to a particular type of a social benefit may not be deduced from Article 67(1) of the Constitution. The basis of eventual claims of persons applying for a disability pension, an old-age pension or another form of social security may be statutory provisions regulating those matters in detail, and not Article 67(1) of the Constitution, which authorises the legislator to determine the extent and form of social security. The liberty of the legislator in the scope of realisation of the right to social security is however not unlimited (cf. the judgment of 6 February 2002, Ref. No. SK 11/01, OTK ZU No. 1/A/2002, item 2).

Determining the scope of the right to social security, the statute may not infringe on the essence of a given right, which determines its identity. Thus the legislator does not dispose of a full liberty, neither in the determination of the group of persons entitled to the acquisition of old-age and disability pension benefits, nor in the determination of the content

and the amount of the benefits. By determining the manner of assessment of the amount of benefits, the statute must guarantee to the entitled persons benefits not only enabling them to satisfy their basic needs. On the quality of the given system of social security testifies above all the amount of the average old-age pension benefit, taking into account the amount of average worker remuneration, and the guarantee of mechanisms securing the maintenance of an economic practicability of payments of old-age pensions in a long, plurigenerational run (cf. also § 11 of the *General Commentary* of 4 February 2008, Committee of Economic, Social and Cultural Rights of the UN, to Article 9 of the Covenant of Economic, Social and Cultural Rights recognising "The right of everyone to social security, including social insurance", E/C.12/GC/19).

The obligation levied on the legislator to realise social guarantees expressed in the Constitution by adequate normative regulations does not mean an obligation of a maximum expansion of the system of benefits. The protection of social rights should manifest itself in such a shaping of the statutory solutions, which shall constitute an optimum of the realisation of the constitutional right. It is also without any doubt that regardless of the intensity of the impact of factors, which may restrain the pursuance to satisfy justified social needs, a statutory realisation of the constitutional social right may never place itself below the minimum set by the essence of the given right (cf. the judgment of 8 May 2000, Ref. No. SK 22/99, OTK ZU No. 4/2000, item 107).

Then again, the essence of the right to an old-age pension includes a guarantee of livelihoods in case of discontinuation of work in connection with the reaching of a certain age. A fundamental goal of the constitutional right to social security after reaching pensionable age is a guarantee of a dignified living standard in conditions of a lowered ability to earn money, resulting from advanced age. An old-age pension is assumingly a benefit, which replaces, and not supplements remuneration from an employment relationship (cf. judgment of 7 February 2006, Ref. No. SK 45/04, OTK ZU No. 2/A/2006, item 15 point 3).

Article 67(1) of the Constitution thus establishes the basis to distinguish: 1) the minimum scope of the right to social security, corresponding to the constitutional essence of this right, which the legislator has the duty to guarantee, and 2) the realm of rights guaranteed by statute and exceeding the constitutional essence of the discussed right. In the first case the legislator has a much narrower margin of freedom in the introduction of amendments to the legal system, for the new legal solutions may not infringe on the constitutional essence of the right to social security. In the second case, the legislator may – as a rule – abolish rights exceeding the constitutional essence of the right to social security. However, in any case those

changes should be made with respect of the other constitutional principles and norms determining the limits of the legislator's freedom of amending the legal system, and in particular the principle of protection of citizens' trust in the state, the principle of protection of acquired rights and the requirement of maintaining an adequate *vacatio legis* (cf. the judgment of 11 December 2006, Ref. No. SK 15/06, OTK ZU No. 11/A/2006, item 170).

One should share the established standpoint of the Constitutional Tribunal that the second sentence of Article 31(3) of the Constitution, according to which limitations of the exercise of constitutional freedoms and rights may not infringe on the essence of those freedoms and rights, applies to statutes determining the scope of the right to social security. Indeed, in the case of the right to social security, the constitutional scope of protection corresponds to the essence of this right, which may not be limited (cf. the judgment of 4 December 2000, Ref. No. K 9/00, OTK ZU No. 8/2000, item 294; Ref. No. SK 45/04, item 3; the judgment of 1 April 2008, Ref. No. SK 96/06, OTK ZU No. 3/A/2008, item 40 and of 29 April 2008, Ref. No. P 38/06, OTK ZU No. 3/A/2008, item 46).

8.3. The applicant questioned the challenged provisions on the grounds that they excessively limited old-age pension rights of the members of the Military Council and of the functionaries of state security authorities. Additionally, in the applicant's opinion, the provisions of the Act of 23 January 2009 remain in "flagrant contradiction" with the directive stemming from the Resolution 1096 and with the guidelines to this document, which are to ensure the conformity of lustration statutes and similar administrative means to the requirements of a state ruled by law, recommending that settling accounts with the communist period should be terminated within 10 years after overthrowing the communist dictatorship.

The Constitutional Tribunal states that the lowering of old-age pension benefits of the members of the Military Council and of the functionaries of state security authorities of the People's Republic of Poland finds its axiological basis in the Preamble of the Constitution and in numerous acts of international law. The Act of 23 January 2009, is an expression of unequivocally negative evaluation of the communist regime, which could not function in Poland in the years 1944-1989 without the security authorities standing on its guard. The self-proclaimed Military Council, created in order to save the communist regime, as it was threatened by the peaceful social movement of Solidarity, which expressed the liberty and civilisation aspirations of the Polish people, including a large number of the members of the communist party, also had a similar character. The functionaries of security authorities of the People's Republic of Poland and the members of the Military Council could not expect that

after the collapse of the communist regime their activity would remain legally indifferent. This does not mean, however, discretion over enacting and applying law with regard to the members of the Military Council and the functionaries of security authorities of the People's Republic of Poland. The enforcement of criminal responsibility which was not borne during the regime, as well as other sanctions towards those persons provided for pursuant to the provisions of other divisions of law, must satisfy the standards of a state ruled by law.

The lapse of time from gaining sovereignty by the Polish State in 1989, although not without significance, may not be a decisive criterion of assessment of constitutionality of the regulations adopted by the legislator in order to settle accounts with the former functionaries of the communist regime. There is no provision in the Constitution, which would set a prohibition of enacting such regulations. The Constitution does not outline time limits to perform the settling of accounts with the past of the communist regime. It is not within the competence of the Constitutional Tribunal to make a stand on whether and what and in what time statutes concerning settling accounts may be introduced by the lawmaker of independent Poland. The limitations of the legislator are imposed by the principles of a democratic state ruled by law. The fact how much time elapsed from the collapse of the communist regime until the adoption of a given statute depended on the existence of a configuration of power capable to enact it during a given parliamentary term of office. Thus, as the examples of Poland, other countries in our region of Europe and certain countries of South America show, many years may elapse from the re-establishment or establishment of democracy, until a statute regulating a certain aspect of responsibility for systemic abuses of power will be enacted.

In addition, the Constitutional Tribunal observes that neither the Resolution 1096 nor the guidelines to it were the basis of adjudication of the ECHR in any of the cases, even when these provisions were referred to by the applicants (the last time in the case Rasmussen v. Poland quoted above, § 66).

8.4. Referring to the allegation raised by the applicant that the provisions of the Act of 23 January 2009 remain in a "flagrant contradiction" with the Resolution 1096 and with the guidelines to that document supposed to ensure conformity of lustration statutes and similar administrative means with the requirements of a state ruled by law, the Constitutional Tribunal states that in those acts there is no suggestion that the settling of accounts with the communist period could take place only during 10 years after the overthrowing of the dictatorship. The settling of accounts introduced by statutes was attempted in various regions

and in various years of the past two decades, including the last couple of years, in all countries of the region. As the Constitutional Tribunal has observed above, pursuant to item 14 of the Resolution 1096:

"In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, these should be reduced to the ordinary level".

In conclusion, the Constitutional Tribunal states that the legislator could enact provisions lowering old-age pension benefits of the members of the Military Council and of thefunctionaries of security authorities of the People's Republic of Poland under the condition of observance of constitutional principles, norms and values.

8.5. Proceeding to an examination of the allegation of excessive interference with the right to social security, the Constitutional Tribunal has determined that the legislator modified the way of calculating old-age pensions by lowering the basis of assessment of the said pensions in the case of the members of the Military Council as well as the functionaries of security authorities of the People's Republic of Poland who remained in service before 2 January 1999 and who served at least 15 years, from 2.6% of the basis of assessment for every subsequent year of this service to 0.7%. The Tribunal at the same time states that the legislator has maintained under the previous rules:

1) the right to an old-age pension benefit already after 15 years of service,

2) the right to an increased old-age pension, after having satisfied additional premises specified in Article 15(2) to (4) read in conjunction with Article 15b(2) of the Act on Old-Age Pensions of Functionaries,

3) a privileged way of calculating the basis of assessment of the old-age pension of functionaries, with regard to the universal insurance system,

4) the principles and time limits of valorisation of old-age pensions and of their assessment,

5) disability pension benefits,

6) family pension benefits,

7) supplements to old-age and disability pensions, welfare benefits and other pecuniary benefits set out in Article 25 and Article 26 of the Act on Old-Age Pensions of Professional Soldiers and the Act on Old-Age Pensions of Functionaries respectively,

8) pecuniary benefits and rights set out in Articles 27 to 31 of the Act on Old-Age Pensions of Professional Soldiers and the Act on Old-Age Pensions of Functionaries respectively,

9) old-age and disability pension benefits of former workers of state security authorities who were not functionaries,

10) old-age and disability pension benefits of soldiers of the Military Information, the Military Internal Service, the Administration of the 2nd General Headquarters of the Polish Military and other services of the Armed Forces conducting operative-reconnaissance or investigative actions, also in types of military formations and in military districts.

It should be stressed that the additional premises mentioned above in Articles 15(2) to (4) of the Act on Old-Age Pensions of Functionaries cover the following situations, which result in an increase of the old-age pension:

"2. The old-age pension is increased by:

1) 2% of the basis of assessment for every year of service performed directly as divers or scuba divers and in the physical combating of terrorism;
2) 1% of the basis of assessment for every year of service performed directly:
a) as flying personnel in planes and helicopters,
b) as crew of surface watercraft,
c) as paratroopers and sappers,
d) in intelligence service abroad;
3) 0.5% of the basis for every year of service performed in conditions posing a particular threat to life or health.

3. The old-age pension is increased by 0.5% of the basis of assessment for every started month of performing service on the front during war or in a zone of war activity.

3a. If the pensionable service includes periods of military service, as referred to in Article 13(1)(2), the old-age pension is increased under rules provided in provisions on old-age pensions of professional soldiers.

4. The old-age pension is increased by 15% of the basis of assessment to an old-age pensioner, whose disability remains in link with the service".

The Constitutional Tribunal also observes that the legislator, by lowering the basis of assessment of old-age pensions of functionaries of state security authorities serving in the years 1944-1990, clearly provided for a respective application of Article 14 and of Article 15 of the Act on Old-Age Pensions of Functionaries (Article 15b(2)). In Article 14 of the Act on Old-Age Pensions of Functionaries the legislator has regulated principles, according to which

certain periods falling after the discharge from service are included in the pensionable service. According to this Article e.g.:

"1. The following periods falling after the discharge from service, with the reservation of paragraph 2, are included in the pensionable service of an old-age pensioner entitled to an old-age pension calculated on the basis of Article 15, upon his motion:

1) of employment before the day of 1 January 1999 on a working time basis of at least half of the full working time;

2) of paying contributions to the old-age and disability pension insurance after 31 December 1998 or a period of not paying contributions because of having exceeded during the calendar year the amount of the yearly basis of assessment of contributions to that insurance.

2. The periods, as referred to in paragraph 1, are included in the pensionable service, if:

1) the old-age pension amounts to less than 75% of the basis of assessment and

2) the old-age pensioner has reached 55 years of age – man, and 50 years of age – woman or became disabled.

3. The periods of employment, as referred to in paragraph 1 subparagraph 1, are included in the pensionable service after their recalculation to a period of employment on a full-time basis.

4. For every year of the periods, as referred to in paragraph 1, included in the pensionable service, according to paragraphs 1-3, the old-age pension calculated under Article 15 is increased by 1.3% of the basis of its assessment".

8.5.1. The Tribunal observes that, although in the Act on Old-Age Pensions of Professional Soldiers there are analogous regulations to the ones presented above (Article 14 and Article 15), the legislator - by lowering the basis of assessment of old-age pensions for the members of the Military Council - did not introduce an imperative, such as in the case of the functionaries of state security authorities serving in the years 1944-1990, for their respective application. On the basis of adopted rules of interpretation, the principles of including certain periods subsequent to the discharge from service in the pensionable service, and the principles of increasing the old-age pension expressed in Articles 14 and 15 of the Act on Old-Age Pensions of Professional Soldiers shall apply to the calculation of old-age pensions of the members of the Military Council.

8.6. The allegation expressed by the applicants at the hearing on 24 February 2010 that the Tribunal had changed its established standpoint, according to which the Constitutional Court is a court of law and not a court of facts, was inaccurate.

The Constitutional Tribunal is a court of law. In the examined case, the object of allegations is a norm concerning pecuniary benefits. Therefore, the manner of determination in the Act of those benefits finds its pecuniary expression. Thus, the Tribunal – in the context of an allegation of infringement on the principle of equality – may not disregard the property consequences of the challenged legal regulation.

8.7. It follows from the information which the Constitutional Tribunal received from the Director of the Department of Social Affairs of the Ministry of National Defense (the letter of 23 September 2009, Ref. No. 3062/DSS, the letter of 20 October 2009, Ref. No. 3344/DSS, and the letter of 24 February 2010, Ref. No. 579/DSS), and also from the Director of the ZER MSWiA (the letters of: 30 September 2009 and 9 October 2009, Ref. No. ZER-WOK-052/1847/09; the letter of 27 October 2009, Ref. No. ZER-WOK-052/2032/09; the letter of 5 February 2010, Ref. No. ZER-AM-0602/246/10; the letter of 23 February 2010, Ref. No. ZER-AM-0602/541/10) that, after the application of the Act of 23 January 2009, the average monthly amount of an old-age pension of a member of the Military Council in January 2010 amounted to PLN 6028.80, whereas the average amount of an old-age pension in the group of functionaries of security authorities of the People's Republic of Poland in January 2010 amounted to PLN 2558.82.

8.7.1. It follows from the information gained by the Tribunal from the President of the Social Insurance Institution (the letter of 2 November 2009, Ref. No. 992600/070/90/2009/NS; the letter of 23 February 2010, Ref. No. 992600/037/65/2009/NS) that the average monthly amount of an old-age pension paid within the universal social security system in January 2010 amounted to PLN 1618.70, and the lowest old-age pension from the Social Insurance Fund (hereafter: FUS) amounts to PLN 675.10 (cf. the communication of the President of the Social Insurance Institution of 20 February 2009 on the sum of the lowest old-age and disability pension, the nursing supplement and the supplement for parentless orphans and the sums of maximum diminutions of old-age and disability pensions, M. P. No. 14, item 188).

8.7.2. The presented data are of significant importance for the constitutional assessment of the analysed allegation of the applicants. In February 2010, the average old-age

pension of the functionaries of security authorities of the People's Republic of Poland was lower than the previous one by PLN 346, and was still higher than the average old-age pension under the universal old-age pension insurance system by 58% and almost four times higher than the lowest old-age pension from the FUS. Only in the corps of functionaries holding the rank of a private, who performed service in the security authorities of the People's Republic of Poland, the average old-age pension in January 2010 was slightly lower (PLN 1499.64) than the average old-age pension in the universal social insurance system. However, it is well known that it is a specificity of every security police that functionaries of the officers' corps are the most numerous. In the junior officers' corps the old-age pension of functionaries of security authorities of the People's Republic of Poland in January 2010 amounted to PLN 2102.12 (before PLN 2670.93); in the senior officers' corps – PLN 3479.67 (PLN 4156.21) and in the generals' corps – PLN 8598.43 (PLN 9578.41). According to the letter of the Director of ZER MSWiA of 5 February 2010:

"After applying the provisions of the Act of 23 January 2009 with regard to the functionaries who performed service in state security authorities, as referred to in Article 2 of the Act of 18 October 2006 – 7227 of the paid benefits were not subject to change. This stems *inter alia* from the fact that persons who had the amount of their old-age pensions reassessed had a long pensionable service, which enabled to take into account periods which previously had not been taken into account, and which are to be included in the pensionable service, e.g.: the periods as referred to in Article 14 of the Act on Old-Age Pensions of functionaries of the Police (…), a raise of the old-age pension by 15% of the basis of assessment due to a stated disability remaining in link with the service. Not taking into account of these periods, or their partial taking into account resulted from Article 18(1) of the Act on Old-Age Pensions of Functionaries of the Police (…), according to which the amount of the old-age pension without taking into account the supplements and benefits may not exceed 75% of the basis of assessment, and in the case of an increase by 15% of the basis of assessment due to a stated disability remaining in link with the service – 80% of the basis of assessment. Additionally, some benefit recipients, entitled both to an old-age and disability pension from 1 January 2010, receive a disability pension, which is a benefit more advantageous than the recalculated old-age pension".

In addition, it follows from this letter that, after having verified the benefits on the basis of the provisions of the Act of 23 January 2009 with regard to 589 old-age pension benefits, it was necessary to raise them to the amount of the lowest old-age pension, i.e. to PLN 675.10. In general, the ZER MSWiA issued 38563 decisions on the reassessment of the

amount of old-age benefits to the functionaries of security authorities of the People's Republic of Poland (the letter of 23 February 2010, Ref. No. ZER-AM-0602/541/10).

8.8. The Tribunal states that the regulation adopted in the challenged Act preserves an individual calculation of old-age pensions to functionaries of security authorities of the People's Republic of Poland. This means that the senior officers, and those who have served the maximum number of years, will continue to receive higher old-age pensions than the functionaries of those authorities inferior by rank. The length of the service is here of less importance. For those, who served in those authorities for a shorter period of time, and a longer period in the UOP and in its successors, the ABW and the AW, will have old-age pensions slightly lower than those functionaries who joined service in the second half of 1990. The goal of the legislator, following the principle of social justice, was to lower old-age pensions for the functionaries of security authorities of the People's Republic of Poland to the average level under the universal social insurance system. An instrument to achieve this goal was the lowering of the basis of assessment of old-age police pensions from 2.6% to 0.7% for those functionaries, with a simultaneous preservation of the previous basis of assessment of police old-age pensions, more advantageous than in the universal system of social insurance. The achieved outcome indicates that the average old-age pension of a functionary of security authorities of the People's Republic of Poland in January 2010 was lower by almost PLN 500, still exceeding the average old-age pension paid under the universal system of social insurance. Such a lowering of the amount of old-age pension benefits signifies limits, and not abolishes, structurally excessive and unjustly acquired substantial pecuniary benefits of the functionaries of security authorities of the People's Republic of Poland. Such a limitation also indicates that the goal of the legislator was not revenge on the functionaries of security authorities of the People's Republic of Poland.

The old-age pensions of the members of the Military Council before the change, as well as after the change – introduced by the legislator following the same constitutional principle – were and are many times higher than the average old-age pension under the universal social insurance system, not to mention the minimum old-age pension. However, this is obvious, taking into account that they concern, almost without exception, professional soldiers of the Armed Forces of the People's Republic of Poland who are most senior by rank.

8.9. The Constitutional Tribunal states that the legislator, enacting the Act of 23 January 2009, did not infringe on the essence of the right to social security. Although the

Tribunal regards the lowering of old-age benefits of members of the Military Council and functionaries of security authorities of the People's Republic of Poland as significant, this fits however within the scope of freedom of the legislator, determined by the Constitution. An infringement of the right to social security of the members of the Military Council and functionaries of security authorities of the People's Republic of Poland would occur in particular if the legislator revoked all their old-age pension rights or lowered their pensions to an amount below the social minimum. By lowering old-age benefits of the indicated groups, the legislator at the same time not only guaranteed that the old-age pension benefit might not be lower than the amount of the lowest old-age pension under the universal social insurance system (Article 18(2) of the Act on Old-Age Pensions of Functionaries and Article 18(2) of the Act on Old-Age Pensions of Professional Soldiers), but also ascertained that the average amount of the old-age pension to which both of these groups are entitled on the basis of the new provisions remains still significantly higher than the average old-age pension paid under the universal social insurance system.

8.10. In addition, the Tribunal states that the legislator – enjoying, in this regard, certain freedom to estimate whether, and to what extent, a relevant difference in a somewhat similar situation merits different treatment – pursued a justified goal, and maintained a reasonable proportion between the applied measure and this goal.

In conclusion, the Constitutional Tribunal states that the challenged provisions do not infringe on the essence of the right to social security, and thus conform to Article 67(1) read in conjunction with Article 31(3) of the Constitution.

9. The matter of conformity of Article 15b of the Act on Old-Age Pensions of Professional Soldiers and Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on Old-Age Pensions of Functionaries with Article 30 of the Constitution (the principle of protection of human dignity).

The applicant has asserted that the challenged provisions of the Act of 23 January 2009 do not conform to Article 30 of the Constitution, which sets out the principle of protection of human dignity.

9.1. According to Article 30 of the Constitution "the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities".

In the judgment of 4 April 2001, Ref. No. K 11/00, the Constitutional Tribunal stated that "being the source of individual's rights and freedoms, the concept of dignity determines the manner of their understanding and implementation by the state. The ban on violating human dignity is unconditional and applies to everybody. Yet, the obligation to respect and protect dignity was imposed on the state's public authorities. As a consequence, any activities of the public authorities should, on the one hand, allow for the existence of a certain autonomy within which the person can find an all-round social fulfilment and, on the other hand, these activities must not lead to creating legal situations or facts depriving the individual of his/her sense of dignity. A premise for respecting human dignity understood this way is, among other things, the existence of certain material minimum guaranteeing the individual a possibility of being self-reliant in society, and giving every individual an opportunity for a full personal development in the surrounding cultural environment and civilisation" (OTK ZU No. 3/2001, item 54). In the Constitutional Tribunal's assessment, human dignity may in particular be infringed upon by enacting legal regulations, the goal of is the humiliation of a human being.

9.2. The challenged provisions are neither to deprive the members of the Military Council and the functionaries of security authorities of a social minimum, nor to humiliate them. Instead, the goal of the challenged provisions is a lowering of the amount of old-age pension benefits, which as proven by the Constitutional Tribunal in point 7 of this part of the reasoning of this judgment, stem from a privileged system of social security. As the Constitutional Tribunal has already established above (point 8.7.2.), after the entry into force of the provisions of the Act of 23 January 2009 the average lowered old-age pension of a functionary of security authorities of the People's Republic of Poland is still by 58% higher than the average old-age pension in the universal old-age pension system and almost four times higher than the lowest guaranteed old-age pension. In this situation, the legislator still, also under the rule of the challenged provisions, provides the retired functionaries of security authorities of the People's Republic of Poland with an adequate, justified and just social security for the period of their service before 1990. This argument applies to the same extent to the members of the illegal Military Council.

In conclusion, the Constitutional Tribunal states that the challenged provisions conform to Article 30 of the Constitution.

10. The matter of conformity of Article 15b of the Act on Old-Age Pensions of Professional Soldiers and Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on

Old-Age Pensions of Functionaries with Article 2 of the Constitution (the principle of protection of citizens' trust in the state and its laws, the principle of protection of acquired rights and the principle of social justice).

The applicant alleged that the challenged provisions did not conform to the principles of protection of citizens' trust in the state and its laws, to the principle of protection of justly acquired rights and to the principles of social justice.

In the applicant's opinion, the challenged provisions lead to an unjustified conclusion that verified functionaries of state security authorities were useless to the Polish State that they performed their duties dishonestly and unworthily and, above all, that their activity before 1990 posed a threat to the independence aspirations, was contrary to the law and infringed on rights and freedoms of other persons. As a consequence, the Polish State retreats from the promise of a full, justified and fair old-age security for the functionaries of those authorities.

In the applicant's view, the challenged provisions do not conform to the principle of protection of acquired rights enshrined in Article 2 of the Constitution, because they arbitrarily, without any substantiation, deprive, of old-age benefits, the persons who acquired them in a manner provided for in provisions enacted after 1990 in independent Poland. Meanwhile, those former functionaries, positively verified and subsequently re-employed, retiring after 1994, have acquired the right to an old-age pension benefit on the grounds of provisions of the Act on Old-Age Pensions of Functionaries, enacted by the Republic of Poland.

Substantiating the allegation of infringement on the principle of social justice, the applicant stated that the challenged provisions constituted a form of unsubstantiated and unjustified repression with regard to the verified, and subsequently employed, functionaries of state security authorities, since they drastically lowered the basis of assessment of old-age pension for the former functionaries of these authorities from 2.6% to 0.7%. This is equivalent to the qualification of the period of service in the state security authorities before the year 1990 as a non-contributory period. The legislator had treated all former functionaries of state security authorities as if before 1990 they had not worked at all. The legislator did not make the former functionaries equal with other subjects, using the universal system of social insurance, for which the recalculation coefficient of 1.3% of the basis of assessment is applied, which might seem to be a form of "withdrawal of privileges", but in fact downgraded them to a level significantly lower than that of the universal old-age pension system, and as such was downright repression.

10.1. The matter of protection of citizens' trust in the state and its laws. According to the established jurisprudence of the Constitutional Tribunal the principle of protection of citizens' trust in the state and its laws, also called the principle of loyalty of the state with regard to the citizens, boils down to the obligation of such an enactment and application of the law that the citizen may arrange his or her matters in confidence that he or she will not face legal consequences, which he or she could not foresee at the moment of taking the decision (cf. e.g. decision of the Constitutional Tribunal of 24 May 1994, Ref. No. K 1/94, OTK of 1994, part I, item 10 and judgment of 2 June 1999, Ref. No. K 34/98, OTK ZU No. 5/1999, item 94). In its jurisprudence, the Constitutional Tribunal pointed out that, while assessing the conformity of normative acts to the analysed principle, "it should be established to what extent the expectations of the individual – as to whether he or she will not face legal consequences which he or she could not foresee at the moment of taking the decision - are justified. The individual must always take into account the fact that a change of social or economic conditions may require not only an amendment of the binding law, but also an immediate implementation of new legal regulations. In particular, the risk inherent to all economic activity also includes the risk of disadvantageous changes of the legal system. The time-scale of actions taken by the individual in a given area of life is also of essential significance. The longer the time perspective of activities undertaken in a given area of life, the stronger should be the protection of citizens' trust in the state and its laws (the judgment of 7 February 2001, Ref. No. K 27/00, OTK ZU No. 2/2001, item 29).

The applicant, substantiating that the challenged provisions infringe on the principle of protection of citizens' trust in the state and its laws, alleged that the Polish State rescinds the promise of a full, justified and fair old-age pension security for the functionaries of state security authorities who performed service in those structures before 1990.

10.2. The Constitutional Tribunal states that this allegation is not pertinent. The employment, in the newly created Office for State Protection, of the former SB functionaries who received a positive opinion in the qualification proceedings in 1990 did not mean – and could not mean – a continuation of the same service. Thus, the employment of those former SB functionaries was not equivalent to guaranteeing them old-age pension benefits for the period of service in the years 1944-1990 at the same level as for the period of service after the year 1990. The legislator in the years 1989-2009, as it has been indicated above, both in

subsequent statutes, as in the adopted resolutions, has many times expressed his unequivocally negative attitude to the security authorities of the People's Republic of Poland.

The legislator was entitled – despite the lapse of over 19 years from the system transformation – to introduce regulations lowering old-age pension benefits for the period of service in security authorities of the People's Republic of Poland. For it does not follow from the constitutional principle of protection of citizens' trust in the state and its laws that everyone, without regard to his or her personal features, may assume that the regulation of his or her social rights shall never change in the future for his or her detriment.

The legislator – enacting the provisions challenged by the applicant – remained in accordance with the system of appraisals stemming from the Constitution, in particular with this excerpt of its Preamble, which reminds of the "bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland". The legislator was thus entitled – despite the lapse of over 19 years from the system of government transformation – to introduce regulations lowering – in a reasonably moderate way – old-age pension benefits for the period of service in the secret political police for the sake of establishing and supporting the former regime, which was neither democratic, nor based on the rule of law, and whose fundamental reigning instrument was indeed the secret political police. Following the same values, the legislator has adequately lowered old-age pension benefits to members of the Military Council.

10.3. The matter of protection of acquired rights. What follows from the principle of protection of citizens' trust in the state and its laws is a series of detailed principles, including *inter alia* the principle of protection of acquired rights. The principle of protection of acquired rights prohibits an arbitrary abolition or limitation of rights of the individual to which the individual or other private subjects involved in the legal relations are entitled. The principle of protection of acquired rights ensures protection of rights of the individual – both public, as well as private, and maximally formed expectations pertaining to these rights, and thus legal situations where all principal statutory requirements for the acquisition of particular rights of the individual determined by law have been fulfilled. The protection of acquired rights does not mean at the same time an inviolability of these rights and does not exclude an enactment of less advantageous regulations. The Constitutional Tribunal has stressed many times that the departure from the principle of protection of acquired rights is permissible, provided other constitutional principles, norms or values advocate it.

The assessment of relevance, as regards the allegation of infringement of the principle of protection of acquired rights, requires considering whether the introduced limitations are founded on constitutional norms, principles or values; if there is no possibility of realising a given constitutional norm, principle or value without infringing on acquired rights; whether constitutional values, for the realisation of which the legislator limits acquired rights, may in a given, concrete situation be accorded priority before values founded on the principles of protection of acquired rights, and also whether the lawmaker has taken the necessary actions aiming at ensuring the individual with conditions to adapt to the new regulation. According to a well-established standpoint of the Constitutional Tribunal, the principle of protection of acquired rights does not apply to rights acquired unjustly or dishonourably, as well as to rights not founded on assumptions of the constitutional order binding at the time of rendering judgment (cf. e.g. the decision of 11 February 1992, Ref. No. K 14/91, OTK of 1992, part I; the judgment of 23 November 1998, Ref. No. SK 7/98, OTK ZU No. 7/1997, item 114; the judgment of 22 June 1999, Ref. No. K 5/99, OTK ZU No. 5/1999, item 100; the judgment of 20 December 1999, Ref. No. K 4/99, OTK ZU No. 7/2000, item 165 and the judgment of 13 January 2006, Ref. No. K 23/03, OTK ZU No. 1/A/2006, item 8).

For the support of the allegation of non-conformity of the challenged provisions to the principle of protection of acquired rights, the applicant has raised the issue that the legislator arbitrarily deprived the members of the Military Council, as well as the positively verified and re-employed functionaries of state security authorities, of old-age pension benefits.

10.3.1. The assessment of the relevance of this allegation requires answering the questions whether the old-age pension rights of the members of the Military Council and the functionaries of security authorities of the People's Republic of Poland were acquired justly or honourably, and find justification in the current constitutional order.

Adjudicating in the present case, the Constitutional Tribunal supports the opinion expressed in its decision of 22 August 1990, Ref. No. K 7/90:

"However, protecting acquired rights, one may not assume that every amendment of the existing regulation, which would be an amendment for the detriment to a certain group of citizens, is prohibited form the legislative point of view. Considering the introduction of such an amendment it should be pondered, in each case, whether e.g. a situation where the previous rights are regulated differently but this does not result in solutions which are more accurate and suitable from the viewpoint of the rights of the citizens, as well as the assumptions of the Constitution. The Constitutional Tribunal has no reasons to claim that the legislator may not negatively evaluate legislative solutions made beforehand. Additionally, one may be in a

situation where facing a choice between different values the legislator will opt for the one he considered more important. In its previous decisions, the Constitutional Tribunal stressed that the choice of such solutions is the duty of the Sejm in its legislative activity, which does not exclude an assessment of the accuracy of this choice from the perspective of conformity to the Constitution".

Enacting the challenged provisions, the legislator expressed negative assessment of the activity of the Military Council and the security authorities of the communist state, which was confirmed in the course of legislative work and in the content of the preamble of the Act of 23 January 2009. In this preamble the legislator states that he was following the "principle of social justice which excludes tolerating and rewarding unlawfulness". The axiological foundations of such an assessment, which the Tribunal has already mentioned here, are found in the Preamble to the Constitution.

10.4. As the Constitutional Tribunal has already stated above, the legislator of free Poland never expressed at least one positive opinion on the secret political police of the years 1944-1989, and this standpoint was expressed many times in the years 1989-2009 in statutes and adopted resolutions. The legislator had the right to draw conclusions from the historical experiences of the People's Republic of Poland, as long as he respects constitutional principles and values.

10.4.1. The guarantees of impunity for systemic violations of human rights and freedoms determined in the Universal Declaration of Human Rights of 1948, negotiated by the representatives of bloodlessly falling dictatorships, are deprived of a guarantee of constitutional protection, as shown by numerous examples of other countries from the last four decades. Abolition statutes concerning the perpetrators of state crimes are also deprived of such guarantees. It would be even more groundless to expect a prohibition of enforcing negative legal consequences, including other than criminal law consequences, by a democratic state ruled by law with regard to the former functionaries for their highly rewarded service in the secret political police and in other repression authorities, being the basis of power of every dictatorship. The form, scope and the time of such decisions is at the discretion of the legislator, and is subject to assessment from the point of view of a democratic state ruled by law.

In a democratic state ruled by law one of the key instruments of protection of its fundamental principles is responsibility, which implies - independently from the universally applied utilitarian explanations of violations of human rights, used in dictatorships before

their fall and after their fall - “that people not be sacrificed for the greater good; that their suffering should be disclosed, and that the responsibility of the state and its agents for causing that suffering be made clear” (cf. A. Neier, *What Should Be Done About the Guilty*, [in:] *Transitional Justice. How Emerging Democracies Reckon With Former Regimes*, Vol. I, *General Considerations*, Washington 1995, p. 182). Similarly on this subject, P. Winczorek: “Important consequences arise from the assumption that the choice and realisation of goals by the state, even if they are morally repellent, does not deprive it of the attribute of statehood. The state is responsible for them before its own citizens and before the international community. Such a responsibility covers actions stemming from the pursuit of badly chosen goals and from the non-achievement of well-chosen goals (“Cele państwa, cele w państwie”, *Rzeczpospolita* of 7 January 2010). In this sense, the guarantees of impunity and economic privileges, financed from the state budget for the service in institutions and authorities using repression during the dictatorship, may not be treated as an element of justly acquired rights.

10.4.2. The legislator by enacting the challenged provisions fits fully within this approach. Every functionary of security authorities of the People’s Republic of Poland - who has been employed in the newly formed security police services - has fully been guaranteed equal rights with those admitted to those services for the first time in the second half of 1990, including equal rights to benefit from the privileged old-age pension system. The legislator has negatively assessed the sole fact of commencing service in the security authorities of the People’s Republic of Poland – due to the unequivocally negative assessment of these authorities. At the same time, in the case of providing help by the functionary, during the service in such police, to a person repressed for acting on behalf of the opposition fighting for democracy and independence, the legislator has foreseen the maintenance of privileged old-age pension benefits under the previous principles (Article 15b(3) and Article 15b(4) of the Act on Old-Age Pensions of Functionaries, added by Article 2 point 3 of the Act of 23 January 2009).

10.5. It is not within the competence of the Constitutional Tribunal to decide on the accuracy and purposefulness of legal solutions adopted by the legislator. The Constitutional Tribunal recognises the freedom of the legislator to determine a hierarchy of goals, preferences of given values or means serving their realisation – stemming from the democratic mandate of free elections. The limits of the freedom of this choice are however determined by constitutional principles and provisions. The Constitutional Tribunal may

verify whether, when enacting the law, the legislator followed these principles, norms and values.

10.6. The matter of the principle of social justice. The obligation of enacting law by the legislator, which will realise the principle of social justice, is ordained by Article 2 of the Constitution. The notion of social justice is linked with other notions, such as equality before the law, social solidarity, the minimum of social security and the securing of fundamental conditions of existence of persons remaining without work not out of their own will, etc. Social justice requires balancing of interests and expectations of potential addressees of social benefits with the interests of those who in the end finance them by paying taxes - which is hard in practice. Also, it should not be forgotten that the redistribution of the national income, by means of the budget, entails certain costs of a general social character. The appraisal of ways of realising the principle of social justice in the given conditions requires keeping particular restraint by the constitutional justice. The Constitutional Tribunal recognises that the challenged provisions do not conform to the Constitution only when the infringement of the principle of social justice does not raise any doubt (cf. the Decision of 25 February 1997, Ref. No. K 21/95, OTK ZU No. 1/1997, item 7).

The applicant, substantiating the infringement of the principle of social justice by the challenged provisions, indicated that the legislator applied collective responsibility and a presumption of guilt of the members of the Military Council and functionaries of state security authorities. In the applicant's opinion, the challenged provisions constitute additionally unjustified and unfair repression, with regard to the verified and re-employed functionaries of these authorities. The legislator did not make the former functionaries equal with other subjects, using the universal social insurance system, for which the recalculation coefficient of 1.3% is applied, which might seem to be a form of "withdrawal of privileges", but in fact downgraded them to a level significantly lower than that of the universal old-age pension system.

Examining these allegations, the Constitutional Tribunal mentions that there is no need to refer to Article 2 of the Constitution in the case where there is a constitutional provision explicitly regulating a norm which may constitute a higher-level norm for review of the challenged regulation. In this regard, the Constitutional Tribunal will not examine here the allegation that the legislator applied collective responsibility and a presumption of guilt of the members of the Military Council and the functionaries of security authorities of the People's Republic of Poland. The Constitutional Tribunal will examine this allegation, reviewing the

challenged provisions with reference to Article 42 of the Constitution in item 14 of the reasoning.

The bench in this case shares the viewpoint of the Constitutional Tribunal expressed in the decision of 15 February 1994, Ref. No. K 15/93 that:

"Cooperation with repression authorities set for combating Polish independence movements must be assessed negatively and without regard to what positions and what character of employment in those authorities is relevant. This concerns both the repression apparatus of foreign states, as well as the communist repression apparatus in Poland. Thus, the sole criterion of excluding from the group of persons entitled to special rights of those who collaborated with the repression apparatus, aiming for combating independence movements, should be considered as accurate and not infringing on the principle of justice".

The allegation of downgrading the functionaries of security authorities of the People's Republic of Poland "to a position decisively below the universal insurance system" is unfounded. The Tribunal has already proved it above in points 8.6.-8.9. of this part of the reasoning.

The applicant seems to admit that the challenged provisions would conform to the constitutional principle of social justice, if the adopted recalculation coefficient of the basis of assessment of the old-age pension amounted to 1.3% of the basis of assessment, which might seem to be a form of "withdrawal of privileges". However, the recalculation coefficient of 0.7%, adopted in the challenged provisions, downgrades its addressees to a position decisively below the universal old-age pension system, which as such, according to the applicant, is downright repression. This repressiveness is supposed to manifest itself also in the sole fact that in the universal old-age pension system the recalculation coefficient of 0.7% relates to non-contributory periods, so such periods, during which the person entitled to old-age pension benefits does not provide work. In this way the legislator has treated, according to the applicant, all the former functionaries of state security authorities and members of the Military Council, as if before 1990 they did not provide any work.

Such an argumentation of the applicant is erroneous.

He assigns the recalculation coefficients applied for the final calculation of the old-age pension benefit a value that they do not have. The recalculation coefficient applied in the universal old-age pension system (1.3% of the basis of assessment of the benefit, Article 53(1)(2) of the Act on Old-Age and Disability Pensions from the FUS, taking into account additionally all other indices serving to calculate an old-age pension in this system, enables to establish that the average old-age pension in Poland amounts to about the half of

the average pay in a given period. This index has thus a technical significance in the given old-age pension security system. As the Tribunal has already indicated in point 7 of the reasoning, the index of 0.7% adopted by the legislator in the examined case for every year of service must be assessed taking into account remunerations significantly higher than the average in Poland reached during service by functionaries of security authorities of the People's Republic of Poland and the other basis of acquisition, increase and valorisation of old-age pensions for the whole time of service in the military by members of the Military Council and the service of functionaries in security authorities of the People's Republic of Poland. The amount of the assessed old-age benefit is not determined by the index of basis of assessment alone (2.6%, 1.3% or 0.7%), but is a result of the amount of the "base amount" and other supplements, which settle the final amount of this whole benefit in separate old-age pension systems: on the one hand – in the system of police old-age pensions and the system of military old-age pensions and on the other hand – in the system of universal old-age pensions. The applicant has completely ignored this circumstance significant for the examined case.

The Tribunal has already established that, after coming into force of the Act of 23 January 2009, the average lowered old-age pension of a functionary of security authorities of the People's Republic of Poland (PLN 2 558.82) is still by 58% higher than the average old-age pension in the universal old-age pension system (PLN 1 618.70) and almost four times higher than the lowest old-age pension from the FUS. The new average old-age pension of a member of the Military Council (PLN 6 028.80) is almost four times higher than the average old-age pension in the universal old-age system and almost nine times higher than the lowest old-age pension from the FUS. The legislator - taking into account the constitutional principle of social justice, with regard to an unequivocally negative assessment of the role of state security authorities in the history of Poland in the years 1944-1990, and such an assessment of the joining service of retired functionaries linked with it, and an identical assessment of the illegal Military Council, and the assessment of the participation in the creation and in the functioning of this institution of a group of generals and colonels of the Armed Forces of the People's Republic of Poland linked with it – could, in the Tribunal's view, take a decision on the lowering of old-age pension benefits of such defined groups of functionaries and soldiers, in the adopted period. The legislator still, also under the rule of the challenged provisions, guarantees the retired functionaries of security authorities of the People's Republic of Poland an adequate, justified and fair social security for the period of their service before 1990. This argument applies to the same extent to the members of the illegal Military Council.

10.7. In conclusion, the privileged old-age pension rights, acquired by the addressees of the challenged provisions, have been acquired unjustly, for the goals and methods of activity of the Military Council and the security authorities of the People's Republic of Poland may not be recognised as fair. The Tribunal states that service in institutions and authorities of the state which systemically infringed on the inherent human rights and the rule of law may not justify claims in a democratic state ruled by law that privileges acquired before the fall of the regime should be preserved.

A way of rewarding the functionaries of security authorities of the People's Republic of Poland for service was, among many other things, by providing them with old-age pension privileges. These privileges were kept by their beneficiaries also in free Poland, which was expressed in the Act on Old-Age Pensions of Functionaries. Assessing negatively the security authorities of the People's Republic of Poland, the legislator could, in 2009, resort to the abolition or limitation of an unjustly acquired old-age pension benefits. Concerning the lowering of old-age pension benefits to members of the Military Council, the Tribunal states that the legislator was legitimised to make such a decision, taking into account the essence of this institution.

The Tribunal considers as balanced, restrained and proportional the manner in which the legislator resorted to this instrument in 2009, namely the lowering of unjustly acquired old-age privileges.

As the Tribunal has stressed many times in this part of the reasoning, the addressees of the challenged provisions could not have not known about the negative assessment formulated in both chambers of the Parliament reiterated, during the years 1989-2009, on martial law, the SB and its predecessors in the People's Republic of Poland. It is thus impossible to recognise that the Act of 23 January 2009 constituted for its addressees some surprise.

The Tribunal states that the legislator, limiting in the challenged provisions the unjustly acquired old-age pension privileges of the members of the Military Council and functionaries of security authorities of the People's Republic of Poland, reached for adequate means to reach a justified goal; he achieved this at the same time in a way possibly least onerous for the addressees of the challenged norms.

The Tribunal also states the following: taking into account the fact of much lower old-age pensions earned during the period of the People's Republic of Poland and paid in the universal system, and intending to bring closer to them the much higher, acquired in an unfair way, privileged old-age pensions paid to the addressees of the challenged provisions for the

period of service in the security authorities of the People's Republic of Poland or from the establishment of the Military Council, the legislator has additionally proceeded justly.

Taking the above into account, the Constitutional Tribunal states that the challenged provisions conform to the principles of protection of citizens' trust in the state and its laws, of protection of acquired rights and of social justice, enshrined in Article 2 of the Constitution.

11. The matter of conformity of Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on Old-Age Pensions of functionaries with Article 32 of the Constitution (the principle of equality and the prohibition of discrimination).

11.1. In the applicant's view, the challenged provisions do not conform to the principle of equality and to the prohibition of discrimination.

In the applicant's opinion, the nonconformity of the challenged provisions with the principle of equality before the law and the prohibition of discrimination is founded on the fact that the legislator has treated in an identical way all functionaries of security authorities of the People's Republic of Poland, regardless of the fact whether they were positively assessed in the qualification proceedings, or whether they did not undergo these proceedings or were assessed negatively, and also those, who retired before 1990 and after 1990.

The applicant, undoubtedly, assigns particular importance to the fact of a positive appraisal in the qualification proceedings of former functionaries of the SB by regional committees or by the Central Qualification Commission. He has expressed this in a letter, which the Tribunal received on 25 September 2009. Namely, the applicant relating to the standpoints of the Marshal of the Sejm and the Prosecutor General, indicated *inter alia* that:

"It is particularly essential that (…) in the light of the recognising by verification committees functioning in 1990 that some of the functionaries did not act in a manner deserving condemnation described in the preamble of the Act of 23 January [2009] (…) In particular (when) it is as referred to the functionaries positively verified, with regard to whom one may absolutely not speak about a clash of principles of social justice and of protection of acquired rights. Such a clash in this case absolutely does not take place. (…) the amending statute completely depreciates the established facts adopted by the verification committees, which settles that the Polish legislator without a justified reason and above all without adequate proof retreated from the declarations of Polish public authorities which were the certificates rendered by these committees. (…) Sanctioned by the prestige of independent authority of the Republic of Poland, the opinions of the verification committees certified that

a former functionary of security authorities displays moral conduct appropriate to perform service (…). These persons were subsequently employed in the UOP, where a necessary condition for being admitted to service was a blameless character and a patriotic attitude (Article 15 of the Act on the UOP). The assertion that opinions of this type have instrumental character constitutes a grave abuse and aims only at depreciating the declarations of public authorities included therein".

11.2. The Tribunal shares the standpoint of the Marshal of the Sejm on qualification proceedings of former functionaries of the SB, who admitted that this fact does not have significance for the review of constitutionality of the inclusion of those functionaries in the challenged regulation. The Marshal of the Sejm accurately states that:

"Both the proceedings before the committee, as also its final result of an opinion should be treated instrumentally, only as regards the certification of usefulness for service in the authorities of the Third Republic of Poland and the fulfilling of requirements of the statute binding at that time. On the other hand, the legal quality of the opinion may not be applied to the events not linked with qualification proceedings of that time and the recruitment to the newly created state institutions".

The Tribunal, referring once again to the established facts indicated in point 6.5. of the reasoning, stresses once more that the aim of the qualification proceedings was not to issue pass moral judgment on the functionaries of the SB, but the creation of new security police, which is not the object of review in this case.

11.3. According to the established jurisprudence of the Constitutional Tribunal, what follows from the principle of equality, enshrined in Article 32(1) of the Constitution, is an obligation of equal treatment of subjects of a right within a determined class (category). All subjects of a right characterised to an equal extent by a given significant (relevant) feature should be treated equally, thus according to an equal measure, without neither discriminating nor favouring differentiations. Assessing a legal regulation from the point of view of the principle of equality, it should be considered, in the first place, whether a common relevant feature may be indicated, justifying equal treatment of subjects of rights. This establishment requires an analysis of the goal and content of the normative act, in which the legal norm under review has been included.

If the lawmaker differentiates subjects of a right, characterised by a common relevant feature, he introduces derogation from the principle of equality. However, such derogation

does not have to designate an infringement of Article 32 of the Constitution. It is admissible if the following conditions have been met:

1) there remains a rational link between the differentiation criterion and the goal and content of the given regulation;

2) the gravity of the interest, which the differentiation is supposed to serve, remains in an adequate proportion to the gravity of interests, which will be infringed as a result of the introduced differentiation;

3) the criterion of differentiation remains linked with other constitutional values, principles or norms, substantiating different treatment of similar subjects.

11.3.1. The common feature of all functionaries of security authorities of the People's Republic of Poland, which the legislator adopted enacting the Act of 23 January 2009 is their service in security authorities of the state determined in this act during the years 1944-1990. This feature differentiates those functionaries substantially from the other functionaries of uniformed services before 1990. The Constitutional Tribunal recognises this feature as significant (relevant), since as demonstrated above, it finds its basis in the principle of social justice and in the Preamble to the Constitution. The qualification proceedings of former functionaries of the SB in connection with the adopted conception and procedure of creating the UOP do not contradict this, since its results do not erase the sole fact of voluntarily joining the SB – the secret political police of the People's Republic of Poland.

The legislator, having adopted a common relevant feature, has treated the functionaries of security authorities of the People's Republic of Poland in an equal way. The legislator has provided for an exception only as regards those functionaries who will prove that before the year 1990, without the knowledge of their superiors, undertook cooperation and actively supported persons or organisations acting for the sake of the independence of the Polish State during the period of service in state security authorities in the years 1944-1990 (Article 15b(3) and (4) of the Act on Old-Age Pensions of Functionaries). Among the functionaries of security authorities of the People's Republic of Poland the legislator thus established a special solution for a certain category of functionaries, who are treated equally within the emphasised subclass. From the information which the Tribunal received, in the aforementioned letter of 5 February 2010, from the Director of the ZER MSWiA, it follows that, according to the content of Article 15b(3) and (4) of the Act on Old-Age Pensions of Functionaries, the amount of old-age pension benefits has not been lowered for six former functionaries.

11.4. The time limit adopted by the legislator – the year 1990 – of service in security authorities of the People's Republic of Poland is linked, which the Prosecutor General rightly drew attention to, with the transformations of the system of government which occurred in Poland, which resulted in the dissolution of the SB and the creation of the UOP (Article 129(1) of the Act on the UOP). The service in authorities of sovereign Poland after the year 1990 is also treated equally, without regard to whether a given functionary previously performed service in the state security authorities of the People's Republic of Poland, or not.

In conclusion, the Constitutional Tribunal states that the challenged provisions conform to Article 32 of the Constitution.

12. The matter of conformity of Article 15b of the Act on Old-Age Pensions of Professional Soldiers with Article 32 of the Constitution (the principle of equality and the prohibition of discrimination).

12.1. The situation of the members of the Military Council, from the point of view of their equal treatment with other professional soldiers, is different when it comes to the right to social security.

The Constitutional Tribunal recognises as significant (relevant) the feature of being a member of the Military Council. Professional soldiers who created this Council or joined its personnel differ significantly from other professional soldiers of the Armed Forces of the People's Republic of Poland. The Military Council, as the Tribunal established in point 5 of the reasoning, was an extra-constitutional and illegal institution, which fitted into the logic of a non-democratic communist state, resorting to – in the case of a threat to its existence from peaceful aspirations of the society – to bring the military in the streets. To find oneself in this institution was strictly linked with the previous career and position in the Armed Forces of the People's Republic of Poland in December 1981. However, those features characterised, at that time, also other senior officers of the military. Since the goal and the content of the regulation of Article 15b of the Act on Old-Age Pensions of Professional Soldiers was a lowering of old-age pension benefits of the members of the Military Council as a consequence of the establishment, activity and impact of this Council on the fate of Poland from 12 December 1981, the Tribunal states that the legislator arbitrarily established that he may lower old-age pension benefits of its members before the "establishment" of the Military Council. Until the emergence of the Military Council, and the decisions made by it during the

night between 12 and 13 December 1981, its members did not differ from other professional soldiers of the Armed Forces of the People's Republic of Poland so significantly.

Thus, the legislator could not, by lowering old-age pension benefits of the members of the Military Council, enact for them a different method of calculation from the method of calculation of old-age pensions of other professional soldiers for the time of service before 12 December 1981. This means that the members of the Military Council should have their old-age pensions calculated for the period of service before 12 December 1981 under the principles from before the entry into force of the Act of 23 January 2009, i.e. under Article 15(1) of the Act on Old-Age Pensions of Professional Soldiers.

In conclusion, Article 15b added by the Act of 23 January 2009 to the Act on Old-Age Pensions of Professional Soldiers insofar as it foresees that an old-age pension of a person who was a member of the Military Council, amounts to 0.7% of the basis of assessment for every year of service in the Polish Military after 8 May 1945 until 11 December 1981 does not conform to Article 32 of the Constitution. Indeed, the criterion of differentiation between the members of the Military Council and the other professional soldiers adopted in this regard does not remain in a rational link with the goal and content of the challenged regulation. The index of 0.7% of the basis of assessment for every year of service in the Polish Military, provided for in Article 15b of the Act on Old-Age Pensions of Professional Soldiers, may thus be a basis of calculation of an old-age pension only if, during the period from the beginning of service until 11 December 1981, the old-age pension of one of the members of the Military Council did not yet reach the maximum amount, i.e. 75% of the basis of assessment, which is not likely to occur.

13. The matter of conformity of Article 15b of the Act on Old-Age Pensions of Professional Soldiers and Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on Old-Age Pensions of Functionaries with Article 10 of the Constitution (the principle of separation of powers).

13.1. The applicant also alleged an infringement by the challenged provisions on the principle of separation of powers (Article 10).

13.1.1. It follows from the constitutional principle of separation of powers that the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers (Article 10(1) of the Constitution). Legislative power shall be vested in the Sejm and the Senate, executive power

shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals (Article 10(2) of the Constitution). The separation of powers means, *inter alia*, that material competence corresponding to their essence should be vested in each of the three powers, and what is more – each of the three powers should keep a certain minimum competence settling the preservation of this essence (cf. the decision of 21 November 1994, Ref. No. K 6/94, OTK of 1994, part II, item 39). Shaping the competences of the particular state authorities, the legislator may not infringe on the "essential scope" of the given power (cf. the decision of 22 November 1995, Ref. No. K 19/95, OTK of 1995, part II, item 35). The extent of interference in the essence of a given power determines not only the principles of shaping the extent of competences of state authorities in legislation, but also the way of using competences conferred to particular state authorities. On the other hand, the balance between the powers implies that the system of state authorities should contain internal mechanisms preventing concentration and abuse of state power (cf. the judgment of 14 April 1999, Ref. No. K 8/99, OTK ZU No. 3/1999, item 41).

The applicant recognised that the challenged provisions did not conform to Article 10 of the Constitution, because the legislator used them to collectively punish all former functionaries of security authorities of the People's Republic of Poland.

13.1.2. The Constitutional Tribunal states that the legislator, by enacting the challenged provisions, did not transgress competence assigned to the legislative power in the Constitution. The challenged provisions do not provide for a collective punishment for the members of the Military Council and functionaries of security authorities of the People's Republic of Poland, but only for the lowering of their privileged old-age pension benefits to the level of the average pension under the universal old-age pension system.

13.1.3. What is also unfounded is the allegation of the applicant that the norms encoded in the challenged provisions do not have general and abstract character. The Constitutional Tribunal, in line with findings of theoreticians of law, admits that the manner of designation of the norm's addressee determines whether a given norm is general or individual. We deal with a general norm when this designation stems from an indication of generic features of the addressee. Whereas an addressee bearing the generic features may, in fact, be only one, or there may be many such addressees. On the other hand, an abstract norm is such a norm, which regulates, as a rule, repetitive behaviour in certain circumstances indicated generally (cf. Z. Ziembiński, *Logika praktyczna*, Warszawa, 1999, pp. 106-107 and decisions of the Constitutional Tribunal: the procedural decision of 6 December 1994, Ref. No. U 5/94, OTK ZU of 1994, part II, item 41; the decision of 15 July 1996, Ref. No. U 3/96,

OTK ZU No. 4/1996, item 31; the procedural decision of 14 December 1999, Ref. No. U 7/99, OTK ZU No. 7/1999, item 170; the judgment of 22 September 2006, Ref. No. U 4/06, OTK ZU No. 8/A/2006, item 109).

The challenged provisions of Article 15b of the Act on Old-Age Pensions of Professional Soldiers and Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on Old-Age Pensions of Functionaries may serve to reconstruct norms addressed to generally indicated subjects – members of the Military Council and the functionaries of security authorities of the People's Republic of Poland and, at the same time, they determine repetitive behaviour – calculating and paying out old-age pension benefits. The applicant inaccurately understands both the generality and the abstractness of the legal norms, and additionally contradicts himself, since just after making the allegation of the lack of generality and abstractness of the norms he claims that "giving the provisions of the statute a general and abstract character additionally forejudges the establishment of collective responsibility" (p. 31 of the application of 30 August 2009).

To sum up, the Constitutional Tribunal states that the challenged provisions conform to Article 10 of the Constitution.

14. The matter of conformity of Article 15b of the Act on Old-Age Pensions of Professional Soldiers and of Article 13(1)(1) and (1b), as well as Article 15b(1) of the Act on Old-Age Pensions of Functionaries with Article 42 of the Constitution (the prohibition of collective criminal responsibility).

14.1. It follows from the content of the substantiation of the application that the applicant alleges that the challenged provisions do not conform to Article 42 of the Constitution. In the applicant's opinion, the legislator, by enacting the challenged provisions, has applied collective responsibility and a presumption of guilt to the former functionaries of state security authorities. For the legislator assumed that all functionaries of these authorities performing service before 1990 had been criminals and they were not entitled to any rights.

14.2. It is impossible to agree with this allegation. According to the jurisprudence of the Constitutional Tribunal, "Articles 42(1) to (3) of the Constitution (…) refer only to criminal responsibility and criminal proceedings. There is no basis, and often factual possibility, to extend the scope of these provisions to all proceedings, which apply any measures aimed at causing sanctions and distress to the addressee of the judicial decision. A

different approach to this matter would lead to the questioning of the whole philosophy of guilt and responsibility on the grounds of civil and administrative law, which has rich traditions and is not challenged. Thus, the Tribunal has, in its previous jurisprudence, provided for– within the scope of application of the principle of presumption of innocence – only certain derogations for the sake of proceedings, the goal and function of which was the application of repressive measures (e.g. in disciplinary proceedings) and only through a respective (and not direct) application of Article 42(3)" (the judgment of 4 July 2002, Ref. No. P 12/01, OTK ZU No. 4/A/2002, item 50).

The Constitutional Tribunal states that the challenged provisions do not contain criminal sanctions, or even sanctions of repressive character; these provisions do not determine the guilt of the addressees of the norms expressed in them. The challenged provisions introduce new principles of assessing the amount of old-age pension benefits for members of the Military Council and functionaries of security authorities of the People's Republic of Poland. These benefits under the challenged provisions will still remain significantly higher than old-age pensions under the universal system.

All things considered, the Constitutional Tribunal states that Article 42 of the Constitution is not an adequate higher-level norm for review of the challenged provisions.

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

Dissenting Opinion

of Judge Adam Jamróz,

to the Judgment of the Constitutional Tribunal

of 24 February 2010, Ref. No. K 6/09

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; hereafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 24 February 2010 in the case K 6/09.

I submit my dissenting opinion to this judgment, for I believe that the entire challenged Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145; hereafter: the amending Act or the challenged Act) – is inconsistent with Articles 2 and 10 of the Constitution of the Republic of Poland. I am going to focus here on a few basic issues.

I. The amending Act has amended the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 66, as amended; hereafter: the Act on Old-Age Pensions of Professional Soldiers) and the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 67, as amended; hereafter: the Act on Old-Age Pensions of Functionaries).

The object of the allegation is the amending Act of 23 January 2009, and not the amended old-age pension Acts, and therefore, in accordance with the principle of initiating court proceedings solely upon application, which is binding for the proceedings before the Constitutional Tribunal, the object of assessment of constitutionality should be the challenged amending Act, not only for the reasons indicated by the applicant. An analysis of the provisions of the challenged Act is obviously necessary in the context of the provisions of the

amended Acts, but the Tribunal has not justified why the object of assessment were not the provisions enacted in the challenged Act, but those identified as the provisions of amended Acts.

An important reason why the Tribunal should assess the constitutionality of the amending Act, and not the aforementioned amended Acts, is the significance of the preamble preceding the amending Act. The Tribunal discontinued the proceedings in this regard, owing to the inadmissibility of the pronouncement of a judgment, explaining that the preamble of the amending Act of 23 January 2009 is meant to serve as an "interpretative guideline" for the interpretation of its articles. "The applicant has not proved whether and what normative content has been encoded in the preamble of the Act of 23 January 2009 by the legislator, and also in what way this content infringes on the Constitution"- the Tribunal stated.

In my view, the preamble of the challenged amending Act is of special normative significance, and the main allegations of the applicant pertain not only to that part of the Act which has a structure, within which particular provisions can be singled out, identified as articles, paragraphs and points. The main allegations of the applicant also regard the preamble. The preamble is significant not merely due to the fact that it shows that the introduced amendments stem from the political and moral evaluation of the communist regime. This evaluation is manifested in the following fundamental statements:

"the system of the communist regime was mainly based on an extensive network of state security authorities, actually performing the functions of political police, using unlawful methods and breaching fundamental human rights";

"crimes were committed towards the organisations and persons defending independence and democracy; at the same time, the perpetrators were not called to responsibility and escaped justice";

"the self-appointed Military Council of National Salvation was meant to sustain the communist regime in Poland".

Even these general political and moral evaluation of the system of the People's Republic of Poland and of its functioning are significant for the assessment of constitutionality of legal provisions of the challenged Act, for they indicate the basic reasons for the said amendments, introduced 20 years after the fall of the communist regime in Poland.

In the subsequent sentence of the preamble, the legislator presents political and moral evaluation regarding the functioning of the communist regime in Poland, but also indicates the aims of the amending Act. Namely, the aim is to favour "the conduct of those

functionaries and the citizens who, taking a great risk, chose to support freedom and the persecuted citizens".

In the final sentence of the preamble, the legislator declares that he bears in mind "the principle of social justice, which excludes tolerating and rewarding unlawfulness". In other words, the aim of the legislator is to implement the principle of social justice, according to which unlawfulness is not to be tolerated and rewarded. This general formulation – preceding the Act amending provisions on old-age pensions of the functionaries of state security authorities, within the meaning of Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (Journal of Laws - Dz. U. of 2007 r. No. 63, item 425; hereafter: the Act on Disclosure of Information), and the provisions concerning old-age pensions of the members of the Military Council of National Salvation (WRON) – suggests that the provisions drastically lowering the old-age pension benefits of the members of the WRON and the functionaries of state security authorities are aimed at implementing the principle of social justice as well as at moving away from tolerating and rewarding unlawfulness, which, as one may rightly interpret, was manifested in the previous provisions on old-age pensions of the functionaries of state security authorities. In the light of the above sentences of the preamble, they also play a role of important interpretative guidelines for the provisions of the challenged amending Act, at least as regards the teleological interpretation.

The following sentence of the preamble has a special normative significance: "considering that the functionaries of state security authorities performed their duties without risking their health or life, at the same time enjoying numerous material and legal privileges in return for sustaining the inhumane political system, (...) it is decided as follows: (...)". In the context of the introduced Article 2(3) of the challenged amending Act, introducing Article 15b in the Act on Old-Age Pensions of Functionaries, the above quoted sentence of the preamble, is not only moral, historical and political evaluation which explains the reasons for introducing a just legal regulation which involves a sanction in the form of a radical lowering of pension benefits for the "sustaining the inhumane political system". The norm reconstructed in the light of Article 15b(1), which has been added by Article 2(3) of the challenged Act to the Act on Old-Age Pensions of Functionaries – in the context of the above sentence of the preamble – indicates that the said sentence of the preamble, referring to the functionaries, adds detailed elements of a hypothesis to the norm ensuing from the aforementioned Article 15b(1), which plays a role of a key material law provision in the

challenged regulation that drastically lowers the old-age pension benefits of the persons who worked in state security authorities in the years 1944-1990.

The provision of Article 15b(1) of the Act on Old-Age Pensions of Functionaries reads as follows: "In the case of a person, who performed service in state security authorities, as referred to in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents, and who remained in service before the day of 2 January 1999, the old-age pension amounts to: 1) 0.7% of the basis of assessment – for every year of service in state security authorities in the years 1944-1990; 2) 2.6% of the basis of assessment – for every year of service or periods equivalent with the service, as referred to in Article 13(1)(1), 13(1)(1a) and 13(1)(2)-(4)". The hypothesis of the norm arising from Article 15b(1) is supplemented with detailed subject elements included in the preamble and indicates moral, historical and political inspiration for the provision of Article 15b(1). Indeed, "persons who were in service in state security authorities" are, in the light of Article 15b(1), the functionaries who performed their duties "without risking their health or life at the same time enjoying numerous material and legal privileges in return for sustaining the inhumane political system" and who will therefore will receive, pursuant to the above Article 15b(1)(1), 0.7% of the basis of assessment for every year of service in state security authorities in the years 1944-1990, unlike the coefficient of 2.6% of the basis of assessment for every year of service, which regards the other functionaries and uniformed services, enumerated in the Act on Old-Age Pensions of Functionaries (Article 15b(1)(2) mentioned above).

It follows from the above analysis that some sentences of the preamble referring to the challenged Act of 23 January 2009 as a whole not only play a role of interpretative guidelines, although this also means that they have normative significance but, as the sentence of the preamble quoted above, which refers to the functionaries of security authorities, also play a role of elements of the hypothesis of the legal norm. This pertains to the hypothesis of subject elements which arise from the above-quoted Article 15b(1), but also to the hypothesis of the norm which arises from Article 13(1)(1b) of the Act on Old-Age Pensions of Functionaries, introduced by Article 2(1) of the challenged Act. As a result of the amendments introduced in the Act on Old-Age Pensions of Functionaries by Article 2(1) of the challenged Act, Article 13(1) and (2) of the Act on Old-Age Pensions of Functionaries reads as follows: "Article 13. 1. The following shall be considered as equivalent to the service in the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border

Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service:

1) periods of service as a functionary of the Office for State Protection (UOP);

1a) periods of service as a functionary of the state Police, the Citizen Militia, except for the service specified in paragraph 2;

1b) periods of service as a functionary of state security authorities, as referred to in Article 2 of the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (Journal of Laws - Dz. U. of 2007 No. 63, item 425, with subsequent amendments), according to the principles set out in Article 15b, except for the service defined in paragraph 2;

2) military service taken into consideration when determining the right to military old-age pension;

3) periods of service as a functionary of the Railway Guards if the functionary moved to the service in the Citizen Militia or the Penitentiary Service no later than until 1 April 1955;

4) periods of employment or service in the professional units of anti-fire protection and training in fire training schools, as a member of the Technical Fire Corps, as well as a firefighter no later than until 31 January 1992.

2. The provision of paragraph 1 does not apply to the service in the years 1944-1956 as a functionary of state security authorities, public order and public security, if in the course of performing service activities, the functionary committed a crime against the administration of justice or infringed on personal rights of the citizen, and for that reason was given disciplinary dismissal, criminal proceedings were discontinued in his/her case due to a minor or small threat his/her act posed to society, or was convicted of intentional fault by a final court judgment".

The above provision of Article 13(1)(1b) of the Act on Old-Age Pensions of Functionaries deals with the functionaries of security authorities, as referred to in Article 2 of the Act on Disclosure of Information. However, it should be noted that complete description of those functionaries also arise from the sentence of the preamble quoted above. In the light of the systemic interpretation, the said provision should be interpreted taking into consideration of the subject elements of the hypothesis, arising from the preamble, and thus with the supplementation: as referred to (...) also in the preamble of the Act of 23 January 2009. The supplementation of subject elements of the norm arising from Article 13(1)(1b) is analogical as in the case of Article 15b(1) of the Act on Old-Age Pensions of Functionaries,

which has been added by the challenged Act; what is more, this provision also makes reference to the above-mentioned Article 15b of the Act on Old-Age Pensions of Functionaries.

It follows from the analysis of the above-quoted provisions of the challenged Act, introduced in the Act on Old-Age Pensions of Functionaries, in the light of the preamble of the challenged Act, that in the provisions of the amending Act, drastically reducing old-age pension benefits of the functionaries of security authorities, this is regarded as a sanction towards these functionaries who in the years 1944-1990 sustained the inhumane political system, working in "an extensive network of state security authorities, actually performing the functions of political police, using unlawful methods and breaching fundamental human rights", that in the communist regime which they sustained "crimes were committed towards the organisations and persons defending independence and democracy; at the same time, the perpetrators were not called to responsibility and escaped justice".

However, the provisions of the challenged Act provide that stringent sanctions with regard to old-age pension benefits will not affect the functionaries of state security authorities who were in service in the years 1944-1990, provided they can prove that they are free of guilt which collectively concerns all the functionaries who were in service in those years, arising from the preamble and the articles of the Act, i.e. they will prove that before 1990, without the knowledge of their superiors, they supported the activities of the democratic opposition aimed at regaining the "independence of the Polish State". The provisions of Article 15b(3) and (4), introduced in the Act on Old-Age Pensions of Functionaries, reads as follows: paragraph 3: "the periods referred to in Article 13(1), upon the applicant's request, may include periods of full-time employment in the years 1944-1990 in state security authorities if functionaries prove that, before 1990, without the knowledge of their superiors, undertook cooperation and actively supported persons or organisations acting for the sake of the independence of the Polish State".

Paragraph 4 stipulates: "In the case referred to in paragraph 3, the measure of inquiry may be the information referred to in Article 13a(1) as well as other evidence, in particular a sentence, even if not final, for an activity consisting in active cooperation, without informing their superiors, with persons or organisations acting for the sake of independence of the Polish State during the service in state security authorities in the years 1944-1990".

The above provisions, on the basis of which the functionaries of state security authorities, performing service in the years 1944-1990 may free themselves, pursuant to the provisions of the Act, from the guilt about sustaining the communist regime, are rooted in the

preamble which specifies that one of the aims of the Act is also to favour the conduct of those functionaries and the citizens who, taking a great risk, chose to support freedom and the persecuted citizens". The above provisions, in the way which is inconsistent with the long-established democratic standards, assume the presumption of guilt of all the functionaries employed in the years 1944-1990 in the units of security authorities of the communist state, but the functionaries, with whom the burden of proof lies, may prove "their innocence" if they wish to do so.

II. The challenged Act infringes on the principle of protection of citizens' trust in the state, which arises from the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution. This is the basic allegation, and other infringements are related therewith – the infringements of the principle of protection of justly acquired rights, which arises from Article 2 of the Constitution, the infringements as regards the issue of individuals being the subjects of rights, and the infringements of Article 10 of the Constitution.

The applicant aptly points out that all former functionaries of security authorities who were re-employed there after 1990 had to undergo a verification process, as set out in the resolution No. 69 of the Council of Ministers of 21 May 1990 on the procedure and requirements for admitting former functionaries of the Security Service to service in the Office for State Protection (UOP) and in other organisational units subordinate to the Minister of Interior as well as for employing them in the Ministry of Interior (Official Gazette - *Monitor Polski* (M. P.) No. 20, item 159; hereafter: the Resolution No. 69), during that process they were qualified, by regional qualification committees and the Central Qualification Committee as persons able to serve the Republic of Poland.

It should be noted that the former functionaries of security authorities of the communist state during the period of the People's Republic of Poland, who were positively verified and then re-employed in the democratic Republic of Poland, when retiring after 1994, acquired the right to old-age pension benefits pursuant to the provisions of the Act on Old-Age Pensions of Functionaries, enacted by the authorities of the Republic of Poland.

In my opinion, their right to old-age pension benefits was acquired justly, within the meaning of the normative content of the principle of protection of justly acquired rights, arising from Article 2 of the Constitution, and in the light of the jurisprudence of the Tribunal.

I definitely do not share the views of the Tribunal as regards legal categorisation of the above qualification proceedings and subsequent re-employment of the functionaries of given security authorities in democratic Poland, after the positive outcome of their qualification

proceedings. It follows from the substantiation of this judgment that the goal of those proceedings was not to pass moral judgment on the functionaries of given departments of the Security Service (SB). By no means this was another verification of the functionaries of the Security Service who remained in service on the day the Security Service was disbanded (i.e. on 10 July 1990 – Article 131(1) in conjunction with Article 137 of the Act on the Office for State Protection (OUP)) or of the officers of the Citizen Militia who, until 31 July 1989, had been the functionaries of the Security Service (Article 131(2) of the Act on the UOP).

However, it follows from the same substantiation to this judgment that in order to carry out "qualification proceedings" with regard to the functionaries of the dissolved SB, the Council of Ministers appointed - on the basis of the Resolution No. 69 - the Qualification Commission for Matters of Central Personnel and regional qualification committees. Their tasks involved conducting qualification proceedings and formulating opinions in the case of candidates applying for admission to service in the Office for State Protection, the Police or another organisational unit subordinate to the Minister of Interior or for employment in the Ministry of Interior, on the basis of a motion of the candidate, previous personal documents and documents concerning the course of service and other documents presented to them (§ 5-6 of the aforementioned Resolution). The committees could also conduct a supplementary interview with the candidate, on their own initiative or upon a motion of the candidate (§ 7(1) of the Resolution No. 69). Regional qualification committees gave positive opinions on the candidate when they stated that he or she fulfilled the requirements provided for a functionary of the given service or an employee of the Ministry of Interior, determined by statute, and when they recognised that he or she displayed certain moral conduct, in particular that:

1) in the course of previous service he or she did not commit an infringement of the law,

2) he or she performed his or her service duties in a manner not infringing on the rights and dignity of other people,

3) he or she did not use his or her professional position for extra-service purposes (§ 8 (1) of the Resolution No. 69).

Among the former functionaries of the Security Service, the committees gave positive opinions on 10 349 persons, and negative – on 3 595. Acquiring a positive opinion did not however guarantee employment, since the reorganisation of the Ministry, and above all an exclusion of tasks characteristic for a political secret police resulted in a fivefold reduction of

permanent posts, from about 25 thousand posts in the former SB to about 5 thousand in the newly appointed UOP.

I believe that there is no doubt that the goal of verification was not only the assessment of usefulness of the candidates for the service in democratic Poland, but also the assessment of their previous service in communist Poland, including their moral conduct. The applicant's view that verifying and then employing again the former functionaries of state security authorities constituted, in a sense, a statement issued by public authorities, on behalf of the Republic of Poland, that these persons would be treated in the same way as the other functionaries of the services established after 1990 - is justified. The former functionaries of state security authorities pledged to "loyally serve the Nation, protect the legal order established in the Constitution of the Republic of Poland, and protect the security of the State and its citizens". The applicant aptly points out that the functionaries who subsequently retired fulfilled their obligations; otherwise they would not have earned the right to receive that benefit.

In my opinion, the drastic lowering of old-age pension benefits of those functionaries, with the justification arising from the preamble of the Act and, as indicated, being of normative significance, constitutes a non-fulfilment of obligations on the part of the state towards those functionaries, especially that – as the Tribunal substantiates – the legislator decided in 1994 that an old-age police pension would not be provided for a former functionary who served in the years 1944-1956 as a functionary of the authorities of state security, public order and public security, if in the course of performing service activities, the functionary committed a crime against the administration of justice or infringed on personal rights of the citizen, and for that reason was given disciplinary dismissal, criminal proceedings were discontinued in his/her case due to a minor or small threat his/her act posed to society or was convicted of intentional fault by a final court judgment (Article 13(2) of the Act on Old-Age Pensions of Functionaries, introduced by the challenged Act). This provision was supposed to be the proof that none of the functionaries of security authorities from the years 1944-1956, who committed acts called at that time "application of impermissible methods in the investigation", would take advantage of the privileged system of old-age pensions. The Tribunal noted in the judgment that, until the time of enactment of the Act in 1994, none of those functionaries had been convicted and that, during the legislative proceedings in the Sejm (2nd term of office) on the adoption of the Act on Old-Age Pensions of Functionaries, the Deputies and Senators of the opposition, in vain, proposed to extend the time-frame of Article 13(2) of the Act until the end of 1989. However, I wish to emphasise

that the ineffectiveness of the state, as regards penalising particular functionaries for committing a crime, may not justify the introduction of collective responsibility of the functionaries, as a way of penalising particular perpetrators; neither may it justify the use of a special means of repression in the form of a radical lowering of old-age pension benefits, applied to all the functionaries, based on collective responsibility arising from the service within the structures of state security authorities.

In this judgment, the Tribunal has recognised that the employment, in the newly created Office for State Protection, of the former SB functionaries who received a positive opinion in the qualification proceedings in 1990 did not mean – and could not mean – a continuation of the same service, and that the employment of those former SB functionaries was not equivalent to guaranteeing them old-age pension benefits for the period of service in the years 1944-1990 at the same level as for the period of service after the year 1990. The Tribunal has stated that "the legislator in the years 1989-2009, as it has been indicated above, both in subsequent statutes, as in the adopted resolutions, has many times expressed his unequivocally negative attitude to the security authorities of the People's Republic of Poland".

I do not agree with the above statements of the Tribunal, which are significant for this case. There is obvious "iunctim" between the verification of individual functionaries together with their subsequent employment and their right to an old-age pension. In this case, the constitutional problem, related to the infringement of the principle of protection of citizens' trust in the state and its laws, arising from Article 2 of the Constitution, is not whether old-age pensions for the years 1944-1990 are to be the same as for the period after 1990, but consists in the fact that old-age pension benefits granted to those functionaries have been drastically lowered, for the aforementioned period, 20 years after the verification, and the justification of such a drastic lowering is negative political and moral evaluation due to service in state security authorities.

It follows from the challenged Act that, on the basis of legal norms arising from the legal provisions and from the preamble of the challenged Act, the legislator rescinded its obligations towards particular functionaries of former state security authorities, which he had assumed pursuant to legal provisions he himself had issued, in accordance with the procedure specified by law. The legislator rescinded his obligations in a collective way, without looking into the activities of particular functionaries, providing for no procedure in that regard, burdening all the functionaries with blame who were in service in the security authorities of

the People's Republic of Poland, for "sustaining the inhumane political system"; also, in the case of those whom it had previously regarded as morally and occupationally fit for service in democratic Poland, justifying this with historical and political reasons.

In an obvious way, especially in the case of the functionaries who were re-employed in democratic Poland, the legislator infringed on the principle of protection of citizens' trust in the state and its laws, which is one of the fundamental principles of a democratic state ruled by law, respected within the framework of contemporary standards of mature democracy, arising from the normative content of Article 2 of the Constitution, and well-established in the jurisprudence of the Constitutional Tribunal. In respect of those functionaries for whom the outcome of qualification proceedings was positive, who were re-employed in democratic Poland and who subsequently retired – the legislator also infringed on the principle of protection of justly acquired rights, which arises from Aricle 2 of the Constitution.

Changes in the old-age pension system are obviously permissible, and also the justly acquired rights may not be, in certain circumstances, absolute rights. However, this needs to be done with respect for constitutional principles, and in particular the ones arising from Article 2 of the Constitution. The Tribunal has pointed this out in its previous rulings, emphasising that the acquired right to an old-age pension has the status of a specially protected right of the individual.

In the judgment of 20 December 1999, Ref. No. K 4/99 (OTK ZU No. 7/1999, item 165), the Tribunal stated *inter alia* that: "The Constitutional Tribunal has repeated on number of occasions the significance of stability of provisions concerning old-age pensions and disability pensions, at the same time emphasising that the legislator also has the right to modify the justly acquired rights based on those provisions. This may occur at the time of social and economic transformation (see the judgment of the Constitutional Tribunal of 14 March 1995, Ref. No. K. 13/94, OTK of 1995, Part I, item 6).

In the case of complex and thorough reforms, such as the reform of old-age and disability pensions, which entered into force in 1999, internal coherence and fairness of a new system may justify the modification of rights which have been granted earlier. This, in particular, regards unifying a regulation concerning all the persons it applies to. (...) The allegation concerning the infringement on the principle of citizens' trust in the state and its laws by the challenged provisions - is justified. Although this principle has not been explicitly stated in the Constitution, but it undoubtedly belongs to the canon of principles making up the notion of a state ruled by law, within the meaning this notion is used in Article 2 of the Constitution. Observance of this principle is of special significance in a situation where there

is a change of current provisions, and in particular of those which have been applied as a factor shaping the legal situation of their addressees. The amended provisions regulate the situation of old-age pensioners i.e. persons of limited capability of adaptability to a changing situation".

III. The amending Act infringes on Article 10 of the Constitution, as the legislator has administered collective punishment to all the persons who were the functionaries of state security authorities before 1990, without considering the activities of individual functionaries. The decisive factor here is the mere fact of being in service in the security authorities of the People's Republic of Poland. In this way the legislator entered the realm of authority which is constitutionally restricted to judicial bodies, without carrying out any proceedings aimed at checking and verifying the legitimacy, adequacy, legality, rightness an proportionality of the sanction imposed. As a consequence, the legislator, bearing in mind the principle of collective responsibility, has administered severe punishment, regardless of the fact whether the functionaries are responsible for committing any unlawful acts, which violated human dignity or were morally reprehensible.

The legislator has resorted to the mechanism of collective responsibility, regarding all the functionaries, including those positively verified in democratic Poland and re-employed, as responsible for sustaining the inhumane political system in communist Poland. This way he administered the same punishment, without differentiating the degree of responsibility of individual functionaries, in the form of the drastic lowering of old-age pension benefits, almost 20 years after the positive verification, which the functionaries had been granted and had, in numerous cases, been receiving for many years. The legislator explicitly states in the preamble that the goal here is to administer justice – to impose severe sanctions on the retired functionaries who were positively verified and re-employed.

Administering justice in a democratic state falls within the remit of the judiciary, and not the legislative power. Administering justice falls within the remit of the independent judiciary which, on the basis of examination of individual actual state of affairs, adjudicates in accordance with general and abstract norms, reconstructed in the light of statutory provisions. In the challenged Act, the legislator – fulfilling the legislative functions – has also taken on the function of the judiciary, by administering justice, which without examining individual cases is to arise "uniformly" from the provisions of the Act and apply to all former functionaries of the security authorities of the People's Republic of Poland. Therefore, in my view, the challenged Act has infringed on Article 10 of the Constitution.

The challenged Act, as has been indicated, assigned collective responsibility to all former functionaries of the People's Republic of Poland (to the same extent) for sustaining the inhumane political system, it burdens them with collective guilt (to the same extent) and imposes a sanction for that in the form of the drastic lowering of old-age pension benefits. This is not about creating criminal responsibility, and thus Article 42(1) of the Constitution is not an adequate higher-level norm for review of the challenged Act. However, it should be pointed out that by creating collective responsibility of the former functionaries of security authorities of the People's Republic of Poland, the Act negates the fact that the functionaries – as individuals and citizens – are subjects of rights. In my opinion, this constitutes a serious infringement of the principle of a democratic state ruled by law. Respecting the fact that persons are subjects of rights is an indispensable and obvious requirement for assigning entitlements and obligations to a given subject, for determining individual responsibility of natural persons and legal entities, and with regard to public authorities, assigning them with certain powers. Therefore, it also follows from the above that the challenged Act has infringed on Article 2 of the Constitution.

The fundamental non-conformity of the challenged Act as a whole to Articles 2 and 10 of the Constitution renders it unnecessary, in the context of this dissenting opinion to the judgment, to assess the challenged Act in relation to the other higher-level norms for review indicated by the applicant, and in particular in relation to Article 31(3) of the Constitution.

IV. The judgment of the Constitutional Tribunal, following the intentions of the legislator which have been expressed in the preamble, passes on political and moral judgment regarding the functioning of the security authorities in the People's Republic of Poland, drawing legal consequences therefrom with regard to constitutional matters. However, I object to the methodology for adjudicating in the name of "pure justice" assumed by the Tribunal, which has been inspired by political and moral evaluation, but with the omission of the well-established, in the jurisprudence of the Tribunal, constitutional principles reflecting contemporary long-standing standards of a democratic state ruled by law.

Such methodology creates a risk of changing the court of law, which the Tribunal is now, into a court of social justice. Article 2 of the Constitution stipulates that "the Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice". Therefore, the Republic of Poland should be a democratic state ruled by law, in order to be

able to implement the principles of social justice. Implementing the principles of social justice is necessary, but it is only possible in a democratic state ruled by law.

Dissenting Opinion

of Judge Ewa Łętowska

to the judgment of the Constitutional Tribunal

of 24 February 2010, Ref. No. K 6/09

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; hereafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 24 February 2010 in the case K 6/09. I hold the view that:

1. The preamble of the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145; hereafter: the amending Act or the Act under review) **is inconsistent with Article 2 of the Constitution of the Republic of Poland, due to the fact that *ratio legis* expressed therein does not correspond to the mechanism for verification of old-age pensions for uniformed services, which has been introduced by the challenged Act.**

2. Articles 1 and 2 in conjunction with Article 3 of the amending Act (this Act – preceded by the preamble which explains its *ratio legis* – should be the object of review in this case, and not the amended Act after the introduction of amendments) are inconsistent with Article 2 and 67(1) in conjunction with Article 31(3) of the Constitution of the Republic of Poland.

3. Moreover, I do not agree with general statements constituting the assumptions of the reasoning adopted in the judgment, namely:

– with the thesis that, as regards Article 67(1) of the Constitution, one could speak of an infringement of constitutionality, if the legislator had enacted a statute excluding the rights to disability or old-age pensions of a given group of workers or had infringed on the social minimum, as this implies exclusion of constitutionality review of any statutes, as referred to in Article 67(1) and (2) *in fine* of the Constitution, regardless of their object – from the point of view of the principle of proportionality (Article 31(3) of the Constitution);

– with the thesis negating the importance of the passage of time for the intensity and way of settling accounts with history, with the argument that such settling of accounts is triggered by the existence of an alignment of powers in the Parliament that is capable of enacting such provisions. Since the review of constitutionality is to protect against unconstitutional majority decisions of the ordinary legislator, such an argument, in fact, may not be raised in the discussion of constitutionality of a statute on settling accounts. By contrast, it may be raised in political discussions.

STATEMENT OF REASONS

1. I do not question the constitutional admissibility (and legitimacy) of lowering of old-age pensions for the staff forming a kind of "Praetorian Guard" of the totalitarian regime, subsequently discredited in the democratic system. I question the way this has been carried out: due to conceiving a statutory mechanism for the said lowering of pensions in a way which does not meet the requirements of appropriate legislation and proportionality as well as due to the lack of coherence between the aim of the Act (expressed in the preamble) and its content. Such lack of coherence always proves the clash with the principles of appropriate legislation. This is the first of two assumptions sufficient for stating unconstitutionality.

2. The preamble of the challenged Act unambiguously links the negative consequences with legal and moral discreditting of the addressees of the Act; whereas, with regard to the preambule, the Act is both too broad and too narrow, in respect of its addressees. On the one hand, discrediting regards persons who do not have the negative qualities mentioned in the preamble concerns (which may in a way justify the allegation of infringement on Article 30 of the Constitution), but on the other hand, (due to the scope ratione personae being too narrow, cf. point 15 below) not all potential "negatively evaluated former SB functionaries" are subject to the statutory mechanism for lowering old-age pensions. In fact, the Act leaves out intelligence services and the persons entered in the confidential register of the Institute of National Remembrance. This infringes on the principle of appropriate legislation (the coherence of *ratio legis* with the content of the Act) and the principle of justice and equality.

3. I also question the decision of the Constitutional Tribunal not to carry out a complete test of proportionality (Article 31(3) of the Constitution), which was necessary due

to the fact that the situation of the addressees of the Act is not uniform. This pertains, in particular, to the persons who had been positively verified (due to the reasons and aims of the verification), the functionaries who had not held any repressive functions or carried out any repressive tasks as well as the members of the Military Council. The judgment lacks a separate analysis of their situation, from the point of view of the aims of the Act and the criteria required by Article 31(3) of the Constitution – just as this has so far been adopted in the jurisprudence of the Tribunal. And this is the second of the two reasons for unconstitutionality.

4. The current Polish legal system (just as systems of other countries) provides for the existence of the old-age pension system for uniformed services which is more beneficial than the universal old-age pension system (FUS). Such differentiation may be, in principle, constitutionally admissible. This is also approved by the judgment to which I submit this dissenting opinion. Therefore, the problem is not the inequality arising from the creation of a privileged system as such (in relation to the universal one), neither is the fact that this system happens to concern uniformed services. The reason for enacting the Act under review (as stated in the application and the subsequent judgment) was, however, the axiological disapproval of the period of totalitarian regime, which had been preserved by state security authorities. The Act under review (and the judgment of the Constitutional Tribunal) regarded the service in the units constituting institutional support for the regime (the preamble qualifies that as a kind of political police) as undeserving of such "better" treatment – in the form of an old-age pension system for uniformed services.

5. The Act (like the judgment) does not regard the lowering of old-age pensions as a consequence of recognising the conduct of individual addressees of the Act as reprehensible. However, the mere fact of performing service (regardless of the post held and the tasks carried out) is regarded as grounds for lowering old-age pensions.

This may possibly have been regarded as sufficient constitutional justification for the lowering of old-age pensions from the system for uniformed services in the case of the former security authorities, for the period of service in the political police (but e.g. not in the armed forces or criminal police – regardless of the formal subordination of a given organisational unit), if this had consisted in moving the functionaries to the universal old-age pension system (FUS), since the service in the former uniformed services – even during the period of totalitarian regime - is not recognised as illegal and since, in principle, it is included in the

pensionable service. In other words: the mere operation of moving old-age pensioners from the system for uniformed services to the universal old-age pension system would not have been, as such, discriminatory (if there had not been other allegations, *vide* above, points 1 and 3). However, the Act under review does not introduce the shift from the system for uniformed services to the universal one. It establishes a special system, which is harsher. The harshness pertains to the recalculation coefficient – this is stressed in the application as giving the Act a discriminatory character, which is actually an unjustified statement (*vide* below, point 8). The period of individual service (regardless of its character and the post held), in the years 1944-1990 in the institutions indicated by statute which "performed the functions of the political police", is treated in an analogical way to the non-contributory period in the universal system. At the same time, as regards other factors determining the amount of old-age pensions – the criteria for old-age pensions from the system for uniformed services are maintained here. An additional restriction has been introduced with regard to the members of the Militarry Council, in whose case a non-contributory period is counted as a whole period in the armed forces from 13 December 1981, and not merely the period overlapping with the membership in the Military Council.

In the context of this case, I consider moving to the universal system to be more consistent with the principles of appropriate legislation (as this eliminates the allegation of inadequacy between the declared aim of the Act and its actual content). Obviously, this is not tantamount to the conclusion that this would automatically result in the constitutionality of the Act under review – since what remains is the question of the group of addressees, the problem of proportionality and the analysis of the preamble. However, if I relate to the universal old-age pension system, then this is done to oppose the view presented in the application: that the discriminatory character of the Act is due to the fact that the coefficient has been lowered from 2.6 to 0.7, instead of being lowered to 1.3. Indeed, the mere change of the coefficient is not enough. The inaptness of the allegation of discrimination on the grounds indicated in the application reveals the fact that assessment would require making reference to the entire old-age pension mechanism of the universal system, in respect of the full scope of required factors (age, total employment period, the amount of the basis of assessment), also including years of service regarded as contributory periods – the recalculation coefficient of 1.3 for the persons whom the Act under review concerns. However, carrying out that process consistently has more far-reaching consequences than what is currently done by the Act under review. Indeed, one may not argue that discrimination is using a lower recalculation coefficient and at the

same time preserving other parameters of comparable old-age pension system. It is necessary to be consistent here.

6. In such a situation, the object of review of constitutionality in this case should have been the conformity of that special system to the principles of appropriate legislation and proportionality, separately for the particular individual groups of addressees, which are varied in respect of who they comprise. This has not been done in the judgment, to which I submit this dissenting opinion, but attention was focused (cf. the proportions in the reasoning of the judgment, and in particular the way of formulating conclusions in the particular points of the reasoning) on the mere fact of admissibility and the need to settle accounts with the totalitarian regime. Still, this has been dealt with too generally. Firstly, those deliberations were not limited to the situation where the instruments for settling accounts took the form of the lowering of old-age pension benefits (which would have drawn attention to the boundaries of admissible use of that particular legal instrument), but general stance was taken with regard to the strategy, need and admissibility of settling accounts. Secondly, approval of the solution adopted in the Act under review has been done globally and pertains to all cases of the lowering of old-age pension benefits, without categorising them and drawing comparisons, i.e. without applying the test of proportionality. Such rendering of the reasoning of the judgment suggests an erroneous identification of the constitutional problem in this case. The focus of the reasoning is on the negative evaluation of the former totalitarian regimes of the communist states: by the Parliament, from the comparative point of view (as well as in the jurisprudence in the context of human rights). The conclusion drawn from those deliberations amounts to the assumption that the state is entitled to carry out such evaluation and such settling of accounts, and their legal form varies. However, the problem in this case is not this - indisputable - issue. The problem is the assessment whether the Polish legislator, while enacting the given challenged Act, aimed at settling accounts with the communist past applied - for that purpose - a legal mechanism which had been adequately and proportionally constructed for the attainment of the aim (set out in the preamble) and whether that aim was achieved, *inter alia* by appropriate specification of the scope ratione personae of the Act. The need, legitimacy or constitutionality of the imperative to settle accounts with the totalitarian regime does not automatically, without further analyses, determine that the scope ratione personae of the population that was subject to the lowering of old-age pensions, the procedure, the way and – as a result – the scale of the said lowering guarantee the

achievement of the aim of the Act and are proportional in that respect (Article 31(3) of the Constitution). In the context of this case, there were no attempts to carry out that test.

7. The judgment, to which I submit my dissenting opinion, emphasises as its main argument the fact that, even after calculating the new old-age pensions from the system for uniformed services, the beneficiaries will still receive fair benefits in comparison with the analogous benefits under the universal old-age pension system. The reason for that is a generally higher level of remuneration in the uniformed sectors, but also maintaining the privileges concerning the number of total employment years for the reliable determination of the basis of assessment, regardless of other material and status privileges related to the service. The judgment leaves the question of effectiveness as regards the functioning of the calculation mechanism outside the constitutional assessment, focusing on the scale of lowering (and more precisely, on the result of the calculation). Such an approach is entirely improper. The constitutional problem is not the fact how much a person ultimately received and whether it was much or little, but the point is whether the mere mechanism (and only then, as a result of that mechanism, the scale as well) for the lowering is constitutionally impeccable i.e.: corresponding to the aim expressed in the preamble of the challenged Act, clear and procedurally correct, as well as referring to a properly specified group of persons, from the point of view of the aim of the Act. Assessing the constitutionality of statutes concerning taxes, social benefits, payments and charges, the Constitutional Tribunal has on a number of occasions stressed the need for such a constitutional review: not from that point of view, whether it was about taxes, benefits, "high" and "low" charges. In the judgment, to which I submit my dissenting opinion, such a test of proportionality has not been carried out in a proper way; the goal of the test is to determine if the aim of the Act under review has been achieved (and there has been no analysis of that aim: whether there has been only deprivation of privileges, or whether also a sanction and how it has been formulated) and whether this has been done by applying measures which are constitutionally correct and correspond to the principle of proportionality. The requirement of proportionality always concerns every statute which interferes with the constitutionally protected rights. Under constitutional review, what should be subject to the assessment of proportionality is therefore each time the mechanism of restriction, guarantees and coherence with *ratio legis* of a given statute introducing that mechanism (see the judgment of the Constitutional Tribunal of 22 September 2009, Ref. No. P 46/07, OTK ZU No. 8/A/2009, item 126). However, this is

impossible to be assessed, as by renouncing the examination of the preamble, the Tribunal eliminated an indispensible tool.

8. The Act includes a preamble, and thus it is easier to determine *ratio legis*. However, the preamble has not been examined at all, since it has been concluded that "the applicant has not proved whether and what normative content has been encoded in the preamble (...) by the legislator, and also in what way they infringe on the Constitution". On these grounds, the proceedings have been discontinued in this regard. However, taking into consideration the application and the supplementary letter of 30 August 2009, a different conclusion should have been drawn. There was necessity for the constitutional review of the preamble (and, in the light of the preamble, for the constitutional review of the scope ratione personae of the Act as well as of the proportionality of its content) and there were no grounds for discontinuation. Despite the uncompromising statement in the reasoning of this judgment, the applicant pointed out the stigmatising character of the preambule, and the ensuing inconsistencies of the Act (cf. in the application: point I p. 5 *in fine* and 6 *in princ*, by analogy on p. 9 paragraphs 2, 3 and 4, as well as point III pp.9-10, and point V pp. 12-13; in a letter of 30 August 2009, point 1 pp. 4-5, point 4 pp. 6-7 – with regard to the members of the Military Council, point 5 *in princ* p. 7, point 10 pp. 20-21, point 12 pp. 25-26 and with specific arguments in point 13 pp. 26-28 and in point 14 pp. 30-31). These issues should be the object of analysis in the course of constitutional review; only assuming these allegations as groundless would give grounds for stating the constitutionality of the norms under assessement. In such a situation, without carrying out assessment of specific allegations, there were no grounds for discontinuing the preceedings. In that situation, it is inapt to formulate an *a priori* conclusion about the lack of normative content of the preamble and to regard the allegations about the preamble as *per non est*.

9. Regardless of the incorrect conclusion as regards the issue of a normative character of the preamble *in casu*, I question the view underlying the reasoning, which is expressed in revealing the role of the preamble in the process of constitutional review. Every preamble, stating the aim of a statute - its underlying axiological, systemic and constructive assumptions - is significant for every case of constitutional review, when the conformity to Article 2 of the Constitution is considered (the principle of appropriate legislation). Indeed, inconsistency between the content of the Act under examination and its preamble is crucial for stating the inappropriateness of legislation (likewise the judgments of the Constitutional Tribunal in full

bench of 31 March 2005, Ref. No. SK 26/02, OTK ZU No. 3/A/2005, item 29, of 20 April 2005, Ref. No. K 42/02, OTK ZU No. 4/A/2005, item 38, both with reference to the ECHR, the case of Gillow v. the United Kingdom). Therefore, I think that, in general, proceedings regarding the constitutionality of the preamble – when the allegations of infringement of Articles 2 and 31 of the Constitution were presented generally (and this was the case in a specific instance) - should not be discontinued *a limine* and that such allegations should be subject to substantive examination.

10. It is true that the Tribunal is bound by the object of review and a higher-level norm for review. Nevertheless, it is erroneous practice when the Tribunal feels bound by the scope of argumentation presented by the applicant and expects to find, in the application, ready-made arguments justifying the unconstitutionality of a given norm under examination, assuming that the lack of such deliberations obliges the Tribunal to abandon the review and discontinue proceedings due to the lack of formal premiss of the application. Proceedings before the Tribunal, although they are based on civil proceedings, may not be – due to their public law function and goal – a formal accusatorial procedure. Moreover, the Tribunal itself has on many occasions negatively assessed the excessive formalisation of the principle of accusatorial procedure in judicial practice, viewing this as an infringement on constitutional principles. It is oversight to raise an allegation about the lack of substantiation of the application where there are constitutional doubts in its text (even if they are clumsily formulated); as then there is rudimentary indication of the reasons for such doubts. The Tribunal is not exempt from the obligation to conduct its own argumentation in the course of a given review. This is required under Article 19(1) and (2) of the Constitutional Tribunal Act. I submitted a dissenting opinion twice – in the case K 64/07 (of 15 July 2009, OTK ZU No. 7/A/2009, item 110) and the case U 10/07 (of 2 December 2009, OTK ZU No. 11/A/2009, item 163) – challenging, *inter alia*, the discontinuation of proceedings before the Tribunal, which was justified by the fact that the applicant had not sufficiently substantiated the allegation of unconstitutionality. Indeed, there is a clear difference between lack of substantiation and insufficient substantiation, and that leads to different consequences. In this case, we again have an instance of such unjustified discontinuation of proceedings, with regard to the preamble. Too quick and groundless discontinuation of proceedings as regards constitutional review bears the characteristics of *déni de justice* (I formulated that allegation in the dissenting opinion to the judgment in the case U 10/07) and puts the Tribunal at risk of being accused of manipulation aimed at avoiding substantive adjudication in a given

case. In this case, the problem is that the Tribunal, by discontinuating the proceedings with regard to the assessment of the preamble, deprived itself of a tool for analysis of constitutionality from the point of view of *ratio legis* of the Act, which affects the assessment of the allegations of violation of human dignity (attributing the commitment of despicable acts) and the allegation of collective responsibility.

11. The preamble of the Act under review, first of all, stigmatises the persons whom the lowering of old-age pensions concerns and, secondly, specifies the aims of the Act. With regard to the former, it states that, as the functionaries of state security authorities, they received a pensioner status granted "in return for sustaining the inhumane political system", in which "at the same time the perpetrators were not called to responsibility and escaped justice". These allegations contain are emotionally, morally and legally condemnatory. When an allegation like this is made globally – this justifies the allegation of humiliation.

12. I do not share *a priori* (without carrying out a thorough analysis, as there is no place for that in the dissenting opinion) the view expressed in the application that the preamble, in that regard, really attributed the criminal acts as if the legislator played the role of a court (which might justify the allegation of infringement of Article 10 of the Constitution). Maybe such an application would be justified – after carrying out proper assessment, which has not been conducted. However, I notice here (cf. also the conclusion alleging the infringement of Articles 10 and 30 of the Constitution by the legislator) a matter that required the Tribunal to carry out review and undertake formulation of substantive assessment. In the light of the said strong stigmatisation (even in the mass media, the Act under review is referred to in Polish as '*dezubekizacyjna*', which means that all its addressees are regarded as '*ubecy*' [a Polish contemptuous word for the Security Service functionaries of the communist regime], it should not surprise that there has been a protest against attributing the qualitities or actions of the persons regarded by the Act under review as a core personnel of the security apparatus (of the political police) – in the situation where the Act also concerns persons whose jobs had no operational character, but auxiliary, and was not related with the main functions of the security apparatus. Indeed, assessment should have been carried out as to whether the (method) way of specifying the persons under the Act was in harmony with the axiology expressed in the preamble.

13. The mere fact of the above-mentioned stigmatisation of all persons whom the amending Act concerns, in my view, is an infringement on the principle of appropriate legislation (Article 2 of the Constitution), as the scope ratione personae of the Act is broader than the group of persons whom the aim of the Act, indicated in the preamble, concerns (deprivation of the privileges which were unjustly acquired during the period of the totalitarian regime). The Act – and this has not been taken into account in the judgment – regards two different notions as synonyms: "a functionary of security authorities" and a functionary – a person employed in organisational units, specified by statute, which are subordinate to the Ministry of Interior if the employment relationship was based on a public-law service relationship or appointment. Hence, the functionaries of the security apparatus acting unlawfully (according to the preamble), and thus undeserving of old-age pensions in accordance with the rules set out for the old-age pension system for uniformed services, will be, for instance, IT specialists, medical personnel, librarians, kindergarten teachers and the like, operating in the unit subordinate to the Ministry of Interior, even if that subordination resulted from organisational changes which were beyond the person had been verified, was temporary, and they themselves performed identical non-operational work as to the persons employed based on an employment contract (or even also based on a public-law service relationship, and thus as functionaries), but in a different place than the Ministry of Interior – if only their employment relationship was based on an appointment or a public-law service relationship. In the judgment, it is incorrect to consider the term "functionaries of security authorities" understood as persons performing the duties of the political police to be tantamount to an employee whose employment relationship is based on a public-law service relationship. This would be different if the Act under review had assigned the status of a functionary who unjustly acquired a privilege in the form of an old-age pension from the system for uniformed services for the service performed for the totalitarian regime, based on his/her post, function and the range of responsibilities.

14. However, the scope ratione personae of the population affected by the consequences of the Act under review is not limited merely to the functionaries who, due to their posts or function (or alternatively due to individual conduct), can be categorised as persons performing the duties of the political police, as it is stated in the preamble. Therefore, the Act concerns a larger group of addressees than this is necessary to achieve the aim indicated in the preamble: revoking the privileges due to perfoming service which is negatively evaluated, from the point of view of axiology of a democratic state. I think that the

more the content of the preamble is stigmatising, the more limited is the freedom of the ordinary legislator as regards specifying the group of stigmatised persons, by means of criteria that leave aside the specific post or function. In any case, this issue should be analysed in the judgment, but this has not been done.

15. The inadequacy of *ratio legis* of the Act, expressed in the preamble, with regard to the group of its addressees also surfaces – which is paradoxical – in the excessively narrow scope ratione personae as regards those (again due to the axiology of the preamble) whom the Act should concern. It is not clear why (the hearing also did not provide the answer) the military intelligence has been omitted. Another limitation arises from the mistake of the mechanism of lowering old-age pensions. In accordance with the mechanism created by the Act, lowering old-age pensions is carried out on the basis of a certificate issued by the Institute of National Remembrance (IPN) (Article 2(2) of the amending Act). Also in this regard, the proceedings were discontinued in the judgment by the Tribunal, again overlooking the significance of this – provision indeed challenged in the application – for the mechanism assessed by the Tribunal. This is, in fact, another identification mistake as regards constitutional problem in the judgment. By contrast, Article 2(2) of the Act under review creates an unreliable and counter-productive procedure. In fact, the IPN does not issue a relevant certificate about the service to a person whose personal data are included in a restricted data filing system. Therefore, with regard to those persons, the Act will not result in the verification of old-age pensions and their lowering. A restricted data filing system perforce comprises potential addressees of the Act, within the meaning of the preamble. This circumstance indicates inappropriateness of specifying (in a too narrow way) the scope ratione personae of the Act – if the preamble is to be treated seriously as an expression of *ratio* of the Act. The ineffective procedure and inconsistency of the content of the Act with its aim – with regard to including the intended group of addressees in the Act – justify the allegation of non-conformity to Article 2 of the Constitution.

16. The scope ratione personae, which the Act refers to, is on the one hand too broad, and on the other hand too narrow in relation to the *ratio legis* expressed in the preamble. The Act introduces the lowering of old-age pensions, not only for those who deserve that, according to *ratio legis*, and on the one hand – it does not include all the persons it intended to include (due to *ratio* itself). Therefore, the Act does not correspond with the basic premiss determining the proportionality of a regulation: it does not meet the requirement of necessity

of a regulation. The inadequacy of the scope ratione personae of the group of addressees, with regard to the purposes expressed in the preamble, was confirmed by the representative of the Sejm during the hearing. Article 31(3) of the Constitution, where it comes to interference with the right protected constitutionally (in this case the right to social security), requires that it should be possible for a regulation to achieve its aim. However, the mechanism for verification of old-age pensions, as regards the scope ratione personae, is not possible to bring about the effects intended by the Act: deprivation of the privilege to receive old-age pensions from the system for uniformed services, in the case of all the functionaries of the units categorised as the political police, and at the same time only those functionaries (see above points 15-17 of this dissenting opinion).

17. Also, the judgment does not include the analysis and assessment of the aims of the Act (deprivation of privileges or also imposition responsibility – to what extent and with regard to whom – in the form of the "penal" mechanism for calculating of old-age pensions). This is obviously understandable since, in the judgment, the proceedings with regard to the preamble were discontinued. However, in this way, the Tribunal deprived itself of the instruments for carrying out the test of proportionality. It should be emphasised that carrying out such a test is the obligation of the Tribunal, regardless of the fact whether this measure of inquiry has been requested by a participant of the proceedings, as the case pertains to the restriction of constitutional rights and freedoms (and this is so, since the Act under review concerns the lowering of old-age pensions).

18. I do not share the view expressed in the judgment that the positive verification of the staff of the Citizen Militia and the Security Service, carried out in 1990, is irrelevant for the assessment of constitutionality of the Act. This view was supported in the judgment with the arguments that the positive verification is neither tantamount to "a certificate of morality" nor to "turning a blind eye", and that the verification only meant the possibility of continuing of service. Also, I do not share the view that, since the verification was carried out schematically and hastily, and hence it was unreliable, therefore this renders it legally irrelevant in this case. The verification (the Act of 1990 on the Police and the Resolution No. 69 of the Council of Ministers of 21 May 1990) allowing the continuation of service encompassed the screening of the past: whether the verified persons did not break the law, did not viloate the rights and freedoms of other persons and whether they took advantage of their posts for other than work-related purposes. At the same time, ((§ 8(1) of the Resolution

No. 69) the positive verification was based on "arriving at a conviction that he/she [the verified person] displays moral conduct appropriate to perform service". By contrast, the service in the Police (Article 25), the Office for State Protection (UOP) (Article 15 of the Act on the UOP), the Border Guard (Article 35 of the Act on the Border Guard) required impeccable moral and patriotic conduct from all the persons performing service, and thus also from those who were to perform it after the positive verification. Therefore, the positive verification was linked with the confirmation of these qualities (and hence – despite the statement in the judgment – it did constitute a certificate of morality) – both with regard to the past as well as the present of the verified person, as regards his/her usefulness for further service (which, of course, means only a certain forecast and which may be undermined in the course of individual assessment, if needed). Consequently, the verification concerned the assessment of morality of the verified person.

19. It may not be assumed (as it has been in the judgment) that nobody guaranteed the prospects of an old-age pension from the system for uniformed services by means of verification. The uniformed service is not merely an obligation to provide work and the right to remuneration, but the entirety of legal status related to that service. The status also includes acquiring (as a continuous action during the period of service) old-age pension entitlements which would be appropriate for uniformed services. And such status was granted to the positively verified persons, by allowing them to perform service in the democratic state. Therefore, I share the view expressed, *inter alia*, in the letters (of 14 December 2009) of the former Ministers of Interior and Heads of the Office for State Protection, Andrzej Milczanowski and Krzysztof Kozłowski, who held their offices during the period of verification, that the verified persons had been admitted to service with the implication of social security as regards old-age and disability pensions, and that omission of that fact in the Act under review is tantamount to the infringement on the principle of citizens' trust in the state and its laws (Article 2 of the Constitution). The positively verified functionaries had the grounds to assume (and these assumptions, as it seems, were shared by the Ministers of Interior of that time, who had been appointed in the democratic state) that the circumstances under positive verification would not determine the prospects for their old-age pensions, being shaped after the verification, already after the fall of the totalitarian regime and after the introduction of the constitutional principle of a democratic state ruled by law (December 1989).

20. Making reference to the argumentation presented in the judgment as regards the actual circumstances of verification - haste and formalism of the verification in 1990 may not, firstly, incriminate the verified persons and, secondly, the actual characteristics of the verification are misleading in the argumentation concerning a normative quality i.e. the constitutionality of the Act.

21. The discrepancies between the situations of persons who were positively verified would suggest the need for differentiation as to the impact of the Act under review on those persons, as well as – on the part of the Tribunal – for carrying out a relevant test and assessment of its proportionality, with regard to that group of its addressees, from the point of view of factors specified in points 14 and 15 of this dissenting opinion.

22. The test of proportionality (which has not been carried out) was necessary even more so, as the Act treats the positively verified functionaries worse than those who – due to having been convicted of a crime (maybe also related to the service they performed in the past, pursuant to Article 10 of the Act on Old-Age Pensions of Professional Soldiers or Article 10 of the Act on Old-Age Pension of Functionaries) – have lost their right to old-age pensions from the system for uniformed services for penal reasons. Indeed, they have been placed under the universal old-age pension system (FUS) (with the coefficient of 1.3). In the judgment in the case P 38/06 of 29 April 2008 (OTK ZU No. 3/A/2008, item 46), concerning Article 10 of the Act 18 February 1994, in point 3.4 of the reasoning, the Constitutional Tribunal stated that, in the case of deprivation of an old-age pension due to a criminal conviction (i.e. in the case of a crime), one could speak of an infringement of Article 67(1) of the Constitution if the functionary lost the entitlement arising from the universal system, recognising the argument that there the periods of service were counted as contributory periods under the universal system (thus 1.3). In this situation, the worse treatment of the positively verified persons, from the point of view of old-age pension system, than of those who has lost their right to old-age pensions due to criminal convictions is unclear also in the light of the jurisprudence of the Constitutional Tribunal.

23. The Act provides for stricter measures with regard to the members of the Military Council than towards the other addressees of the Act, depriving them of old-age pensions from the system for uniformed services not only for the period of their membership in a body which was an embodiment of the totalitarian power. This time-frame cannot be justified even by the argument that the service in the Military Council, as a usurpatory body, implied the

focus of its members on activities which fall outside the scope of the service which "counted for" uniformed old-age pensions. However, then the non-contributory period should be limited – logically – only to the period of service in the Military Council, which has not been done in the judgment.

24. The legislator, foreseeing the negative consequences of such a situation and regarding them as a consequence of disapproval of such a situation, must take into account the interdependencies and commensuration (functional relation) between such a situation and its consequences. I do not see such a relation between the membership in the Military Council and the exclusion of its members from not only the system for uniformed services but also the universal "ordinary" old-age pension system for the period of service outside of the Military Council. Also, the severity of sanctions (the lowering of old-age pensions together with the stigmatisation expressed in the preamble, regardless of individual conduct) with regard to the persons who were deluded by verification – is strikingly disproportionate. For the same reason (lack of relation between an offence and the form of additional penalty), I criticised in 1989, when holding the office of the Polish Ombudsman, admissibility of adjudicating the forfeiture of a house or car as an additional penalty for the production (transport) of illegal publications (the second speech of the Ombudsman (Ref. No. RPO/Ł/36/89) of 28 February 1989, *Biuletyn RPO – Materiały* No. 3/1989, p. 39 and subsequent pages). During the period which has passed since the time I held the post of Polish Ombudsman, my legal views with regard to the necessity for considering the relation between a prohibited act and the forms of sanctions for that act – have not changed.

25. All the above-indicated considerations have inclined me to submit this dissenting opinion.

Dissenting Opinion

of Judge Marek Mazurkiewicz

to the Judgment of the Constitutional Tribunal

of 24 February 2010, Ref. No. K 6/09

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), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 24 February 2010, Ref. No. K 6/09, as a whole.

I state as follows:

a) the preamble of the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145; hereafter: the amending Act) – is inconsistent with Articles 2 and 10 of the Constitution,

b) Article 1 and Article 3(1) and (3) of the amending Act are inconsistent with Article 2, Article 10, Article 32(2) and Article 67(1) in conjunction with Article 31(3) of the Constitution,

c) Article 2 and Article 3(2) and (3) of the amending Act are inconsistent with Article 2, Article 10, Article 32(2) and Article 67(1) in conjunction with Article 31(3) of the Constitution,

d) Article 4 of the amending Act is inextricably related to its Articles 1 to 3.

I also state that the object of the application for the examination of conformity to the Constitution wsa the Act amending the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 66, as amended; hereafter: the Act on Old-Age Pensions of Professional Soldiers) and the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 67, as amended; hereafter: the

Act of 18 February 1994 on Old-Age Pensions of Functionaries) and it is the provisions of the amending Act, and not the provisions of the Acts amended by it, should be the object of adjudication of the Constitutional Tribunal in the operative part of the judgment, to which I submit this dissenting opinion.

This would not have triggered the potential "revival" of the previously binding provisions, which lost their binding force when the amending Act entered into force. However, adjudication of non-conformity of the preamble and Articles 1 to 3 of the amending Act to Articles 2 and 10 of the Constitution would have eliminated, from the legal system, the normative term of *ratio legis* and those of the new procedural provisions of that Act which were not included *in extenso* in the provisions of the amended Acts.

STATEMENT OF REASONS

1. I wish to draw attention to the fact that, as the Constitutional Tribunal stated in the judgment of 11 May 2007, Ref. No. K 2/07 (OTK ZU No. 5/A/2007, item 48) – and the Tribunal makes reference to that statement also in the present judgment, to which I submit this dissenting opinion – "the means of dismantlement of the heritage of former totalitarian communist systems may be reconciled with the idea of a democratic state ruled by law only when – remaining in accordance with the requirements of a state ruled by law – they will be aimed at threats endangering fundamental human rights and the process of democratisation. (…) In eliminating the legacy of former communist totalitarian systems, a democratic state ruled by law must implement formal-legal measures that have been adopted by such a state. It must not apply any other measures, since this would resemble activities undertaken by the totalitarian regime, which is to be completely dismantled. A democratic state ruled by law possesses all necessary means to guarantee that justice will be done and the guilty will be punished. It must not, and should not, satisfy the thirst for revenge, rather than serve justice. It must respect such fundamental human rights and freedoms as the right to a fair trial, the right to be heard or the right to defence, and apply such rights also to persons who failed to apply them when they were in power".

The Constitutional Tribunal has indicated on many occasions that the principle of a democratic state ruled by law, enshrined in Article 2 of the Constitution, requires that the enacted norms should be impeccable from the point of view of the rules on legal drafting. These norms should implement the assumptions underlying the Polish constitutional order and safeguard the values which are enshrined in the Constitution (cf. the judgment of 12 April 2000,

Ref. No. K 8/98, OTK ZU No. 3/2000, item 87). The general principles that arise from Article 2 of the Constitution should be strictly observed when it comes to legal acts which impose restrictions on the civil rights and freedoms and assign obligations towards the state (the judgment of 20 November 2002, Ref. No. K 41/02, OTK ZU No. 6/A/2002, item 83). In particular, a statutory regulation should meet the requirement of adequate specificity and stability of legal regulations, which is derived from the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution (the judgment 18 February 2004, Ref. No. P 21/02, OTK ZU No. 2/A/2004, item 9).

The principle of specificity should also be associated with Article 31(3) of the Constitution and the requirement of adequate specificity should be understood as an imperative to precisely determine the permissible extent of the legislator's interference. Unclear and imprecise wording of the provision leads to uncertainty on the part of its addressees, with regard to their rights and obligations, as well as results in creating too broad a framework for the authorities that apply the provision. The legislator may not, by unclear wording of provisions, give the authorities that are to apply them excessive freedom in delineating the scope of the object and the scope ratione personae of the restrictions on constitutional rights and freedoms of the individual. These principles should be strictly observed, in particular with regard to the provisions which restrict the rights and freedoms of the individual and the citizen (the judgments of: 30 October 2001, Ref. No. K 33/00, OTK ZU No. 7/2001, item 217, 22 May 2002, Ref. No. K 6/02, OTK ZU No. 3/A/2002, item 33, 20 April 2004, Ref. No. K 45/02, OTK ZU No. 4/A/2004, item 30).

I wish to point out that since the entry into force of the amended Constitution of 29 December 1989 (Journal of Laws - Dz. U. No. 75, item 444, as amended), which initiated a change in the basis of its government system, with the adherence to democratic procedures and with the preservation of state continuity of the Republic of Poland, which proclaimed the principle of a democratic state ruled by law as well as the tri-division and balance of powers as the foundations of the government system of the Republic of Poland, all the constitutional organs of the state have been obliged to apply these principles in the fields of legislative process, execution of law and administration of justice.

Subsequent constitutional amendments introduced by the Constitutional Act of 17 October 1992 (Journal of Laws - Dz. U. No. 84, item 426, as amended), and finally by the present Constitution of 2 April 1997 (Journal of Laws - Dz. U. No. 78, item 483, as amended) did not repeal that constitutional obligation.

2. An unquestionable expert in the field of legal problems in the contemporary history, addressing an international forum on the subject of questioning history by law in the global context (cf. W. Czapliński, *Kwestionowanie historii przez prawo*, "Europejski Przegląd Sądowy" No. 11/2009, p. 4 and subsequent pages), stated that:

"Political changes in the world after 1989 have changed our approach to history. This remark refers to both individuals as well as whole nations, including what is sometimes labelled as "official historiography" or "historical politics". By way of explanation: in totalitarian regimes, official versions of history were created, which were then presented by the historians who were closely linked to those in power. The same approach was applied to a majority of fields in social sciences and humanities, which played a crucial role in legitimasing the political system. That one and only version of history had to be replaced by varied approaches by authors who were not linked to any political group, or rather who were linked to diverse political factions" (p. 4).

He also stated that in Poland: "in pursuit of public justice, various measures are undertaken, including legislative ones. It is hard not to realise that at least some of them are driven by a certain sense of vengeance. The intervention of the Polish Constitutional Tribunal completely undermined the concept of lustration, the goal of which was the elimination of the former collaborators of the political police from the communist era from the public life. The Tribunal reviewed the Lustration Act from the perspective of the principle of a state ruled by law. The enacted Act did not meet the guarantees of the fundamental rights provided for by the Constitution, and also the standard of democratic treatment, specified by legal acts of international law, in particular taking into account the European Convention for the Protection of Human Rights (including the presumption of innocence, the right to legal defence, the right to court review of administrative acts, public access to documents, etc.).

Polish experience shows that the mechanisms, institutions and procedures (including the Institutite of National Remembrance) established in order to carry out examination and investigation in the archives of the former political police, which were formally created to look into the previous infringements of law, may be easily used for political purposes, and the version of history presented by them may be equally one-sided as the version promoted by *ancien-régime*" (as above p. 6).

He also pointed out that:

"After many years, a lawsuit was filed against political leaders who imposed the martial law in Poland in 1981. Although the martial law was inconsistent with the Constitution of 1952, which was binding at the time, the public is divided as to the assessment

thereof. Many believe that the decision about the introduction of the military rule in Poland saved the country from the Soviet military intervention, whereas others reject such an interpretation." (as above p. 6).

What is characteristic is that the said opinion – which is important from the point of view of the case under examination – on the evaluation of those involved in the imposition of the martial law corresponds with the conclusions of the opinions presented earlier to the Constitutional Accountability Committee of the Sejm by the following professors: Krystyna Kersten, Jerzy Holzer, Andrzej Paczkowski and Marian Zgórniak, during the period 1991-1996, when the Committee examined the application, submitted by a Polish political party called the Confederation of Independent Poland (KPN), for holding the former members of the Miliatry Council constitutionally and criminally responsible for the imposition of the martial law. Since the allegations raised in the application were not confirmed during the examination, the Sejm discountinued the proceedings.

Professor A. Paczkowski, whom the Judge Rapporteur quotes in the judgment, at that time stated *inter alia* that: "the dispute over the martial law is – and probably always will remain – a historiosophic and worldview dispute or, in the best-case scenario, a political one" (cf. *O stanie wojennym w Sejmowej Komisji Odpowiedzialności Konstytucyjnej*, Warszawa 1997, p. 157).

3. Reviewed by the Constitutional Tribunal, as to its conformity to constitutional provisions, the amending Act comprises a preamble and 4 articles:

a) the preamble emphasises the aim of the Act, by stipulating *inter alia* that in the communist regime, "resorting to unlawful methods, violating the fundamental human rights", "crimes were committed and the perpetrators escaped justice", and that the legislator enacts provisions bearing in mind the principle of social justice which excludes tolerating and rewarding unlawfulness";

b) Article 1 and Article 3(1) and (3) of the amending Act limit the entitlement to old-age pensions from the system for uniformed services to the disadvantage of the persons who used to be members of the Military Council (by changing the coefficient of 2.6% to 0.7% of the basis of assessment for each year of service in the Polish Military Forces after 8 May 1945). At the same time, since 1994, Article 10 of the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families, stipulating that "the right to old-age pensions is not granted to soldiers who were convicted by a binding court judgment to

an additional penalty of deprivation of public rights or a penalty of demotion for a crime committed before the release from service".

c) Article 2 and Article 3(2) and (3) of the amending Act limit, to the disadvantage of the functionaries, the entitlement to old-age pensions from the system for uniformed services for the service in the police formations enumerated in the Act of 18 February 1994 on Old-Age Pensions of Functionaries, whose data will be transferred to an old-age pension authority, based on personal files kept in the Institute of National Remembrance which indicate their service in state security authorities within the meaning of the Lustration Act.

And also here the provision of Article 13(2) of the Act of 18 February 1994 on Old-Age Pensions of Functionaries, which has been binding since 1994, remains in force, and stipulates that:

"The provision of paragraph 1 does not apply to the service in the years 1944-1956 as a functionary of state security authorities, public order and public security if in the course of performing service activities, the functionary committed a crime against the administration of justice or infringed on personal rights of the citizen, and for that reason was given disciplinary dismissal, criminal proceedings were discontinued in his/her case due to a minor or small threat his/her act posed to society, or was convicted of intentional fault by a final court judgment",

as well as Article 10(1) and (2), which stipulate that:

"The right to an old-age pension, on the basis of the Act is not granted to a functionary [by analogy, nor is it granted to an old-age pensioner and a person receiving a disability pension – paragraph 2] who was convicted, by a final court judgment, of a crime or a fiscal crime, committed intentionally and prosecuted by indictment, committed in relation to work duties and in order to gain material or personal advantage, or of a crime specified in Article 258 of the Penal Code, or with regard to whom a criminal measure was adjudicated in the form of deprivation of public rights for a crime or a fiscal crime which had been committed before the release from the service";

d) Article 4 of the Act, stipulating that the Act enters into force after 30 days since the date it was promulgated, is inextricably linked to its Articles 1 to 3.

4. The amending Act, being under constitutional review in the case under examination, shows a clear link to the functioning of the lustration system, which was introduced by the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (Journal of Laws

– Dz. U. of 2007, No. 63, item 425, as amended; hereafter: the Act of 18 October 2006). It constitutes an extension of the system by the introduction of new – unknown to the system under the Act 18 October 2006 – sanctions towards the persons perceived as the opponents of the new political system of the Republic of Poland, which was shaped after 1989.

As part of the lustration procedure, which was introduced earlier by the Act of 18 October 2006, by means of that Act, the rights of the groups of persons specified therein were limited as regards their access to certain professions and public offices as well as they were to take responsibility for the so-called "lustration lie". This was "only" to politically isolate former opponents of the founders of the new system.

The amending Act under review goes much further. Due to the initiative of a group of Deputies who submitted the relevant bill (the Sejm Paper No. 1140, 6th term of the Sejm), by the Act enacted 19 years after the Polish constitution-maker had changed the basis of the political system and 15 years after the regulation – (in accordance with the principles of a state ruled by law by the Sejm of the democratic Republic) by means of the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and the Act of 18 February 1994 on Old-Age Pensions of Functionaries – of the rules of the old-age pension system of the soldiers and functionaries which also took into account the period prior to 1989, new restrictions on the individual's rights of a large number of citizens are introduced, by changing the rules for calculating old-age pensions and by drastically lowering the benefits they have been entitled to so far.

At the same time, the requirement of court adjudications on guilt and penalty for a committed crime as the premisses of a change in the rules for calculating the benefits, which was introduced by the democratic legislator, is overlooked here.

And this legislative measure has a mass scale. According to the information of 30 July 2009 received by the Tribunal from the President of the Institute of National Remembrance, approximately 191 500 citizens, as qualified for the change of their amount of old-age pensions under this procedure, were referred to the Institute of National Remembrance by the Pension Office of the Ministry of Interior and Administration and the Pension Office of the Penitentiary Service. So far the lowering of the amount of old-age pensions affected dozens of thousands of persons.

5. In the course of legislative proceedings concerning the amending bill submitted by the group of Deputies, the bill was evaluated by the Supreme Court Research and Analyses Office (authorised as "Remarks of the Supreme Court" by the First President of the said

Court) and by the Studies and Analysis Bureau of the Chancellery of the Sejm, and – at the stage of examining the content of the Act by the Senate – also by the Legislative Bureau of the Senate. In all those opinions it was indicated – already in the legislative phase – that the bill was inconsistent with the Constitution. This was before the applicant formulated his allegations in the application lodged with the Constitutional Tribunal.

The Supreme Court, above all, pointed out "the infringement on the principle of separation of powers, enshrined in Article 10 of the Constitution of the Republic of Poland, in accordance with which the political system of the Republic of Poland is based on the separation and balance between the legislative, executive and judicial powers (paragraph 1). (...) These branches of government fulfil their functions based on the authority vested in them by the Constitution. And so the legislative branch has the authority to enact legal norms which regulate in a primary way the matters which have not yet been regulated, or amend the existing legal system. By contrast, the judicial branch is authorised to administer justice, which comprises the authority to resolve disputes and inflict punishment. As regards the executive branch, it performs the tasks of the state with regard to particular cases, except for situations involving disputes. From the point of view of the drafted regulation, the infringement on Article 10 of the Constitution of the Republic of Poland consists in acting beyond the scope of powers which are specified by the political system, on the part of the legislative branch - as, indeed, it is the legislative branch, instead of the judicial branch, that inflicts specific punishment (lowering old-age pensions) on the said group of persons [the members of the Military Council]. The legal norm, reconstructed on the basis of the challenged provision, has neither a general nor abstract character, which is a basic requirement for regarding the proposed regulation as correct from the point of view of appropriate legislation. (...) The authors of the bill made an *a priori* assumption that the Military Council of National Salvation was a criminal organisation. However, determining the said findings, in a state ruled by law, falls within the remit of an independent court. At the same time, it is worth bearing in mind that, in the current legal system, there are sufficient instruments to achieve the goal set by the authors of the bill (...) The Act on Old-Age Pensions of Professional Soldiers contains a regulation which provides for deprivation of old-age pension benefits in the case of a conviction, by a final court judgment, to deprivation of public rights or to a penalty of demotion on a charge of a crime which was committed prior to the release from service (cf. Article 10)".

In such a case – as the Supreme Court indicates in its remarks –old-age pensioners or disability pensioners, if they meet the criteria set in the Act of 17 December 1998 on

Retirement and Disability Pensions from the Social Insurance Fund (Journal of Laws - Dz. U. of 2004, No 39, item 353, as amended). The sanction consists in calculating an old-age pension in accordance with the rules which apply under the universal old-age pension system of employees; this means that the period of service is treated as a contributory period, just as the period of employment, with the coefficient of 1.3%. Indeed, there is no mention of lowering old-age pension entitlements to the level of 0.7%. In the case under examination, there is no connection between the membership in the Military Council of National Salvation and the acquisition of rights to old-age pensions by its members. This connection is only visible in the part concerning the legal qualification of the military service that was performed by the members of the Military Council. The old-age pension for that period of service is 2.6% of the basis of assessment for every year of such service. The Council did not grant its members any old-age pension entitlements, and the membership did not entitle to a change in the rules for calculating the amount of a military old-age pension, which entails that there are no grounds for revoking old-age pension entitlements due to a person's membership in the Military Council. In the context of the principle of protection of justly acquired rights, one may merely question considering the period of service performed for the Military Council as a contributory period, for the purposes of calculating military old-age pensions, provided that the activity of the Military Council or the Council itself is deemed criminal or unconstitutional by a court.

There are also no grounds to disregard the military service from 8 May 1945, as well as after the dissolution of the Military Council, merely due to the membership in the Council. This is inconsistent with the understanding of the principle of protection of justly acquired rights as established in the jurisprudence of the Constitutional Tribunal, which has stated on a number of occasions that the point is to forbid arbitrary revocation or limitation of public and private rights granted to the individual or to other private operators participating in legal relations (the decision of the Constitutional Tribunal of 17 February 1999, Ref. No. Ts 154/98, OTK ZU No. 2/1999, item 34, p. 191; the judgment of 10 July 2000, Ref. No. SK 21/99, OTK ZU No. 5/2000, item 144, p. 830).

The Supreme Court also points out that, in its essence, the old-age pension system and the old-age pension entitlements under it may not be an instrument of repressive policy by the state. What is more, this may not be a form of punishment and at the same time a peculiar form of collective responsibility, which also refers to Article 2 of the amending Act.

For this reason, it is justified to allege an infringement, by the Act under review, on the principle of a democratic state ruled by law and the principle of proportionality of regulation, enshrined in Article 2 of the Constitution.

The allegations concerning the non-conformity of the norm reviewed by the Tribunal to the Constitution were raised in the opinions presented by: the Studies and Analysis Bureau of the Chancellery of the Sejm, with regard to the Deputies' bill submitted to the Sejm, and by the Legislative Bureau of the Senate, with regard to the bill passed by the Sejm and submitted to the Senate, pursuant to Article 121(1) of the Constitution.

The experts of these Bureaus - apart from putting forward arguments which overlap with some of the above-mentioned allegations by the First President of the Supreme Court, as regards the bill – have asserted, *inter alia*, that it is difficult to justify the necessity for legislative amendments, introduced by the amending Act under review, with the argument for elimination of privileges which were unjustly acquired by the members of the Military Council and the functionaries of state security authorities specified in the Act, since so far the existing provisions have provided for special old-age pension entitlements neither for the members of the Military Council as soldiers nor for the functionaries of state security authorities. Both Acts, the one of 10 December 1993 on Old-Age Pensions of Professional Soldiers and the one of 18 February 1994 on Old-Age Pensions of Functionaries, provide for separate solutions with regard to the universal old-age system, but they do not single out the members of the Military Council or the functionaries of state security authorities. The rules for determining the amount of old-age pensions for the persons whom the bill concerned fall within the scope of the rules set for all soldiers and uniformed functionaries who have an appropriate period of service and who are subject to regulations of the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and the Act of 18 February 1994 on Old-Age Pensions of Functionaries.

One might speak of privileges for the members of the Military Council and the functionaries of the specified security authorities only if these two groups received old-age pensions which were calculated in accordance with rules which were different than the rules applied with regard to other old-age pensioners from uniformed services. However, the Acts which have been binding so far do not contain such privileged rules.

Pursuant to the preamble of the amending Act, the lowering of old-age pensions of uniformed functionaries of specified services and state security authorities, who were in service in the People's Republic of Poland, is motivated by the negative evaluation of the aims for which the communist regime used those services. Doubts arise as to whether such

evaluation may be expressed by means of modifications of the old-age pension system for uniformed services. The said restriction, aimed at all the functionaries of specified services, shows the lack of cause-and-effect relation between the evaluation of disgraceful aims for which these services were used and the „punishment" incurred by all the functionaries of these services, regardless of individual acts or guilt.

The amending Act introduces the principle of equal responsibility of all the functionaries, which is clearly contrary to the basis of the functioning of a democratic state ruled by law. It may prove dubious to restore social justice by means of *en bloc* lowering old-age pensions of all the functionaries of services and authorities, regardless of their role and function in those services (Article 2 of the Constitution). Negative evaluation of effects of the activity of security authorities and services may not impact determining whether the individual rights were justly or unjustly acquired by particular functionaries. In the case of soldiers and functionaries of uniformed services, there is a possibility of holding individuals responsible on the basis of binding provisions (*vide* the opinion of the Supreme Court).

A Sejm expert has raised doubts as to whether the proposed solutions of the Act do not constitute an infringement of the principle of proportionality within the meaning of Article 2 and Article 31(3) of the Contitution by "an incomprehensible and intense activity of the legislator" in the sense in which the Constitutional Tribunal adjudicated on severity of an established sanction in the judgment of 13 March 2007, Ref. No. K 8/07 (OTK ZU No. 3/A/2007, item 26).

The expert also pointed out that the Tribunal stated in the judgment of 11 May 2007 (Ref. No. K 2/07) that "guilt which is individual and not collective – should be proven in each individual case, which clearly indicates the necessity to apply lustration statutes in an individual, and not collective, way".

In the course of legislative proceedings, the legislator did not take into account these apt, in my opinion, allegations of unconstitutionality, and the Tribunal, in the judgment to which I submit my dissenting opinion, overlooked that.

6. The Constitutional Tribunal is a court of law, and not a court passing judgments on history. Respecting the principles of appropriate legislation is functionally linked with the legal certainty and security as well as the protection of citizens' trust in the state and its laws (cf. the judgment of 17 May 2006, Ref. No. K 33/05, OTK ZU No. 5/A/2006, item 57). The principle of legal security requires that the legislator respects the existing legal relations. Introducing amendments in the process of enacting law which are not justified by any

objective circumstances, and which divert the previous direction of the legislative process that was set by the aforementioned Acts of 1993 and 1994, infringes on the principle of a democratic state ruled by law. Observing that principle is particularly significant in the situation where changes are made to binding provisions, especially those which have already been applied to shape the legal situation of their addressees (the judgment 10 July 2000, Ref. No. SK 21/99), and where there are no important reasons and constitutionally protected values which would change that legal situation.

The principle of legality obliges legislative authorities to formulate laws to be enacted in accordance with the provisions of the Constitution. Each case of infringement, by a state authority, on prohibitions and orders contained in particular constitutional regulations, in particular taking a formal and universally binding decision which exceeds its scope of powers specified by the Constitution and statutes, always additionally constitutes an implicit infringement of such general constitutional principles as the principle of a democratic state ruled by law, which is set in Article 2 of the Constitution (cf. the judgment of 23 March 2006, Ref. No. K 4/06, OTK ZU No. 3/A/2006, item 32). In the case under examination such a situation has occurred.

The challenged provisions of the amending Act under review are at the same time inconsistent with the constitutional right to social security (Article 67(1) in conjunction with Article 31(3) of the Constitution), and the differentiation in the amount of old-age pensions from the system for uniformed services: 1) due to the lack of relation between the introduced differentiation among old-age pensioners from uniformed services and the main aim of the statutes on old-age pensions, 2) due to the lack of proportionality of the applied legal solutions and 3) without any justification arising from a possible need for the protection of another, more important, constitutional value – must be regarded as inconsistent with Article 32(1) in conjunction with Article 31(3) of the Constitution.

I am for ruthless and effective prosecution of crimes and for punishing perpetrators for the acts committed in the past and at present.

The Act examined by the Tribunal, infringing on constitutional principles, does not serve that purpose. Neither does it serve modernisation of Polish old-age pension system, which the government of the Republic of Poland has declared in its agenda for the next few years.

For these reasons, I submit my dissenting opinion both to the operative part and the reasoning of the judgment.

Dissenting Opinion

of Judge Mirosław Wyrzykowski,

to the Judgment of the Constitutional Tribunal

of 24 February 2010, Ref. No. K 6/09

1. 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), I submit my dissenting opinion to the judgment of 24 February 2010 in the case K 6/09. I do not agree with the operative part and the reasoning of the judgment. I hold the view that:

a) the preamble of the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145; hereafter: the amending Act) is inconsistent with Articles 2, 10 and 42 of the Constitution of the Republic of Poland;

b) Article 15b(1) of the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. of 2004, No. 8, item 67, as amended; hereafter: the Act on Old-Age Pensions of Functionaries), added by Article 2(3) of the amending Act, is inconsistent with the principle of protection of acquired rights (which arises from Article 2 of the Constitution) in conjunction with Article 67(1) and Article 31(3) of the Constitution, as well as is inconsistent with Articles 10 and 42 of the Constitution;

c) Article 15b of the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws – Dz. U. of 2004, No. 8, item 66, as amended), added by Article 1 of the amending Act, is inconsistent with the principle of protection of acquired rights (which arises from Article 2 of the Constitution) in conjunction with Article 67(1) and Article 31(3) of the Constitution, as well as is inconsistent with Articles 10 and 42 of the Constitution.

2. The first problem that arises in connection with the judgment concerns the significance of passage of time for the boundaries of the legislator's activities. The amending Act was enacted almost 20 years after the change of the political and social system in Poland. During that period, as mentioned in the reasoning of the judgment, on numerous occasions measures were taken to "settle accounts with the past". Settling accounts with regard to the perpetrators of the events and situations which are negatively assessed from both the perspective of the axiology of the new constitutional order and the perspective of the victims of the former political regime.

The passage of time has an impact on both the intensity of measures with regard to the former group of problems as well as the latter – the victims. The further the perspective, the more urgent the issue of redress (not yet provided) for the victims becomes.

The situation looks different as regards consequences of evaluation of institutions and conduct of persons working for them from the point of view of the adopted axiology of a democratic state. Settling accounts with the past – in this context – should take place only when unknown earlier circumstances are revealed which cast new light on the functions of the institutions and the conduct of particular persons who were employees there. If no such new circumstances occur, then it is advisable for the state to refrain from any legal regulation. Refraining in this context is linked with the principle of protection of citizens' trust in the state.

The citizens of the Republic of Poland whom the amending Act concerns had all the grounds to assume that the rules which were binding for the last 20 years would not be changed unless there were new circumstances justifying the radical amendment of the legal regulation. Neither the legislator nor the Public Prosecutor-General indicated such circumstances in their stances. This role was taken over by the Constitutional Tribunal – going beyond the remit of its competence. I hold the view that it is the legislator's obligation to prove those circumstances. The mere presumption of constitutionality is not enough in the case of the restriction or deprivation of acquired rights.

3. In the case of revocation of acquired rights which have been the basis for calculating the amount of old-age pensions for almost 20 years, without any change to vital circumstances justifying them – for assuming the grounds for recognising them as acquired unjustly – it is necessary to carry out a convincing test to determine the correctness of the grounds (substantive and procedural) for the revocation of the rights.

In the jurisprudence of the Constitutional Tribunal, it is assumed that old-age pension rights are, in principle, justly acquired (the judgment of the Constitutional Tribunal of 11 February 1992, Ref. No. K 14/91, OTK of 1992, Vol. I, item 7, pp. 93-148), and only in an exceptional situation it may be assumed that they were acquired with a breach of the principle of social justice (the judgment of 22 August 1990, Ref. No. K 7/90, OTK of 1990, item 5, pp. 42-58). Taking into consideration that "the Constitution requires that strict standards be applied as regards the protection of individual and political rights" (the judgment of 7 February 2001, Ref. No. K 27/00, OTK ZU No. 2/2001, item 29) and that "in the case of a conflict between human rights and other constitutional values, the fundamental problem is to guarantee adequate protection of human rights in the face of a threat of infringement of those rights by the state, which has a general social interest in mind" (the judgment of 8 October 2007, Ref. No. K 20/07, OTK ZU No. 9/A/2007, item 102), I hold the view that the burden of proof, in the relevant regard, lies with the legislator.

Due to a special character of the principle of protection of justly acquired rights, as a norm which constitutes an element of the principle of legal security, which in turn is a derivative of the principle of citizens' trust in the state and its laws, I hold the view that there is necessity to modify the rules for spreading the burden of proof and argumentation in the proceedings in the case at hand. Thus, I agree with the view of A. Mączyński – expressed in the context of assessment of constitutionality of limitations on the exercise of a right acquired by inheritence – that the introduction of restrictions on constitutional rights and freedoms requires substantiation that such a restriction is justified in the light of the Constitution. The provisions which provide for such restrictions in case their conformity to the Constitution is challenged before the Constitutional Tribunal does not enjoy the presumption of constitutionality which requires providing argumentation that would justify their non-conformity to constitutional norms" (the dissenting opinion of Judge A. Mączyński to the judgment of the Constitutional Tribunal of 16 April 2002, Ref. No. SK 23/01, OTK ZU No. 3/A/2002, item 26). A similar view was expressed by E. Łętowska in the context of assessment of constitutionality of criminal law restrictions on freedom of speech (see the dissenting opinion of Judge E. Łętowska to the judgment of the Constitutional Tribunal of 30 October 2006, Ref. No. P 10/06, OTK ZU No. 9/A/2006, item 128). This stance is partly reflected in the literature on the topic where, taking as a starting point the principle that the burden of argumentation lies with the thesis of non-conformity of a legislative measure to the Constitution, it is assumed that "modified rules for spreading the burden of proof and the

burden of argumentation primarily apply to the assessment of constitutionality of legal regulations which introduce restrictions on constitutional rights. The basic element of a democratic state ruled by law is to guarantee the protection of human rights. In the light of Article 31(3) of the Constitution, the restrictions on the rights of the individual may be enacted only when they are necessary in a democratic state for the protection of values mentioned in that provision. Interference with human rights is permissible only as an exception and always requires a substantive justification. As a consequence, the scope of applying a general rule, according to which the burden of proof and argumentation lies with the thesis of unconstitutionality, is here limited to the thesis that a given regulation concerns a given right. In the case of proving this thesis, one should – in the subsequent stage of substantiation of adjudication – apply the rule according to which the burden of proof and argumentation lies with the thesis that enacted restrictions are useful and proportional in a literal sense" (K. Wojtyczek, "Ciężar dowodu i argumentacji w procedurze kontroli norm przez Trybunał Konstytucyjny", *Przegląd Sejmowy* No. /2004, p. 22).

In this context, I express my opinion that neither the text of the preamble of the amending Act analysed by the Tribunal, nor the course of legislative work, nor the text of the amending Act give sufficient grounds to state that the said right to an old-age pension benefit has been acquired in a way which is inconsistent with "legal norms as regards their object", as it has so far been required in constitutional jurisprudence (cf. the judgment of the Contitutional Tribunal of 25 February 1992, Ref. No. K 3/91, OTK of 1992, Vol. I, item 1).

4. The legal fiction introduced by the legislator may not be regarded as consistent with the Constitution; it entails that by assuming the coefficient 0.7% of the basis of assessment for every year of service in state security authorities in the years 1944-1990, the legislator assumes the situation as if they had not worked in that period. The coefficient of 0.7% pertains to the persons who did not pay old-age pension contributions (cf. Article 62(1) in conjunction with Article 7 of the Act of 17 December 1998 on Retirement and Disability Pensions from the Social Insurance Fund, Journal of Laws - Dz. U. of 2009, No 153, item 1227, as amended).

The functionaries employed in state security authorities perfomed work (service) and assuming fiction - in 2009, for the sake of regulation concerning the change of rules for calculating old-age pensions - must be substantiated in a particularly convincing way. The legislator made neither work (service) nor state security authorities illegal, but merely ostricised them in the content of the preamble of the amending Act. Regardless of that,

delegitimisation of the authorities does not have to, in itself, mean necessity to accept – impossible to maintain - legal fiction that allegedly those people did not perform work (service). The adoption of the coefficient 0.7% is not, in its nature, revocation of a privilege, but it is a kind of individually addressed sanction.

5. The regulation of the challenged amending Act concerns diversified groups of addressees who have been treated by the legislator as if they belonged to one group. This diversification primarily concerns persons who were verified in 1990 and were then employed in security authorities of the Republic of Poland and the members of the Military Council of National Salvation (hereafter: the WRON).

When it comes to the functionaries who were positively verified in 1990, then it was particularly them who had the reasons to expect that, after meeting certain requirements, they would be able to benefit from the rules applying to the old-age pension system for uniformed services.

In 2009, the legislator equalised the first and the latter group, as regards old-age pension benefits. Making them equal *ex post,* after almost 20 years, must be justified with strong arguments. Such argumentation has been found neither in the opinions of the Sejm and the Public Prosecutor-General, nor in the stance of the Constitutional Tribunal.

Verification in 1990 was carried out by authorities of the democratic state. The criteria for positive verification included, *inter alia*, professional and moral conduct during the service until 1989. A positive opinion on a candicate could be issued when it had been stated that he or she met the criteria set for a functionary of a given service or an employee of the Ministry of Interior, specified by statute, and when it was recognised that he or she displayed certain moral conduct, in particular that:

1) in the course of previous service he or she did not commit an infringement of the law, 2) he or she performed his or her service duties in a manner not infringing on the rights and dignity of other people 3) he or she did not use his or her professional position for extra-service purposes (cf. § 8 (1)) of the Resolution No. 69 of the Council of Ministers of 21 May 1990 on the procedure and requirements for admitting former functionaries of the Security Service to service in the Office for State Protection and in other organisational units subordinate to the Minister of Interior as well as for employing them in the Ministry of Interior (M. P. No. 20, item 159, in conjuction with Article 132 of the Act of 6 April 1990 on the Office for State Protection (UOP) (Journal of Laws - Dz. U. of 1999, No. 51, item 526, as amended). Positive verification meant confirmation that those persons did not display conduct which would

eliminate them from work in uniformed services of the democratic state. Those persons trusted the state, just as the state trusted those persons (cf. the judgment of the European Court of Human Rights of 7 April 2009, in the case of Žičkus v. Lithuania, Application No. 26652/02, § 33 and subsequent ones).

To be respected by its citizens, a state must respect its own decisions. A state which does not respect its decisions may not expect respect and trust from its citizens. The legislator's solution, being the object of the case at hand, may be applauded, today and tomorrow, in some social circles. However, these circles should be aware that such a method of acting by the legislator paves the way for more actions which may concern today's advocates of lowering old-age pension benefits for the functionaries of uniformed services of the People's Republic of Poland. The adoption, by the Contitutional Tribunal, of the assumptions which allowed for recognising the challenged regulation as consistent with the Constitution means paving the way for constitutionally unrestrained legislative action in the future. The action, being justified with political, moral, philosophical and religious reasons, will limit acquired rights.

Moreover, the acceptance, by the Tribunal, of adopted legislative solutions is, at the same time, the acceptance of delegitimisation of the state's own actions. If the Constitutional Tribunal does not protect, in this judgment, the rights and freedoms of the individual, it should at least protect the state from self-delegitimisation. The case at hand is an example of questioning the solutions of some authorities of the democratic state by another authority. The character of the state, as a democratic state ruled by law, imposes special obligations and requirements on its authorities and the functionaries of those authorities. That model of a state requires more from authorities as well as from citizens. The task of the Constitutional Tribunal is the protection of rights and freedoms of the individual, but also the protection of the state from self-delegitimisation. The judgment which I challenge here is an example of non-fulfilment of statutory tasks of the Tribunal.

6. I do not agree with the adjudication of the Constitutional Tribunal as to partial constitutionality of the regulation concerning the change of rules for calculating old-age pensions from the system for uniformed services in the case of the members of the Military Council. The statutory regulation concerning that group of addressees includes a different construct than the regulation regarding uniformed services. It provides for a sanction concerning both the period before the creation of the Military Council, i.e. a period which was

not subject to any qualification from the perspective of the preamble of the amending Act, as well as the entire period after 12 December 1981.

The Tribunal has stated that the statutory regulation concerning uniformed services for the period of actual service (or work) until 1990, but not after that period, is constitutional. Also, in this judgment, the constitutionality of sanctions have been stated with regard to the members of the Military Council during the existence of the Council, as well as after its dismantlement.

I can accept neither the logic of the legislator nor the logic of the Constitutional Tribunal, since such reasoning infringes on Article 2, in conjunction with Article 67 and Article 31(3), as well as Article 10 and Article 42 of the Constitution of the Republic of Poland.

7. The preamble of the amending Act contains the statement which may be regarded as crucial for understanding the essence of the changes introduced to the rules for calculating old-age pension benefits. As the justification of the Act, it stated that "crimes were committed towards the organisations and persons defending independence and democracy; at the same time, the perpetrators were not called to responsibility and escaped justice".

The object of the discussion is not the general aptness and truth of that statement, which is obvious today. The problem arises due to the character of the Act which is under constitutional review. The amending Act is special in a way that it does not have – contrary to the view of the Constitutional Tribunal – a general and abstract character. The Act concerns specified addressees who, on the basis of that Act, have received decisions changing the amount of their old-age pensions. From the date of entry into force of the Act, the number of the addressees has been known, and, with the passage of time, that number may only decrease. Indeed, the amending Act applies to a clearly defined group that, in the process of its application, becomes even more concrete as the names of addressees become specified. This feature which undermines the general and abstract character of the Act must affect the understanding of the content and function of the preamble.

This means that the aforementioned part of the preamble of the Act, indicating *ratio* for its enactment, may be understood as indication – as a result of application of the Act - of a singled-out group of perpetrators of crimes who were not called to responsibility and escaped justice.

This is not just stigmatisation of particular persons, to whom the individual decisions specifying the new amount of old-age pensions were addressed, but this is also the application

the rhethorics which – in its mildest interpretation – suggests that the adopted statutory solutions concerning old-age pensions are a form of responsibility for the undetected crimes against the organisations and persons defending independence and democracy, and that the crimes were committed by the perpetrators who were not called to responsibility and escaped justice (i.e. by particular addressees of the Act which amends the rules for calculating old-age pensions for the years 1944-1990).

Not only was there no indication of the crimes referred to in the preamble of the amending Act, but also the legislator imposed a sanction in the form of a change in the system for calculating old-age pensions. Therefore, if the premiss for the legislator's decision concerning the regulation contained in the Act is an assumption that the addressees committed crimes and that they did not bear responsibility for their acts, than this means that the legislator classifies certain acts. The point is that such classification should be done by a criminal court, and not by the legislator. The crime that was committed must be adjudicated upon in the course of court proceedings, and not in the course of legislative work. There is no doubt that the legislator has infringed on Articles 10 and 42 of the Constitution.

For these reasons, I submit my dissenting opinion.

Dissenting Opinion

of Judge Bohdan Zdziennicki,

to the Judgment of the Constitutional Tribunal

of 24 February 2010, Ref. No. K 6/09

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), I submit my dissenting opinion to the judgment as a whole. I do not share the stance of the Constitutional Tribunal expressed both in the operative part as well as in the reasoning of the judgment.

In my view, the object of the hearing – in accordance with the principle of initiating court proceedings solely upon application – should be the Act of 23 January 2009 amending the Act on Old-Age Pensions of Professional Soldiers and Their Families and the Act on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection

Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. No. 24, item 145), and not the relevant provisions of the amended Acts, i.e. the Act of 10 December 1993 on Old-Age Pensions of Professional Soldiers and Their Families (Journal of Laws – Dz. U. of 2004, No. 8, item 66, as amended) and the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws – Dz. U. of 2004, No. 8, item 67, as amended).

The applicants, both in their application of 23 February 2009 and in the subsequent pleadings (of 26 February 2009, of 30 August 2009, and of 10 November 2009), as well as at the hearing on 13 January 2010, requested the Tribunal to determine the non-conformity of the entire amending Act of 23 January 2009 to the Constitution of the Republic of Poland, and not the relevant provisions of the amended Acts.

The reasoning of the applicants is based on such formulation of the object of the allegation, and hence – in accordance with the principle of initiating court proceedings solely upon application, which is binding in the proceedings before the Constitutional Tribunal, in its formal and substantive sense – the object of the allegation may not be changed by the Tribunal. Therefore, I entirely agree with the argumentation of the applicants, presented at the hearing on 13 January 2010, that the object of the allegation is the amending Act with its preamble, and not the relevant provisions of the amended Acts.

The Act of 23 January 2009 was challenged before the Tribunal at the beginning of its year-long *vacatio legis.* It was not the applicants' fault that the proceedings began only at the beginning of 2010, i.e. after the entry into force of the Act.

Penal stigmatisation of certain persons in the preamble of the Act justifies the drastic lowering of old-age pensions which those persons have been receiving so far. The solutions of the challenged Act without its preamble are, therefore, completely incomprehensible. Hence, one may not examine the constitutionality of the provisions of the amended Acts, instead of the amending Act of 23 January 2009, since this leads to the omission of the indicated preamble in the basic considerations. Such a way of handling the case not only distorts the essence of the application by the group of Deputies, but it also deprives it of the most important part of constitutional argumentation. The Tribunal must not do such a thing, since the preamble of the Act of 23 January 2009, which has a special normative significance, has not been incorporated into the wording of the two amended Acts.

I hold the view that the challenged Act of 23 January 2009 as a whole, including its preamble, is inconsistent with the higher-level norms indicated by the applicants.

I

The law concerning settling accounts with the communist past

The Act of 23 January 2009 is closely related with the Act of 18 October 2006 on the Disclosure of Information on Documents of State Security Authorities from the Years 1944-1990 and the Content of those Documents (Journal of Laws – Dz. U. of 2007, No. 63, item 425, as amended), commonly referred to as the "Lustration Act". This relation primarily arises from the same ideological and historical premisses, which are the basis of the preambule of the challenged Act and the preambule of the Act of 18 October 2006. This relation also arises from the reference to the "Lustration Act", which has been made in Articles 2 and 3 of the Act of 23 January 2009.

This indicates that the law aimed at settling accounts with the regime that fell 20 years ago not only does not fade away, but actually expands and becomes more radical. This happens despite the fact that the matter under the challenged Act was regulated 15 years ago by the Acts of 10 December 1993 and of 18 February 1994, which specified the rules of the old-age pension system for soldiers and functionaries with regard to the period prior to 1989 (the year when the political system changed).

Introduced by the "Lustration Act" of 2006, the penalty of infamy, restrictions on access to some professions and public offices as well as responsibility for the so-called "lustration lie" have been supplemented, by the challenged Act, with another form of repression which consists in a drastic lowering of old-age pensions so far received by professional soldiers who used to be the members of the Military Council of National Salvation (WRON) and the functionaries of security authorities of the People's Republic of Poland.

In that situation, as regards the Act of 23 January 2009, the conclusions of the judgment of the Constitutional Tribunal of 11 May 2007, Ref. No. K 2/07, remain fully relevant. They indicate that, while dismantling the heritage of the totalitarian regime, the Republic of Poland, as a democratic state ruled by law, must apply legal measures of such a state, respect the principles of social justice, and thus refrain from any form of retaliation or revenge towards the persons considered to be its former opponents.

What also fully applies to the challenged Act is the Resolution of the Parliamentary Assembly of the Council of Europe of 1996 (No. 1096) on measures to dismantle the heritage of former communist totalitarian systems which outlines a time-frame for any kind of settling of accounts with the past, which is not to be extended. The Resolution is based on the Convention for the Protection of Human Rights and Fundamental Freedoms, which was ratified by the Republic of Poland, and it refers to Article 6(1) and (2) of the Treaty on European Union (which has been binding for Poland since its accession to the EU). The European Court of Human Rights in Strasbourg, in its numerous rulings, has made reference to the Resolution 1096 as an indicator of standards which need to be observed by all European states, when settling accounts with the past of the former totalitarian regimes.

II

Constitutional norms which concern settling accounts with history

The Constitution is the supreme legal act in the state, and the entire binding legal order must conform thereto. Arising from Article 8(1) of the Constitution, the superiority of that legal act implies absolute prohibition on enacting law which is inconsistent with the Constitution and an absolute imperative for enacting law which is consistent with the Constitution.

The Constitution binds all powers, and in particular the legislative power. Therefore, it is inadmissible to assume any interpretations of the Constitution – whether less or more far-fetched – in order to adjust its wording to the requirements and aims of extraordinary statutes aimed at settling accounts with the communist past.

There are no special solutions in the Constitution as regards the evaluation of events and facts from the past, with only one exception. It is a provision for dealing with acts which in the past infringed on fundamental human rights, or constituted other crimes. Article 44 of the Constitution stipulates that the statute of limitation regarding crimes which were committed by, or by order of, public officials and which have not been prosecuted for political reasons, shall be extended for the period during which such reasons existed. The Constitution does not provide for a possibility of extending the scope ratione personae or the scope of the object of this provision.

The fundamental legal values of a democratic state ruled by law – the Republic of Poland being such a state in accordance with Article 2 of the Constitution – include the

principle of *lex retro non agit*. This principle has been recognised by lawyers since the Roman times. Thus, departure from this principle is only possible when all the principles, values and rules of the binding Constitution are respected. This means that occupational experience of the living generation must be considered with due respect for the inherent and inalienable dignity of the person (Article 30 of the Constitution), everyone's equality before the law (Article 32(1) of the Constitution), the right to legal protection of a person's private and family life, and his/her honour and reputation (Article 47 of the Constitution). The basis of constitutional order - a certain foundation of public authority – is the acknowledgement that the Republic of Poland constitutes "the common good of all its citizens" (Article 1 of the Constitution), also including the former functionaries of security authorities and the members of the Military Council of National Salvation. The Republic ensures "the freedom and rights of persons and citizens and the security of the citizens" to everyone (Article 5 of the Constitution), prohibiting discrimination "for any reason whatsoever" (Article 32(2) of the Constitution).

It is not permissible to bypass the principles, values and rules of the Constitution by means of a simple legislative measure – presenting, in the preamble of the Act concerning settling accounts with the communist regime, a specific version of history only in order to use this evaluation of the past to derive specific legal consequences towards a group of citizens regarded as former (from 20 years ago) political opponents of the parliamentary majority that is currently in power.

The law in a democratic state ruled by law may not impose one view of the past on everyone; even more so, it may not derive, from that view, the right to repress certain social or occupational groups.

Guaranteed by the Constitution, the freedom of conscience and opinion (Article 53(1)) and Article 54(1)) allows one to freely profess, accept and manifest, either individually or collectively, convictions, and hence also views on history. Everyone has the right, from the point of view of ethics or from their own perspective, to harshly evaluate, or even condemn, the years of the People's Republic of Poland, even without any commonly assumed periodisation.

It is a known fact that, in totalitarian regimes, official versions of history were and are being created. By contrast, in democratic states ruled by law, there may not be one single prevailing vision of history. There are various interpretations of history which are put forward by authors who are not linked to any political parties as well as by those who represent particular worldviews.

Published results of opinion polls constantly indicate that the public in Poland is divided as to the evaluation of the People's Republic of Poland and its particular periods. The same is true with regard to the martial law. Opinion polls indicate that many peple still believe that the decision about the imposition of martial law, although inconsistent with the Constitution of 1952, which was binding at that time, was motivated by the situation of absolute necessity and saved Poland from a military intervention by the countries of the Warsaw Pact, which the People's Republic of Poland was a member of.

Political parties that came to power, one by one, passed different resolutions in the Sejm and the Senate. In some of them, they formulated their own evalution of the past, usually around the times of various historical anniversaries. The resolutions reflected the ideological and political views of a given parliamentary majority, but they may not be and are not any sources of law. As a result, they may not directly affect the judicial activity of the Constitutional Tribunal.

It is worth recalling here the second, being also the last, sentence of the Preamble of the Constitution of the Republic of Poland:

"We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland".

The wording of the Preamble of the Constitution of Poland is unambiguous - there are impassable axiological boundaries for each power, and thus also for the legislative power.

While examining legislation, the Tribunal may refer only to the Constitution. On no account may it combine the role of "a dedicated modern history scholar" with its function, specified in the Constitution, of a constitutional authority created to rationally adjudicate on constitutionality of the binding law.

Indeed, the Tribunal, in its character, is completely apolitical and ideologically neutral, independent from other state authorities and from the objectives of political parties. While conducting their judicial activities, the judges of the Constitutional Tribunal are obliged to respect everyone, including those they may, for various reasons, dislike or whose convictions they may not share. The judges may only be driven by their legal convictions; they may not be motivated by a potential threat of "embarrassment" or ostracism in the circles that nominated them to the positions of judges, or by their own political views. The essence of adjudicating consists in determining impartially (rationally), without giving in to emotions,

pressure and expectations, whether the challenged regulations do not infringe on the principles, values or rules of the Constitution of the Republic of Poland.

III

The preamble of the Act of 23 January 2009.

The preamble of the Act of 23 January 2009 is written in a solemn style. It presents a certain version of history and derives moral judgment therefrom, which it assumes as the binding legal evaluation with regard to each functionary of security authorities of the People's Republic of Poland and each professional soldier who used to be the member of the Military Council. As mentioned before, this gives normative basis for the drastic lowering of old-age pensions, so far received, by those persons.

Such wording of the preamble of the challenged Act is contrary to the character and content of the Preamble of the Constitution of the Republic of Poland. The Preamble of the said Constitution simply refers to "the existence and future" of our Homeland. And the memory of negative experiences in the past is to be merely a warning against the return of "the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland".

The Preamble of the Constitution, on behalf of the Polish Nation, irrevocably ensures, to everyone, civil rights and freedoms, and respect for the inherent dignity of the person, as well as introduces the obligation of solidarity with others. There are no elements here that would allow for penalising the past, as regards the actions and events which were not crimes.

I maintain my view (cf. my dissenting opinion to the judgment of the Constitutional Tribunal of 11 May 2007, Ref. No. K 2/07) that starting the non-conformity of that type of a special and normative preamble of a statute to the Preamble of the Constitution of the Republic of Poland allows to state the non-conformity of the statute to the Constitution.

The preamble of the Act of 23 January 2009, however, goes even further since it describes *expressis verbis* the old-age pensions that have been paid out so far to the functionaries of uniformed services – and thus also to the functionaries of security authorities of the People's Republic of Poland and to the professional soldiers who used to be the members of the Military Council – as "the case of tolerating and rewarding unlawfulness". Therefore, we have a supposition that a specific part of the legal order, which was binding

until 2010, was unlawful. Such a form of rebutting the presumption of constitutionality of binding provisions is not provided for in Polish legislation. Hence, the indicated wording of the preamble infringes on Article 7 in conjunction with Article 2 of the Constitution of the Republic of Poland.

IV

Separate old-age pension systems and individual property rights ensuing therefrom.

The case at hand does not concern a reform of the old-age pension system of uniformed services. The work is being carried out in that regard so that, after the reform of old-age bridging pensions (the Act of 19 December 2008 on Old-Age Bridging Pensions, Journal of Laws - Dz. U. No. 237, item 1656), a bill can be drafted which will aim at decreasing the number of persons entitled to receive benefits on special terms. This is connected with the crisis in public finances (an increase in public debt and in budget deficit as well as a decrease in state revenue). Hence, the Act of 23 January 2009 is a typical case of a special statute, and it has nothing to do with the work on a unified old-age pension system.

The old-age pensions of uniformed services constitute a separate system in relation to the universal old-age system. However, they are no privileges. The remuneration and old-age pensions of uniformed services (which include the addressees of the challenged Act) are financed (as in most countries) from the state budget.

In 1999, the functionaries of uniformed services were assigned to the universal old-age pension system. After a few years of experience, that decision was regarded as wrong and misguided (since the incentives to work in uniformed services are remuneration and old-age pensions considered together, and not separately), which, in 2003, led to a relevant amendment of the Act of 13 October 1998 on the social security system. It was adopted then, as before the reform of 1999, that the high risk connected with performing service in uniformed services made it necessary to have a separate old-age pension system for uniformed services.

Like old-age pensions under the universal old-age pension system, old-age pensions from the system for uniformed services are granted – on terms specified in regulations – for the periods of employment. The same rules for acquiring old-age pensions are common to all types of uniformed services. By granting such old-age pensions, the state fulfils its obligations arising from the rules of law which were binding in the past and are binding now.

The high risk connected with performing service in uniformed services, which justifies the existence of a separate old-age pension system for those services (in relation to the universal system) has been exhaustively discussed in the doctrine of law (cf. for example J. Jończyk, *Prawo zabezpieczenia społecznego*, Kraków 2006, pp. 223-224, p. 271).

In the light of the above, speaking of a privileged old-age pension system of uniformed services is either an unintentional mistake of shifting categories or intentional terminological manipulation which is aimed at justifying the introduction of drastic measures.

By contrast, the principle of protection of acquired rights, developed in the jurisprudence of the Constitutional Tribunal, forbids arbitrary revocation or limitation of individual rights enjoyed by a person. A reform of the old-age pension system may not be carried out under the populist slogan of revoking "unjust" or "excessive" privileges.

When imposing limitations on individual rights, figures representing an average should not be taken into account. Each right of the individual is individual, and not collective, in its character.

To "justify" the lowering of old-age pensions received so far, in the case of particular persons, one may not refer to various average figures. It is said that, as a result of the challenged Act of 23 January 2009, an average old-age pensioner who used to work for the security authorities of the People's Republic of Poland will lose approximately PLN 1000.

An old-age pension depends on the period of employment and the remuneration determined by the character of responsibilities, the post and the like). Therefore, old-age pension financial entitlements have the character of property rights which are so closely linked with the legal situation of the individual that they are not subject to automatic averaging. Indeed, what is always essential to all property rights is a particular amount of a particular benefit in the case of a particular beneficiary.

The provisions of the two Acts (of 10 December 1993 and of 18 February 1994) on old-age pensions of soldiers and functionaries favoured neither the members of the Military Council nor the functionaries of security authorities of the People's Republic of Poland. They received old-age pensions on the same terms as did (and still do) the other old-age pensioners from uniformed services. Thus, one may not speak here of any "old-age pension privileges".

V

Legislative action aimed at bypassing constitutional principles, values and rules.

The Constitutional Tribunal dealt with ostensible legislative action taken in order to bypass certain legal restrictions in the judgment of 20 April 2004, Ref. No. K 45/02. The Tribunal then declared the unconstitutionality of a transitional provision (two years after the entry into force of the regulation!) of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency (Journal of Laws - Dz. U. No. 74, item 676), as under the pretext of reform of the said institutions, the intention – in the view of the Tribunal at that time – was to bypass provisions which guaranteed enhanced job security to the functionaries of secret services. Ostensible legislative action was needed to formally justify numerous lay-offs which were desirable from the point of view of the parliamentary majority of that time. By the judgment of 20 April 2004, Ref. No. K 45/02, the Tribunal declared the unconstitutionality of the provision which justified lay-offs, bypassing regulations which guaranteed enhanced job security to the above-mentioned functionaries, which meant the possibility of their re-employment or a possibility of demanding relevant compensation from the State Treasury for the period of an unlawful lay-off.

Ostensible legislative action is not only contrary to the principle of diligent work of public bodies, as expressed in the preamble of the Constitution, but also to the very nature of a democratic state ruled by law (Article 2 of the Constitution of the Republic of Poland). Political and ideological arguments may never override constitutional, as well as systemic and legal arguments.

The drastic lowering of old-age pensions – in relation to the amount due, in accordance with the rules which were previously and are currently binding under the old-age pension system for uniformed services – constitutes economic repression towards certain beneficiaries and, what should be stressed, their families. The said repression is accompanied – as mentioned earlier – by penal stigmatisation of old-age pensioners, which consists in describing their service in the People's Republic of Poland as involving unlawful activities and as recurring crimes violating fundamental human rights, which is expressed in the preamble of the Act of 23 January 2009 – all this in order to "sustain the inhumane regime".

Therefore, two basic premisses are satisfied here which determine that we deal with punishment in a material sense, and thus a constitutional sense (imposing restrictions and passing moral judgment).

Ostensible legislative action consists here in efforts to recognise punishment in a material sense as "revocation of only unjustly acquired old-age pension privileges".

It has already been mentioned that the right to social security ensues from the continuation of service by a functionary or a professional soldier. This right is an individual

property right which is subject to protection "on an equal basis", which arises from Article 64(2) of the Constitution. The Polish Supreme Court emphasised a long time ago that an old-age pension system and entitlements arising therefrom may not be an instrument of repressive policy carried out by the state. The drastic lowering of benefits received so far, with regard to a specific group of individuals, may not be a concealed form of punishment combined with assigning inadmissible collective responsibility.

In the case at hand, the point is not to revoke "unjustly acquired privileges" since, as it has been proven earlier, old-age pensions from the system for uniformed services are no privileges, and the rules for granting them have always been the same for everyone. The ostensible action conceals the real legislative aim, namely: collective repression of the functionaries of securities authorities of the People's Republic of Poland and the members of the Military Council, by drastically lowering (20 years after the fall of the communist regime) the amount of old-age pensions which they have so far been receiving. Such non-punishment punishment results in bypassing constitutional and code principles of punishment. In this way, the borderline between a crime and a lawful activity becomes blurred. This triggers a cumulative mechanism of possible subsequent instances of departure from constitutional principles, values and rules if repression is labelled as revocation of only unjustly acquired (excessive) privileges.

A citizen may not be punished because of the state authorities he/she worked for, but for his/her actions. The principles of individual responsibility for committed acts apply with regard to the soldiers and functionaries of uniformed services.The negative evaluation of the purposes for which the communist regime used state security authorities may not lead to assigning collective responsibility.

There is no punishment without guilt. There is neither collective guilt nor collective innocence in the Constitution of the Republic of Poland; there is only individual guilt and innocence.

Subjecting certain individuals to *ex lege* repression (by drastically lowering the old-age pensions which they have been receiving so far) means that the legislative power has decided to replace the judiciary, although there is a constitutional requirement of determining guilt and punishment in court. This infringes on both the principle of separation of powers (Article 10 of the Constitution) and the constitutional right to court.

The Act of 23 January 2009, in its preamble, adjudicates on collective guilt and, in its articles, administers punishment. By contrast, in accordance with binding international standards and Article 45(1) of the Constitution of the Republic of Poland, everyone has the

right to a fair and public hearing of his/her case (when his/her rights and obligations are adjudicated upon) before a competent, impartial and independent court. This is among the universal guarantees of legal security of the individual.

Punishment may not be administered - without any procedural guarantees including the right to two instances - for acts committed 20 or more years ago, the criminality of which is not subject to proof.

Lowering *ex lege* the amount of old-age pensions (which have been so far paid out), without individual inquiry proceedings, and passing condemnatory moral judgment with regard to a specific group of citizens means assigning collective responsibility, which is inadmissible in a democratic state ruled by law (cf. Articles 2 and 42 of the Constitution).

It is worth mentioning here when the binding legislation, in accordance with constitutional and code principles of punishment, permits depriving a functionary of uniformed services of the right to an old-age pension which the functionaries of those services are entitled to.

Pursuant to Article 10(1) and (2) of the Act of 18 February 1994 on Old-Age Pensions of Functionaries (...), the said right is not granted to a functionary who was convicted, by a final court judgment, of a crime or a fiscal crime, committed intentionally and prosecuted by indictment, committed in relation to work duties and in order to gain material or personal advantage, or of a crime specified in Article 258 of the Penal Code (participation in an organised group in order to commit a crime), or with regard to whom a penal measure was adjudicated in the form of deprivation of public rights for a crime or a fiscal crime which had been committed before the release from the service. However, in such a case, a person convicted by a final judgment is entitled to a benefit granted according to the rules under the universal old-age pension.

Therefore, the indicated solution leaves no doubt that the Act of 23 January 2009 has assigned inadmissible, out-of-court and collective criminal responsibility to the persons regarded as former political opponents of the current parliamentary majority. Their old-age pensions have been lowered much more drastically than it is at present permissible even with regarded to the functionaries who have been convicted by a final court judgment for committed crimes. The convicted functionaries may be deprived of old-age pensions reserved for uniformed services, by lowering their pensions to the level provided for under the universal old-age pension system. As it is generally known, the Act of 23 January 2009 lowers those benefits of the entitled group below that level (to 0.7% of the basis of assessment, whereas it is 1.3% of the basis of assessment under the universal old-age system).

What also indicates a clearly political character of the Act of 23 January 2009 is its Article 2(3) which has added Article 15b(3) and (4) to the binding Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families. The indicated two paragraphs of Article 15 introduce two standards for the work of the functionaries of the People's Republic of Poland. They stipulate that for the service in state security authorities in the years 1944 -1990, instead of the lowering from 2.6% of the basis of assessment to 0.7% of the basis of assessment, old-age pensions may be calculated normally with the coefficient of 2.6% of the basis of assessment, provided that the functionaries can prove that before 1990, without the knowledge of their superiors, they cooperated with and actively supported persons or organisations acting for the sake of independence of the Polish State. All evidence is admissible here and, in particular, sentences, even if not final, for activities consisting in active cooperation, without informing superiors, with persons or organisations acting for the sake of independence of the Polish State.

VI

The principle of citizens' trust in the state and its laws

The principle of citizens' trust in the state and its laws arises from Article 2 of the Constitution. It implies the continuity of the Polish State and the law related thereto. The preamble of the Act of 23 January 2009 disrupts that continuity, as it describes the People's Republic of Poland as "the inhumane political system", i.e. a criminal formation excluded from our history. The consequences of this were most aptly expressed by the journalist Rafał Ziemkiewicz in *Tygodnik Powszechny*, Issue No. 5 of 31 January 2010 ("Rozsypka" p. 21). Namely, he stated that using the argument of legitimacy with regard to the People's Republic of Poland made no sense, since the People's Republic of Poland as a whole was illegitimate.

This "revolutionary" disruption of continuity of political community (state), and the law enacted by it, has been done in the preamble of the Act of 23 January 2009 in order to administer punishment for even those activities which at the time of being carried out were legal and did not constitute crimes in the light of international law.

The political system, adopted in the People's Republic of Poland (i.e. after the World War II), was not the choice of free will of Polish society (a similar situation was the case in other countries of the so-called Soviet Bloc). That system was imposed by the USSR, incidentally, with the consent of the leaders of Western democracies of that time.

The political system in the People's Republic of Poland was totally different from the present one. In those circumstances, the citizens had to operate and the state had to function, despite all limitations and irregularities in comparison to current constitutional standards of a sovereign democratic state ruled by law. Still, there was no other Polish State. The dissemination in the mass media of the assertion that the People's Republic of Poland was "a legal void", a "black hole" is, to put it mildly, improper.

The introduction of collective responsibility, a few decades later, for actions which were not crimes at that time as well as did not constitute crimes in the light of international law – indicates that the legislator – of a democratic state ruled by law does not distinguish the present tense from the past tense. It is impossible today to order someone to do something, or not to do something, yesterday.

According to opinion polls, Polish society is still divided as regards the evaluation of the People's Republic of Poland (cf. M. Grabowska, *Podział postkomunistyczny. Społeczne podstawy polityki w Polsce po 1989*, Warszawa 2004, p. 14). In the history of humankind, such divisions always ensued from periods of religious reformation, industrial revolution or radical political transformation.

Therefore, it is not important here to cite the results of opinion polls to show whether this division of the public in this respect is clear-cut or not. Indeed, there is no doubt that the People's Republic of Poland was, for almost half a century, our only reality; and no words or symbolic gestures can erase it from the lives of the citizens who then lived, worked, received education and pursued their careers, got married, had children at that time and so on and so forth – all this being part of their unrepeatable existence.

In the well-known Resolution of 16 April 1998 on Legal Continuity between the Second and Third Republic of Poland (M. P. No. 12, item 200), the Senate of the Republic stated that even the invalidity of legal acts of statutory rank which infringe on fundamental rights and freedoms of citizens "needs to be confirmed by statute, and in the case of other normative acts – decisions of competent state authorities are required". Thus, invalidation may not be carried out implicitly, by assuming - in the preamble of a statute - a certain version of history, according to which the People's Republic of Poland is a "black hole" in the Polish history.

The People's Republic of Poland may not be declared illegitimate by means of the expressions such as "the inhumane political system" because of the international agreements and treaties ratified by the People's Republic of Poland which pertain to essential interests of Poland (e.g. its borders), and its participation in international legal relations (e.g. relations with the United Nations), etc. Moreover, the continuity of the Polish State is determined by Article 241(1) of the Constitution of the Republic of Poland. It stipulates that the international agreements ratified by the People's Republic of Poland take precedence over ordinary statutes enacted after 1990.

The continuity of political community and its laws is related to the unity of every person's life. Historical changes and political transformations take place, but no-one chooses their date of birth, and no-one knows how long and in what "interesting times" they will live their lives.

In order to live, one needs to work. The work performed gives one the right – according to the adopted rules of a democratic state ruled by law – to receive means necessary for supporting oneself when, due to one's age, one is no longer capable of working. In the context of the challenged Act, the disruption of continuity of life, for political and ideological reasons, with regard to a specific group of persons, concerns the right to the already acquired and so far received old-age pensions.

The continuity of human life, which is dealt with in labour law and social security law, was, by contrast, fully understood by democratic builders of Polish statehood which had been restored after 123 years of lack of sovereignty. The Second Republic of Poland –which we often proudly refer to - paid out old-age pensions to the functionaries of the states which had been the partitioners of the Polish State (Austria, Russia and Prussia) when those functionaries became Polish citizens after 1918. The periods of service in the partitioners' armies were regarded as periods served in the restored Polish Military! Subordinating human dignity and fate to the political changes is, by contrast, characteristic of totalitarian regimes, and constitutes one of fundamental differences between a democratic transformation (which we have gone through as a result of the "Round Table Talks"), and a revolution. Hence, for instance, a demand of the Red Guards during the Chinese Cultural Revolution of 1966 was to lower old-age pension benefits for "old bourgeois bloodsuckers and tyrants, from the period before the liberation, (...) whose benefits were much higher than the wages of manual workers (...) to the level of the lowest manual workers' wages".

Everyone may have a different opinion on the lives of particular persons. However, voicing one's opinion does not give one a right to victimise "others", due to one's historical

judgment. Punishment may be administered – as it has already been extensively discussed – only in conformity to the principles set out in Articles 42-45 of the Constitution of the Republic of Poland. It is worth quoting here the words of Czesław Miłosz:

*"*You live here, now. Hic et nunc.

You have one life. One single route.

What you manage to do - will remain.

Even though others may otherwise claim."

("W praojcach swoich pogrzebani" quoted after A.Walicki, *Zdanie,* Issue No. 1-2 (2008), p. 71[1]).

The democratically elected majority, exercising legislative power, may create new solutions only within the framework of the present Constitution. But it has no freedom to impose solutions according to its views and judgment, regardless of the fact whether the judgment and views are biased or, on the contrary, whether they are based on a broad and impartial perspective on the historical determinants of given processes and events.

The question arises: how many more legal solutions will be created to settle accounts with the period 1944-1990? It is worth recalling here the Report (Doc. 7568) of 3 June 1996 of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. It was drafted as a result of extensive work on dismantling the heritage of former communist totalitarian systems. It contains guidelines which are to ensure conformity of any dismantling activities to the requirements of a democratic state ruled by law, i.e. a state which respects the principles guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the principles arising from common constitutional traditions. On the basis of the Report (Doc. 7568) of 3 June 1996, the Parliamnetary Assembly of the Council of Europe adopted the aforementioned Resolution 1096 (1996) on measures to dismantle the heritage of former communist totalitarian systems. As mentioned earlier, the Resolution is based on the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by the Republic of Poland, and closely corresponds to Article 6(1) and (2) of the Teaty on European Union, which has been binding for us since Poland's accession to the EU. Pursuant to the Resolution, dismantling activities should be carried out only by means of administrative measures, and they may not be a form of overt or covert punishment. Such administrative measures should not be misused for political purposes. Also, their application should be

[1] The excerpt from the Polish poem by Miłosz was rendered into English by the translator of this dissenting opinion.

limited in time. All activities in this regard, according to the Resolution, should end no later than 31 December 1999; until then, the new democratic system should be consolidated in all former communist totalitarian countries.

Prior to the enactment of the Act of 23 January 2009, it seemed that the problem of old-age pensions of the functionaries of security authorities of the People's Republic of Poland had been solved, within the time limit set in the Resolution 1096 of the Parliamentary Assembly of the Council of Europe, by means of Article 13(2) of the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (the original version of the Act with previous names of those institutions, Journal of Laws - Dz. U. of 1994, No. 53, item 214). The indicated Article stipulates that the rules concerning old-age pensions of the functionaries do not apply to the service in the years 1944-1954 as a functionary of the authorities of state security, public order and public security, if in the course of performing service activities, the functionary committed a crime against the administration of justice or infringed on personal rights of the citizen, and for that reason was given disciplinary dismissal, criminal proceedings were discontinued in his/her case due to a minor or small threat his/her act posed to society, or was convicted of intentional fault by a final court judgment.

After the lapse of another 15 years, the process of settling accounts with the functionaries of security authorities of the People's Republic of Poland returned, as indicated above, in a new statutory regulation, in an even broader and stricter form.

However, the passage of time is of great significance in European culture as regards criminal law (time limitations for prosecution of prohibited acts and for execution of penalty, as well as deletion of penalty in the criminal record), public law, the protection of security of legal relations (the institution of time limitations or the institution of prescription), the protection of acquired property rights (including the rights to old-age pensions payable). Therefore, it follows from the principle of a democratic state ruled by law (Article 2 of the Constitution) that it is necessary to consider the time factor when creating new legal solutions. The manipulation with time may not lead to lowering the standards of protection of specific individual rights.

Hence, it follows from Article 2 of the Constitution of the Republic of Poland that it is not permissible to drastically lower old-age pensions that persons have been receiving so far,

or to revoke benefits granted under the universal health care system, documents certifying education or professional qualifications, in the case of persons who were *ex post* regarded as "historically responsible", for e.g. privatisation that led to corruption, present negligence in health care, economic difficulties which have resulted in lower living standards of many citizens or their unemployment with all its consequences, etc.

In the same way, while settling accounts with the People's Republic of Poland, what may not be overlooked is the passage of time and (insightful and apt) principles which constituted the basis for the Resolution 1096 (1966) of the Parliamentary Assembly of the Council of Europe.

VII

A reform of the old-age pension system.

It has already been indicated that the present Constitution does not allow for a drastic lowering of old-age pensions which are payable, with regard to a specific group of persons, for purely political reasons, as was the case with the Bolshevik institution of "lishenets" (disenfranchised).

A reform of old-age pensions of persons falling within the scope of the Act of 23 January 2009 is possible only within the framework of the entire old-age pension system of uniformed services, with full conformity to constitutional principles concerning the protection of acquired rights.

Although this goes beyond the scope of the case at hand, it is worth pointing out that the basis of protection of acquired rights is constituted by the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution of the Republic of Poland, with regard to property rights (which include old-age pension entitlements) as well as by Article 64(2) of the Constitution. The jurisprudence of the Constitutional Tribunal indicates that introducing restrictions on acquired rights, in each case, requires examining:

a) whether the introduced restrictions on acquired rights are based on constitutional norms or principles (any interference with acquired rights must be constitutionally justified),

b) whether there is a possibility of implementing a given constitutional norm or principle without an infringement of acquired rights,

c) whether constitutional values underlying restrictions on acquired rights may be assigned precedence over the values underlying the principle of protection of acquired rights,

d) whether the legislator took indispensable action in order to ensure citizens have the conditions to adjust to a new regulation.

Any interference with the rights and freedoms of the individual, including the entitlements to social security, must also respect the principle of proportionality specified in Article 31(3) of the Constitution of the Republic of Poland. The lowering of the old-age pensions of former political opponents, in a democratic state, two decades after the beginning of political transformation is neither necessary for the sake of public security or order, nor for the protection of environment, nor the protection of public morality, or rights and freedoms of other persons.

The lowering of old-age pensions is linked with the risk of infringing on dignity of elderly people by seriously deteriorating their living standards (Article 30 of the Constitution of the Republic of Poland).

VIII

The principles of social justice versus the lowering of old-age pensions.

Taking away is easier than giving. However, the mere fact of lowering old-age pensions of some persons – only because others have lower old-age pensions – does not solve the problem of low old-age pensions, poverty or material exclusion, although this may appeal to old-age pensioners-voters who receive low and the lowest social benefits.

The lowering of old-age pensions for the persons falling within the scope of the Act of 23 January 2009, by means of departure – with regard to these persons – from the rules for granting old-age pensions to all uniformed services, will not, however, increase benefits for the persons under the universal old-age pension system. It will only cater to the desire for revenge and retaliation, or will satisfy envy.

Therefore, this has little to do with the principles of social justice, as referred to in Article 2 of the Constitution of the Republic of Poland. The indicated principles refer to the principle of a social state, i.e. a state which is to be protective to all its citizens. The principles of social justice include the protection of economically disadvantaged persons and groups, which is manifested in the existence of relevant social security and social services.

The role of social justice is emphasised by the jurisprudence of the Constitutional Tribunal in the context of interpretation of the principle of equality. The principle of equality should be analysed in conjunction with the principles of social justice so that the

differentiation in the law with regard to specific individuals (singled out from a larger group) would not change into discrimination, which would be inconsistent with Article 32(2) of the Constitution of the Republic of Poland.

Constitutional principles of social security (Article 2 of the Constitution of the Republic of Poland) not only have nothing in common with "revolutionary principles of historical justice", but actually they are in contradiction with them. Indeed, they may not be implemented in isolation from the values and principles of a democratic state ruled by law. This is clearly indicated by the wording of Article 2 of the Constitution of the Republic of Poland.

The legislator is constrained by constitutional principles, values and norms. He may not arbitrarily – only on the basis of adopted political judgment – reduce old-age pension benefits, with regard to a certain group of individuals, overlooking the principle of protection of acquired rights.

Therefore, rational principles of social justice, by no means, may be regarded as tantamount to "revolutionary principles of historical justice", which are based on political and historical judgment.

The "principles of historical justice" predetermine the solution to the problem. Only

This is compeletely different as regards reasoning based on the constitutional order. The starting point here is not a radical political transformation, but recognising the continuity of human life and the continuity of the state and its laws. The legal and institutional continuity, as mentioned earlier on, is of significance for external security of the entire political community as well as for the protection of civil rights and freedoms (and also in the context of redressing the harm caused by the authorities of the Republic of Poland).

Even partial delegitimisation of the People's Republic of Poland may undermine the principle of citizens' trust in the state and its laws, which arises from Article 2 of the Constitution. As mentioned before, this principle constitutes a clip which holds together the entire binding legal order. The strength of a state and the effectiveness of its activity depend on the trust its citizens' place therein. On no account does this hinder prosecuting crimes committed by the functionaries of state authorities during the period of the People's Republic of Poland which have not fallen under the statute of limitations.

The legislator does not have unrestrained power over time. He may not arbitrarily relativise the significance of passage of time in the law and assume that the existence of a certain alignment of political powers - a coalition which is capable of enacting a statute - allows for overlooking various forms of time limitations or the fundamental principle that the

more time has passed since the beginning of political transformation, the more disproportionate various restrictions on rights are, which is justified solely by the transformation started 20 years ago.

x x x

For all the above reasons, I hold the view that the entire challenged Act together with its preamble is inconsistent with the Preamble of the Constitution of the Republic of Poland and with the constitutional higher-level norms for review indicated by the applicants.

Dissenting Opinion

of Judge Teresa Liszcz

to the Judgment of the Constitutional Tribunal

of 24 February 2010, Ref. No. K 6/09

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; hereafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 24 February 2010 in the case K 6/09.

Although I agree with the adjudication (the operative part of the judgment) of the Constitutional Tribunal, at the same time I have reservations as to the way it has been substantiated. However, I wish to emphasise that on no account do I question the truthfulness of the statements or the accuracy of conclusions included therein. My reservations mainly concern:

1) the way the reasoning of the judgment has been presented – in particular, the inclusion of extensive argumentation on settling accounts with the communist regime in Poland and in other European post-communist countries "before proceeding to the examination of constitutionality of the challenged regulations" (part III point 2.3 of the reasoning of the judgment), as if in isolation from the particular allegations made in the application, which creates a misleading impression of certain autonomy and precedence of ideological and political argumentation over strictly legal argumentation in the Tribunal's judgment;

2) the lack of adequate precision in the deliberations on the comparison of lowered old-age pensions under the old-age pension system of uniformed functionaries (and professional soldiers) with old-age pensions under the ("universal") social security system.

There is no doubt that the challenged provisions triggered a significant lowering of old-age pensions from the system for uniformed services, granted to the professional soldiers who used to the members of the Military Council and to the former functionaries of state security authorities who perfomed service in the years 1944-1990 (with the exclusion of those among them who, without the knowledge of their superiors, undertook cooperation and actively supported persons or organisations acting for the sake of the independence of the Polish State). According to the applicant, the said lowering has been introduced arbitrarily,

with a glaring infringement on – *inter alia* – the constitutional principle of protection of justly acquired rights and the constitutional principle of citizens' trust in the state and its laws, and secondly, it does not result in depriving those persons of a privilege, but "downgraded them to a level significantly lower than that of the universal old-age pension system [recalculation coefficient of 0.7], and as such (...) is downright repression".

Alongside those two main allegations, when examining the challenged provisions, the Constitutional Tribunal had to address two simple questions: 1) whether, within the limits of the constitutional principles (the protection of justly acquired rights and of citizens' trust in the state), the lowering of old-age pensions of the aforementioned groups of persons was ("at all") admissible and 2) in the case of an affirmative answer to the first question – whether the lowering of those old-age pensions as a consequence of the entry into force of the challenged provisions only resulted in eliminating the privileged status of those persons and making their old-age pension benefits equal to old-age pensions under the universal old-age pension system, or whether this resulted in considerable lowering below parallel social security benefits, and hence bore the characteristics of "repression".

In its jurisprudence, the Constitutional Tribunal has, on a number of occasions, taken a stance on the principle of protection of justly acquired rights, which prohibits enactment of norms that arbitrarily revoke or restrict the rights of the individual. Undoubtedly, this principle belongs to the most important principles constituting the concept of a state ruled by law, but – like almost all constitutional principles – it does not have an absolute character and it is possible to depart from it, in particular where this is justified by the necessity to protect other constitutional values (than the security of citizens).

Firstly, the Tribunal has drawn attention to the fact that the objects of protection are only rights which have been justly acquired, and not rights which have been unjustly (or even unlawfully) acquired. At the same time, in its previous jurisprudence, the Tribunal has put unjustly acquired rights on a par with the rights that were not based on the assumptions of the constitutional order which was binding at the time of adjudication (cf. e.g. the judgments of the Constitutional Tribunal of: 28 April 1999, Ref. No. K 3/99, OTK ZU No. 4/1999, item 73; 6 July 1999, Ref. No. P 2/99, OTK ZU No. 5/1999, item 103; 15 September 1999, Ref. No. K 11/99, OTK ZU No. 6/1999, item 116; 20 December 1999, Ref. No. K 4/99, OTK ZU No. 7/1999, item 166; 21 December 1999, Ref. No. K 22/99, OTK ZU No. 7/1999, item 166;

17 November 2003, Ref. No. K 32/02, OTK ZU No. 9/A/2003, item 93; 17 October 2005, Ref. No. K 6/04, OTK ZU No. 9/A/2005, item 100; 10 April 2006, Ref. No. SK 30/04, OTK ZU No. 4/A/2006, item 42; the decision of 6 November 2007, Ref. No. P 32/07, OTK ZU No. 10/A/2007, item 131; and also: W. Sokolewicz, the commentary to Article 2 of the Constitution, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, (eds.) L. Garlicki, Warszawa 2007, p. 37).

What is characteristic is the statement of the Tribunal in its full bench judgment of 28 April 1999, (Ref. No. K 3/99), in the case concerning *inter alia* the exclusion of the periods of employment in the communist party and security authorities - from 22 July 1944 until 1 July 1989 - in the total employment period determining the acquisition of a right and the amount of some benefits ("seniority" bonuses and jubilee awards) for the members of the civil service. In the reasoning of that judgment, the Constitutional Tribunal stated *inter alia* that: "Democratic transformations in Poland, of which an important stage was the proclamation of the Republic of Poland as a democratic state ruled by law, which meant a radical, in its content, retreat from the formula of a socialist state. This clearly arises from the Preamble of the Constitution of the Republic of Poland, which mentions the «bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland». The disapproval of totalitarian methods and activities of the communist party and security apparatus became a foundation of the binding statutory regulations concerning the seizure, by the state, of the property of the former Polish United Workers' Party, the dissolution of the Security Service and the verification of its former functionaries, the consequences for judges who during the period of the People's Republic of Poland surrendered their judicial independence, the lustration of persons holding important public offices in the state, finally the establishment of the Institute of National Remembrance. Apart from the fact that the goals and content of those contemporary legal regulations are diverse, their common axiological denominator is undoubtedly the disapproval of those methods and practices".

In the judgment of 14 July 2003 (Ref. No. SK 42/01, OTK ZU No. 6/A/2003, item 63), the Constitutional Tribunal emphasised that "applying Article 2 of the Constitution only with regard to the principle of protection of justly acquired rights, without recognition of the rightness arising from the principle of social justice, would be selective and therefore inadmissible. Justice as a characteristic concerning the challenged provisions requires taking

into consideration the historical circumstances of the Polish nation in the years 1944-1956, when «fundamental freedoms and human rights were violated in our Homeland» (the Preamble of the Constitution of the Republic of Poland). For that reason, stigmatising judges who worked or served in the security apparatus during that period as well as differentiating between them and the other judges – is not arbitrary and corresponds to the principle of equity".

The theses of the mentioned judgments of the Constitutional Tribunal are fully relevant to the case at hand. It is beyond any doubt that the arguments for the acquisition of the right to old-age pensions and the rules for determining the amount of old-age pensions from different old-age pension systems, encompassing professional soldiers and the functionaries of a broadly defined state security apparatus ("social security for uniformed services") are much more advantageous than the premisses for the acquisition of the right and the rules for determining the amount of old-age pensions under "the universal system", i.e. under the old-age social security system (specified in the following statutes: the Act of 13 October 1998 on the Social Security System, Journal of Laws - Dz. U. of 2009 No. 205, item 1585; and of 17 December 1998 on Retirements and Disability Pensions from the Social Insurance Fund; Journal of Laws - Dz. U. of 2009, No 153, item 1227).

In simplified terms, the main differences are as follows:

1) As regards the acquisition of the right to an old-age pension:

a) an old-age pension from the system for uniformed services is acquired regardless of a person's age, after 15 years of service (and periods which are considered equivalent to periods of service);

b) an old-age pension under the universal old-age system is acquired after attaining the pensionable age (65 years for men, and 60 years for women) and – with regard to the insured persons who were born prior to 1 January 1969 – provided that they have over 25 (men) or 20 (women) years of contributory and non-contributory periods taken into account (i.e. mainly the periods of employment or periods of other economic activity).

2) As regards the rules for determining the amount of old-age pensions:

a) under the system for uniformed services, the amount of an old-age pension (acquired after 15 years of service) is equal to 40% of the basis of assessment and increases at least by 2.6% of the basis of assessment for every subsequent year after 15 years of service (or higher than 2.6% in the case of service in special conditions or service involving special

duties); the coefficient of 2.6% also applies to every year of employment (earning a living) prior to the service, within the time limit of 3 years (longer period of "civil" employment increases an old-age pension from the system for uniformed services by 1.3% of the basis of assessment for every year);

b) under the universal system, the amount of an old-age pension (acquired after at least 25 or 20 years of employment or of earning a living in another way) – is equal to the product of the basis of assessment, the number of contributory and non-contributory years and the coefficient of 1.3% (in the case of 25 years of employment, the amount of an old-age pension amounts to: the basis of assessment x 25 x 1.3% = 32.5% of the basis of assessment), whereas the amount of an old-age pension from the system for uniformed services after 25 years of service is equal to at least (40% + 10 x 2.6%) = 66% of the basis of assessment; thus the percentage of the basis of assessment almost doubles (with the basis being higher anyway).

1) As regards the basis of assessment:

a) the basis of assessment of an old-age pension from the system for uniformed services is the amount of remuneration from the last month of service (the last held post), i.e. in the regular course of events – the remuneration which was the highest in the total period of employment;

b) the basis of assessment of a "civil" old-age retirement in the system of a defined benefit (reliable for making comparisons between universal old-age pensions and old-age pensions from the system for uniformed services in the group of old-age pensioners who were born before 1969) is determined based on an average monthly remuneration from the full consecutive 10 calendar years taken from the last 20 years of employment (or from 20 years selected from the total employment period), regardless of the fact whether or not in all months of a given calendar year, the insured person received remuneration or other income.

The existence of separate old-age pension systems for professional soldiers and the functionaries of uniformed services, which are more advantageous than the universal old-age system concerning the other citizens (except for judges and public prosecutors), has not so far been regarded in the jusriprudence of the Constitutional Tribunal as a privilege which infringes on the principle of equality (Article 32 of the Constitution) and the principle of justice (Article 2 of the Constitution), but as a permissible differentiation in entitlements, being objectively and rationally justified by the special character of the service performed by those persons for the protection of security, sovereignty and territorial integrity of the state as well as the protection of the rights and freedoms of citizens, which implies (burdensome)

increased availability and often a direct risk of losing one's life and health (cf. in particular the rulings of the Constitutional Tribunal of: 22 September 1997, Ref. No. K 25/97, OTK ZU No. 3-4/1997, item 35; 12 Febraury 2008, Ref. No. SK 82/06, OTK ZU No. 1/A/2008, item 3 and 19 February 2001, Ref. No. SK 14/00, OTK ZU No. 2/2001, item 31).

However, the assessment of the same special old-age pension privileges, from the point of view of the principles of justice and equality, must be completely different as their beneficiaries are the functionaries of security authorities of the totalitarian state whose main task was not the activity for the sake of security and sovereignty of the state and the security, rights and freedoms of its citizens, but the activity aimed at preserving and strengthening the totalitarian (communist) regime, by applying – with the approval of the communist authorities – methods which even infringed on the binding law of that time, which resulted in widespread infringements of basic rights and freedoms of the individual (see: *Instrukcje pracy operacyjnej aparatu bezpieczeństwa (1945-1989). Materiały pomocnicze Biura Edukacji Publicznej IPN*, Vol. 1, Warszawa 2004). A considerable fragment of the reasoning of the judgment on pages 41-72 has been to a large extent devoted to proving the aptness of such a characteristic and the operational methods of security authorities in the People's Republic of Poland, which is now obvious and even "attached" in the content of the Preamble to the Constitution of the Republic of Poland of 1997.

It is also true that the functionaries of security authorities performed their duties without risking their health or life (but posing a threat to life or health, and personal rights of other citizens) – with the proviso concerning the functionaries of the Security Office who, in the 1940s, eliminated of the armed underground pro-independence troops in order to "preserve the communist regime" (in the application of the group of Deputies of 23 February 200, these activities are described as the protection of "the legal order of legal Poland that exeisted at that time due to the will of the affiliated superpowers, and which was acknowleged by international community").

In the context of such tasks and operational methods of security authorities enumerated in Article 2 of the challenged Act, in particular the highly beneficial old-age pension entitlements of the functionaries of those authorities appear to be – in the light of axiology and standards of a democratic state ruled by law - not as justly acquired rights, but as a collective privilege of the persons who were especially valuable to the totalitarian regime

and who were its beneficiaries. The said privilege was granted to them solely due to the fact that they were the functionaries of the authorities sepecified in a relevant statute, and not due to giving them any real or alleged individual credit. It was granted in the same way to those who resorted to violating human rights as well as to those who, although did not do so, still accepted the activities of those authorities by serving them – indeed voluntarily, and also by supporting those authorities through their work, and receiving remuneration and other social benefits which were higher than they would have received for the same work provided for other entities.

Since this is an unjustified privilege, the special old-age pension entitlements of the functionaries of security authorities of the People's Republic of Poland are not protected, as is the case with justly acquired rights, and hence the Constitutional Tribunal rightly stated that the privileges may be ("collectively") revoked, and rather – as it was done by means of the challenged provisions – were substatially restricted by statute; just as, by statute, they had been granted ("collectively"). Consequently, it is a misunderstanding to allege that the provisions restricting those unjust privileges supposedly introduce "collective responsibility" or "collective repression" towards the former functionaries of security authorities of the People's Republic of Poland.

The absurdity of the thesis about "collective repression" in the form of restricting old-age pension privileges of the functionaries of security service becomes striking when one compares the amount of their old-age pensions, also after the said lowering (as well as disability pensions which are not subject to lowering), with the amount of old-age pensions (or disability pensions) of a large number of persons involved in the activity of "Solidarity" and other opposition activity against the communist regime, often being the victims of persecution from the security service, who retired during the 1980s and 1990s, and for whom the basis of assessment was calculated based on the remuneration from the period which had been the worst for them, when they spent months or years being unemployed or doing the lowest-paid jobs (as a consequence of their activity for the sake of Poland's independence and democracy).

It is also unjustified for the applicant to allege that all the functionaries of security service, both those who violated human rights in relation to their service as well as those who were not charged with that – have been treated the same, and thus unequally and unfairly.

Attention should be drawn to the content of Article 13(2) of the Act of 18 February 1994 on Old-Age Pensions of Functionaries of the Police, the Internal Security Agency, the Foreign Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anticorruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service and the Penitentiary Service as well as Their Families (Journal of Laws - Dz. U. of 2004, No. 8, item 67, as amended) which excludes from the pensionable service of the functionary the period of service in the years 1944-1956 as a functionary of state security authorities, if in the course of performing service activities, the functionary committed a crime against the administration of justice or infringed on personal rights of the citizen, and to Article 10, which deprives the functionaries - who have been charged with an intentional crime in relation to performing service-related tasks - of the right to social security, which has been granted by that Act.

It is a misunderstanding to allege that the functionaries of security authorities who performed service in the years 1944-1989, and that the other employees of those authorities working during that period, on the basis of an employment agreement, have been treated unequally as the challenged provisions lower the old-age pensions for the period of that service only in the case of the functionaries, and leave the old-age pensions of the other employees intact. This allegation is a misunderstanding since only the former functionaries of security authorities were entitled to the privileged old-age pensions from the system for uniformed services, whereas the other employees of those authorities (who were employed on the basis of an employment agreement) receive old-age pensions under the universal social security system (they may be higher than an average old-age pension received by persons who provided the same or similar work for other employers, only the extent to which earnings of the employees of security authorities which determine the amount of the basis of assessment of old-age pensions were higher than the earnings of those other workers).

Since the Constitutional Tribunal - maintaining its well-established jurisprudence as regards the statutes abolishing various privileges which were granted to the functionaries of the communist state in return for the service performed for the state during the times when fundamental freedoms and human rights were violated by the state – deemed it admissible, pursuant to the Constitution of the Republic of Poland, to lower the old-age pensions of the functionaries of state security authorities granted due to the service in the years 1944-1989, the second of the questions posed above remains: whether this restriction introduced by the challenged provisions only results in eliminating the privileged status of those persons and

making their old-age pension benefits equal to old-age pensions under the universal old-age pension system, or whether – as the applicant claims - this downgrades them to a level significantly lower than that of the universal old-age pension system (coefficient of 0.7)".

This part of consideration should be commenced by pointing out that the challenged provisions as well as other provisions enjoy the presumption of constitutionality, and it is the applicant who should present the arguments supporting allegations that may lead to abolishing that presumption and deeming the provisions unconstitutional. In this case, the applicant limited himself to the above-mentioned groundless statement and indicated only the lowered coefficient of the amount of an old-age pension (0.7%) in relation to the coefficient under the universal old-age pension system (1.3%), disregarding all other elements of the mechanism for determining the right to an old-age pension and its amount, which vary in the two systems.

Fulfilling its obligation to examine all relevant circumstances in order to comprehend the case in every respect (Article 19 of the Constitutional Tribunal Act), the Constitutional Tribunal have examined both legal mechanisms, taking into consideration the effects of their application, in order to determine whether the old-age pensions of the functionaries, after the changes made with the challenged provisions, are comparable in respect of "profits" to old-age pensions under the universal system, or whether they are less advantageous. It should be explicitly stated that this comparison is considerably hindered due to the fact that in both mechanisms almost all elements are different, and thus it may not be well-done without considering the practical (financial) effects of application of the two comparable mechanisms, i.e. the amounts of the benefits.

There would be no such difficulties if - in order to make the level of old-age pensions of the functionaries of security authorities of the People's Republic of Poland (the degree of advantage) equal with the old-age pensions under the universal system - a simple and clearcut formula had been used; namely that the functionaries lose their right to old-age pensions from the system for uniformed services on the date specified in the Act, and instead they acquire the right to old-age pensions calculated in accordance with the rules under the universal old-age pension system. It would not have been possible to allege that the provisions of such (hypothetical) content, which are assessed without taking into account the effects of their application, introduced "economic repression". However, applying such a formally correct legal solution would have either led to the situation that many former functionaries of the security service would not have acquired the right to social security (universal) old-age pension (if they had not had 25 or 20-years of the period of service, employment or other way

of earning a living under the social security), or would have acquired the right to old-age pensions in the minimal amount, due to the fact that they would not have the opportunity to prove, in a way which is strictly defined in the provisions concerning proceedings before the authorities of the Social Insurance Institution (ZUS), the amount of remuneration based on a relatively long period of service, which is regarded as the basis of assessment of old-age pension under the universal system.

Consequently, the legislator chose the "money-saving" variant, which consists in leaving the functionaries of security authorities of the People's Republic of Poland with the previous right to old-age pensions from the system for uniformed services, changing only one element i.e. the coefficient of the basis of assessment of the old-age pensions which – in principle – has been lowered from 2.6% to 0.7%. This means lowering, by almost a half, the coefficient regarding the so-called contributory periods under the universal system (i.e. mainly periods of employment or other economic activity), which is 1.3%. Such lowering of the coefficient of the basis of assessment is to balance the other elements of the mechanism for calculating the amount of old-age pensions of the functionaries which are much more beneficial than the relevant elements of the mechanism for calculating old-age pensions under the universal system (an unchanged and much more beneficial basis of assessment; applying, to the old-age pensions subject to lowering – pursuant to Article 15b(2) of the Act on Old-Age Pensions of Functionaries - the provisions of Articles 14 and 15 of the Act, which provide for coefficients of the basis of assessment for some periods of service which are higher than 2.6%, and applying the coefficient of 2.6% for the periods – of maximum 3 years – of ordinary employment preceding service as a functionary; increasing old-age pensions due to service-related disability; more beneficial rules for limiting the amount of old-age pensions due to receiving additional income by old-age pensioners; not to mention additional welfare benefits granted to old-age pensioners from uniformed services). In this context, having the same coefficient of the basis of assessment would obviously still result in a considerably privileged position of the former functionaries of security authorities of the People's Republic of Poland in relation to old-age pensioners of the Social Insurance Institution (ZUS).

Precise evaluation of relations (equivalence) between the mechanism of acquisition and the amount of old-age pensions of the functionaries of security authorities of the People's Republic of Poland, after lowering the coefficient, and such a mechanism under the universal old-age pension system (taking into consideration an identical period of service and employment) would require carrying out complicated simultaneous calculations, which, for

obvious reasons, the Tribunal cannot do. A much simpler and fully legitimate way of indirect examination of equivalence of these mechanisms is to compare the effects of their application. This was the goal of looking at statistics concerning the amount (in various variants) of the former functionaries of security authorities of the People's Republic of Poland by the Tribunal, which were determined anew on the basis of the challenged provisions and the old-age pensions provided by the Social Insurance Institution (ZUS), which does not entail that, due to this, the Constitutional Tribunal ceased to be – as some have claimed – the court of law and became the court of the fact.

Comparing these data does not confirm the allegation that the entry into force of the challenged provisions led to the lowering of old-age pensions of the functionaries below the level of old-age pensions under the universal old-age pension system. On the contrary, the comparison indicates that the lowered old-age pensions of the functionaries still remain generally more beneficial than old-age pensions under the universal old-age system, and this is the case where the period of service of the functionaries was usually much shorter than the period of employment of other employees.