15/2/A/2010

JUDGEMENT

of 24 February 2010

Ref. No. K 6/09*

In the Name of the Republic of Poland

(…)

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

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

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 services 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 Committee 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 based on the rule of 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.

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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.

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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.

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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 Judgements 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.

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(…)

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 Retirements 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 judgement 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

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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.

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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 judgement 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 intergral 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", "the crime 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 acts on old age pensions, 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 judgement 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 “uniformed” old age pensions 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 judgement 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 questioned 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 questioned 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 Agency of Internal Security, the Agency of Intelligence, 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 questioned “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 the 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 judgement.

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 judgement.

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 Agency of Internal Security, the Agency of Intelligence, 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 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 section 2" (Article 13(1)(1) and (1b) of the Act on Old Age Pensions of Functionaries, amended by Article 2 subsection 1 letters 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 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 judgement of 8 July 2002, Ref. No. SK 41/01, OTK ZU No. 4/A/2002, item 51; the judgement of 6 March 2007, Ref. No. SK 54/06, OTK ZU No. 3/A/2007, item 23; the judgement 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 judgement.

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 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 item 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). Item 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" (item 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" (item 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 judgement. 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.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 judgement 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 laid as 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 judgement 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 based on the rule of law – they will be aimed at threats endangering fundamental human rights and the process of democratisation. (…) Eliminating the legacy of totalitarian communist systems, a democratic state based on the rule of law must apply legal-formal means of such a state. It may not apply any other means, since

then it would not be better than the totalitarian regime, which is to be completely eliminated. The democratic state based on the rule of law has at its disposal sufficient means in order to guarantee that justice shall be done, and those responsible shall be punished. However, it may not and should not satisfy the lust for revenge, instead of serving justice. It must instead respect such human rights and fundamental freedoms, as the right to a fair trial, the right to a hearing or the right to defence, and apply them also with regard to persons who themselves did not 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 confidence 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 level 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 judgement, 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 level 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 taker – 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 judgements 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 judgement of 28 April 1999, Ref. No. 1 BvL 11/94, 1 BvL 33/95, 1 BvR 1560/97; cf. also the judgement 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): "Are not counted in the periods of old age pension seniority the following periods of service of functionaries of the SNB: 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 seniority. 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 counted in, beginning from 1 January 1996, to the years of seniority for the sake of the assessment of the old age pension benefit.

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 judgement 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 judgement 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 judgement 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 judgement 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 judgement 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 Commission, to express opinions with regard to state authorities (*ibidem*, p. 209). The Commission 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 the Commission, 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 Regional 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 legislature, and as a consequence realised that, by participating in its sittings and

taking decisions, he exercised an extra-constitutional supreme supervision over the acting of constitutional bodies of the state of 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 hearings 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) a monopolist power of the communist party in every domain of public life including the political subordination 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 from 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 regime to certain milieus; 6) lack of liberty 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, invigilation 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 Agency of Internal Security 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" of functionaries of the dissolved SB, the Council of Ministers enacted on the basis of the Resolution No. 69 the Qualification Commission for Matters of Central Personnel and regional qualification committees. The task of those committees involved "conducting of qualification proceedings and formulating opinions in the case of candidates (…) applying for admission to service in the Office for State Protection, the Police or other 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 concerning the course of service and other presented to the commission (§ 5-6). The commissions 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 on the law,
2) he or she performed his or her service duties in a manner not infringing on rights and dignity of other people,
3) he or she did not use his or her position in the force for extra-service purposes (§ 8 (1)).

Among the former functionaries of the Security Service, the committees gave positive opinion 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 (invigilation 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 security authorities of the People's Republic of Poland. It enabled the legislator to adopt regulations, which would have the goal of levelling 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 pension 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 Agency of Internal Security, 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 on that reason has been disciplinarily dismissed, the criminal proceedings were discontinued with regard to him due to the minimal or inconsiderable degree of social danger of the deed or has been condemned out of intentional fault with a final court judgement (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, which committed acts called at that time "applying impermissible methods in the investigation", will not 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 such functionary had been condemned. It should also be noted that in the legislative proceedings in 1994 on the adoption of the Act on Old Age Pensions of Functionaries, MPs 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 uniform 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 of acquisition of the right to an old age pension in the "uniformed" social security system 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 seniority of an old age pensioner entitled to an old age pension from the "uniformed" system of social security 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 those insurances. Those periods counted for the old age pension seniority, 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 to the old age pension seniority after their recalculation to a period of employment on a full-time basis. For every year of periods counted for the old age pension seniority 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. 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 uniformed systems, 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 old age pension seniority results in a 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 seniority of at least 30 years of work 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 work seniority, 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 uniformed old age pensioners 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 item 8 of this part of the reasoning of the judgement 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 judgement of 19 February 2001, Ref. No. SK 14/00, OTK ZU No. 2/A/2001, item 31, and in the judgement 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 judgement 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 old age pension seniority (…). 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 «uniformed» system – including persons whose service did not run in an irreproachable way, in particular 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 hearings 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 work seniority, 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 service seniority 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 seniority, 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 judgement 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 judgement 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. judgement of 7 February 2006, Ref. No. SK 45/04, OTK ZU No. 2/A/2006, item 15.3).

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) a sphere 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 the confidence of the individual in the state, the principle of protection of acquired rights and the requirement of maintaining an adequate *vacatio legis* (cf. the judgement 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 Article 31(3) second sentence of the Constitution, according to which limitations of the use 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. For 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 judgement of 4 December 2000, Ref. No. K 9/00, OTK ZU No. 8/2000, item 294; Ref. No. SK 45/04, item 3; the judgement 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 guidelines to this document, supposed to ensure a conformity of lustration statutes and similar administrative means with the requirements of a state based on the rule of law, recommending termination of settling accounts with the communist period within 10 years from the overthrowing of communist dictatorship.

The Constitutional Tribunal states that the lowering of old age pension benefits of the members of the Military Council and of functionaries of 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, which 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 shall remain legally indifferent. This does not mean, however, discretion over enacting and applying law with regard to members of the Military Council and functionaries of security authorities of the People's Republic of Poland. Enforcing criminal responsibility, not having been borne during the regime, as well as other sanctions towards those persons provided on the basis of 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, however not without significance, may not be a decisive criterion of assessment of constitutionality of the settling accounts regulations adopted by the legislator. 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 a settling of accounts with the past of the communist rule. 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 the free Poland. The limitations of the legislator are imposed by principles of a democratic state ruled by law. The fact how much time elapsed since the collapse of the communist regime until the adoption of a given statute depends on the existence in a given parliamentary term of office of a configuration of power capable to enact it. Thus, as shows the example of Poland, of other countries of our region of Europe and certain countries of South America, many years may elapse since the reestablishment or establishment of democracy, until a statute regulating a certain aspect of responsibility for systemic abuses of power shall be enacted.

The Constitutional Tribunal observes *en marge* that neither the Resolution 1096 nor the guidelines to it were a basis of findings of the ECHR in any case, even when it was raised 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 provisions of the Act of 23 January 2009 remain in a "flagrant contradiction" with the Resolution 1096 and with guidelines to this document supposed to ensure conformity of lustration statutes and similar administrative means with the requirements of a state based on the rule of 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. The Constitutional Tribunal observed above, according 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 members of the Military Council and of functionaries 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 in the right to social security, the Constitutional Tribunal determined that the legislator lowered the way of calculating the basis of assessment of old age pensions of members of the Military Council as well as functionaries of security authorities of the People's Republic of Poland, who remained in service before the day of 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 determined 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 and pecuniary supplements and benefits determined in Article 25 and Article 26 of respectively the Act on Old Age Pensions of Professional Soldiers and the Act on Old Age Pensions of Functionaries,

8) benefits and rights determined in Articles (27) to (31) of respectively the Act on Old Age Pensions of Professional Soldiers and the Act on Old Age Pensions of Functionaries,

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, having as a result 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 particularly threatening 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 old age pension seniority 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 counted in to the old age pension seniority. According to this article e.g.:

"The following periods falling after the discharge from service, with the reservation of paragraph 2, are counted in to the old age pension seniority 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 those insurances.

2. The periods, as referred to in paragraph 1, are counted in to the old age pension seniority, 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 counted in to the old age pension seniority after their recalculation to a period of employment on a full working time basis.

4. For every year of the periods, as referred to in paragraph 1, counted in to the old age pension seniority 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 the old age pension to members of the Military Council, did not introduce a prohibition, such as in the case of functionaries of state security authorities serving in the years 1944-1990, of their respective application. On the basis of adopted rules of interpretation, the principles of counting in certain periods falling after the discharge from service to the old age pension seniority 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 in the calculation of old age pensions of members of the Military Council.

8.6. The allegation expressed by the applicants during hearings on 24 February 2010 that the Tribunal has changed its settled standpoint, according to which a Constitutional Court is a court of the law and not a court of the fact, is inaccurate.

The Constitutional Tribunal is a court of the law. In the examined case the object of challenge is a norm concerning pecuniary benefits. The manner of determination in the statute 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 pass over the property results of the questioned 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 (letter of 23 September 2009, Ref. No. 3062/DSS, letter of 20 October 2009, Ref. No. 3344/DSS, letter of 24 February 2010, Ref. No. 579/DSS) and also from the Director of the ZER MSWiA (letters of 30 September 2009 and of 9 October 2009, Ref. No. ZER-WOK-052/1847/09; letter of 27 October 2009, Ref. No. ZER-WOK-052/2032/09, letter of 5 February 2010, Ref. No. ZER-AM-0602/246/10, 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 a 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 (letter of 2 November 2009, Ref. No. 992600/070/90/2009/NS, 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. 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 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 in 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 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 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. It results *inter alia* from the fact that persons who had the amount of their old age pensions reassessed had a long service seniority, which enabled to take into account periods which previously had not been taken into account, which underlie a counting in to the old age pension seniority, 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, allowances, may not exceed 75% of the basis of assessment, and in 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 a part of benefit takers 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, this is to PLN 675.10. In general the ZER MSWiA issued 38563 decisions on reassessment of the amount of old age benefits to functionaries of security authorities of the People's Republic of Poland (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 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, shall have old age pensions slightly lower than those functionaries, who joined service in the middle of 1990. The goal of the legislator following the principle of social justice was to lower old age pensions to functionaries of security authorities of the People's Republic of Poland to the average level in the universal social insurance system. An instrument to achieve this goal was a lowering of the basis of assessment of old age police pensions from 2.6% to 0.7% to 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 effect 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 in the universal system of social insurance. Such a lowering of the amount of old age pension benefits signifies limits, and not abolishes, a structurally excessive, unjustly acquired high benefits of 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.

Old age pensions of members of the Military Council both before the change, 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 in the universal social insurance system, and the more than the minimum old age pension. It is obvious however, taking into account that they concern almost without exception professional soldiers of the Armed Forces of the People's Republic of Poland 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, it fits however within the margin 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 took them away old age pension rights or lowered them to an amount below the social minimum. By lowering old age benefits to the indicated groups, the legislator at the same time not only guaranteed that the old age pension benefit may not be lower than the amount of the lowest old age pension from 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 to on the basis of the new provisions remains still significantly higher than the average old age pension paid within the universal social insurance system.

8.10. In addition, the Tribunal states that the legislator – disposing of an adequate margin of freedom of estimation, whether and to what extent a relevant difference in a somewhat similar situation merits a different treatment – pursued attaining a just goal and preserved a rational proportion between the applied tool 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, ordaining 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 judgement 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 to self-reliant functioning 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, having as a goal the humiliation of a human being.

9.2. The challenged provisions are not supposed 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 item 7 of this part of the reasoning of this judgement, stem from a privileged system of social security. As the Constitutional Tribunal has already established above (item 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 state of things the legislator still, also under the rule of the challenged provisions, provides retired functionaries of security authorities of the People's Republic of Poland an adequate, justified and just social security for the period of their service before 1990. This argument applies to the same extent to members of the illegal Military Council.

Concluding, 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 menaced 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 just old age security of 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 substantiation, deprive of old age benefits 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 reemployed, 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 of the principle of social justice, the applicant stated that the challenged provisions constituted a form of unsubstantiated and unjustified repression with regard to verified, and subsequently employed functionaries of state security authorities, since they drastically lowered the basis of assessment of old age pension for 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 done any work. The legislator did not equalise former functionaries 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 have kept up appearances of a "withdrawal of privileges", but pushes them to a position decisively below the universal system of social insurance, which constitutes an apparent repression.

10.1. The matter of protection of confidence of the citizen in the state and in the law enacted by the state. According to well-established case-law of the Constitutional Tribunal the principle of protection of confidence of an individual in the state and in the law enacted by the state, 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 CT of 24 May 1994, Ref. No. K 1/94, OTK of 1994, part I, item 10 and judgement of 2 June 1999, Ref. No. K 34/98, OTK ZU No. 5/1999, item 94). The Constitutional Tribunal attracted attention in its jurisprudence that while appraising the conformity of normative acts with the analysed principle, "It should be established, to what extent are justified the expectations of the individual that he or she will not face legal consequences, which he or she could not foresee at the moment of taking the decision. The individual must always count with 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 covers also the risk of disadvantageous changes of the legal system. The time horizon of actions taken by the individual in a given sphere of life is also of essential significance. The longer – in a given sphere of life – the time perspective of taken actions, the stronger should be the protection of citizens' trust in the state and its laws (Judgement 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 created UOP of 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 the ensuring 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 questioned 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 rationally 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 exactly 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. It follows from the principle of protection of the confidence of the individual in the state and in the law enacted by the state 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 occurring 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 expectances of these rights, so legal situations, in which all principal statutory premises of 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, if other constitutional principles, norms or values advocate it.

The appraisal of relevance of 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 judgement (cf. e.g. the decision of 11 February 1992, Ref. No. K 14/91, OTK of 1992, part I; the judgement of 23 November 1998, Ref. No. SK 7/98, OTK ZU No. 7/1997, item 114; the judgement of 22 June 1999, Ref. No. K 5/99, OTK ZU No. 5/1999, item 100; the judgement of 20 December 1999, Ref. No. K 4/99, OTK ZU No. 7/2000, item 165 and the judgement 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 with the principle of protection of acquired rights the applicant has raised the issue that the legislator arbitrarily deprived the members of the Military Council and positively verified and reemployed 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 binding constitutional order.

Rendering decision 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 of a certain group of citizens, is prohibited form the legislative point of view. Considering in every case the introduction of such an amendment it should be pondered, whether e.g. a situation has not taken place, where regulating differently the previous rights does not lead to solutions more accurate and better suiting the assumptions of the Constitution from the viewpoint of the rights of the citizens. The Constitutional Tribunal has no reasons to claim that the legislator may not negatively appraise legislative solutions made beforehand. Additionally one may be in a situation, where facing a choice between different goods the legislator will opt for the one he considered more precious. 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 appraisal of the accuracy of this choice from the viewpoint of conformity with the Constitution".

Enacting the challenged provisions the legislator gave expression of a negative appraisal of the activity of the Military Council and security authorities of the communist

state, on which testifies the course of the legislative works and 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 excluding tolerating and rewarding lawlessness". The axiological foundations of such an appraisal, what 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 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 perpetrators of state crimes are also deprived of such guarantees. It would be the more groundless to expect a prohibition of drawing negative legal consequences, including other than criminal law-related by a democratic state ruled by law with regard to 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 within the legislator's hands and is subject to appraisal 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 flow from the assumption that the choice and realisation by the state of goals even 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 deeds stemming from a realisation of badly chosen goals and from the non-realisation of goals chosen well (*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 guaranteed, equal rights with those appointed to those services for the first time from the middle of 1990 on including equal rights to benefit from privileged principles of old age pension security. The legislator has negatively assessed the fact alone of commencing service in security authorities of the People's Republic of Poland – due to the unequivocally negative appraisal of these authorities. At the same time in case of granting help by the functionary during service in such a police to a person repressed for acting in democratic and independence opposition 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 subsection 3 of the Act of 23 January 2009).

10.5. It is not within the competences of the Constitutional Tribunal to decide on the accuracy and purposefulness of legal solutions adopted by the legislator. The Constitutional Tribunal recognises the liberty 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 liberty of this choice are however determined by constitutional principles and provisions. The Constitutional Tribunal may enquire, whether by 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 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 final account finance them by paying taxes, which is hard in practice. It should also not be forgotten that the redistribution of the national

income with the means of the budget entails certain costs of a general social nature. 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 an unjustified and unjust repression with regard to verified and subsequently employed functionaries of these authorities. The legislator did not equalise former functionaries with other subjects, using the universal social insurance system, for which the recalculation coefficient of 1.3% is applied, what could have kept up appearances of a "withdrawal of privileges", but pushes them to a position decisively below the universal system of social insurance.

Examining these allegations, the Constitutional Tribunal recalls *en marge* 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 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 taken alone the criterion of excluding from the group of persons entitled to special rights of those who collaborated with the repression apparatus set for combating independence movements should be considered as accurate and not infringing on the principle of justice".

The allegation of pushing 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 proved it already above in items 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 would seem to be a form of "withdrawal of privileges". However, the recalculation coefficient of 0.7%, adopted in the challenged provisions, pushes 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 fact alone 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 item 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 allowances, 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 appraisal of the role of state security authorities in the history of Poland in the years 1944-1990 and such an appraisal of the joining service of retired functionaries linked with it and an identical appraisal of the illegal Military Council and the appraisal 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 appraisal – take a decision on the lowering, in the adopted period, of old age pension benefits of such defined groups of functionaries and soldiers. 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 members of the illegal Military Council.

10.7. Concluding, the privileged old age pension rights acquired by addressees of the challenged provisions have been acquired unjustly. For the goals and methods of acting 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 to preserve privileges acquired before the fall of the regime.

A way of rewarding 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 benefit. 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 appraisals 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 for the reaching of a justified goal; he achieved this at the same time in a way possibly least onerous for the addressees of the questioned 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 aiming at bringing closer to them the much higher, acquired in an unfair way privileged old age pensions paid to addressees of the challenged provisions for the period of service in security authorities of the People's Republic of Poland or from the constitution 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 confidence of the citizen in the state and in the law enacted by the state, 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 appraisal 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, independently from whether they have been positively assessed in the qualification proceedings, or whether they did not undergo these proceedings or were assessed negatively, also those, who retired before the year of 1990 and after 1990.

The applicant accords without a doubt particular gravity 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 Committee. 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*:

"It is particularly essential that (…) in the light of the recognising by verification committees functioning in 1990 that a part 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 functionaries positively verified, with regard to whom one may absolutely not speak about a clash of clauses 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). An 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 questioned 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 in categories of the certification of usefulness for service in 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 extended on 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 item 6.5. of the reasoning, stresses once more that the aim of the qualification proceedings was not to issue certificates of morality to functionaries of the SB, but the creation of a new security police, which is not the object of review in this case.

11.3. According to established case-law of the Constitutional Tribunal – it follows from the principle of equality, enshrined in Article 32(1) of the Constitution 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, so 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 fact alone of a voluntary joining the SB – the secret political police of the People's Republic of Poland.

The legislator, having adopted a common relevant feature, has treated functionaries of security authorities of the People's Republic of Poland in an equal way. The legislator has foreseen an exception only for those functionaries, who will prove that before the year 1990, without the knowledge of the 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 already mentioned 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, to what the Prosecutor General accurately attracted attention, with 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 security authorities of the People's Republic of Poland, or not.

Concluding, 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 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 member of the Military Council. Professional soldiers, who have 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 item 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 case of a threat for 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 members of the Military Council as a consequence of the appointment, acting and influence of this Council on the fate of Poland since 12 December 1981, the Tribunal states that the legislator arbitrarily established that he may lower old age pension benefits of its members before the "constitution" of the Military Council. Until the appearance 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 by such a significant feature.

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 principles from before the Act of 23 January 2009 coming into force, 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 the day of 8 May 1945 until the day of 11 December 1981 does not conform to Article 32 of the Constitution. For the criterion of differentiation of the members of the Military Council with the other professional soldiers adopted in this regard does not remain in a rational link with the goal and content of the questioned 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 has not yet reached 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 judgement 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 lowering 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 settles whether a given norm is general or individual. We deal with a general norm when this designation results 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. 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 CT: procedural decision of 6 December 1994, Ref. No. U 5/94, OTK ZU of 1994, part II, item 41; decision of 15 July 1996, Ref. No. U 3/96, OTK ZU No. 4/1996, item 31; procedural decision of 14 December 1999, Ref. No. U 7/99, OTK ZU No. 7/1999, item 170; the judgement 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 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 content of these provisions on all proceedings, in which are applied any means providing for the addressee of the judicial decision any sanctions and distress. 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 questioned. Thus the Tribunal in its previous case-law has provided – within the scope of application of the principle of presumption of innocence – only certain derogations for the sake of proceedings, having as a goal and function applying repression (e.g. in disciplinary proceedings) and only through a respective (and not direct) application of Article 42.3" (judgement 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; they 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 in 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 judgement.