81/8/A/2010

JUDGEMENT
of 27 October 2010
Ref. No. K 10/08*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

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

Grażyna Szałygo – Recording Clerk,

having considered, at the hearings on 30 June and 27 October 2010, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the Polish Ombudsman (hereinafter: the Ombudsman) to determine the conformity of:

Article 80(2b), first sentence, of the Act of 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended):

a) to the extent to which the term "an obviously groundless motion for permission to call a judge to criminal responsibility" includes a motion for permission to call a judge to criminal responsibility with regard to a judge who - while adjudicating on criminal cases at the time when the Constitution of the People's Republic of Poland of 22 July 1952 was in force (Journal of Laws - Dz. U. No. 33, item 232, as amended) - applied retroactive criminal provisions, being statutory provisions, to Article 7, Article 10 and Article 42(1) of the present Constitution of 1997, and to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284), as well as to Article 15 of the International Covenant on Civil and Political Rights (Journal of Laws - Dz. U. of 1977 No. 38, item 167),

b) understood in such a way that the obvious groundlessness of a motion for permission to call a judge to criminal responsibility encompasses issues

*The operative part of the judgement was published on 3 November 2010 in the Journal of Laws - Dz. U. No. 205, item 1364.

which require the substantial interpretation of the Act, to the principle of specificity of legal provisions, which arises from Article 2 of the present Constitution of the Republic of Poland,

adjudicates:

Article 80(2b), first sentence, the Act of 27 July 2001 – the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070 and No. 154, item 1787, of 2002 No. 153, item 1271, No. 213, item 1802 and No. 240, item 2052, of 2003 No. 188, item 1838 and No. 228, item 2256, of 2004 No. 34, item 304, No. 130, item 1376, No. 185, item 1907 and No. 273, item 2702 and 2703, of 2005 No. 13, item 98, No. 131, item 1102, No. 167, item 1398, No. 169, item 1410, 1413 and 1417, No. 178, item 1479 and No. 249, item 2104, of 2006 No. 144, item 1044 and No. 218, item 1592, of 2007 No. 25, item 162, No. 64, item 433, No. 73, item 484, No. 99, item 664, No. 112, item 766, No. 136, item 959, No. 138, item 976, No. 204, item 1482 and No. 230, item 1698, of 2008 No. 223, item 1457, No. 228, item 1507 and No. 234, item 1571, as well as of 2009 r. No. 1, item 4, No. 9, item 57, No. 26, item 156 and 157, No. 56, item 459, No. 157, item 1241, No. 178, item 1375, No. 219, item 1706 and No. 223, item 1777), **understood in such a way that "the obvious groundlessness of a motion for permission to call a judge to criminal responsibility" also encompasses an issue which requires the substantial interpretation of the Act:**

a) is inconsistent with Article 2 of the Constitution of the Republic of Poland,

b) is not inconsistent with Article 7, Article 10 and Article 42(1) of the Constitution, as well as with Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, subsequently amended by the Protocols No. 3, 5 and 8 as well as supplemented by the Protocol No. 2 (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended), **and with Article 15 of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966** (Journal of Laws - Dz. U. of 1977 No. 38, item 167).

STATEMENT OF REASONS

I

1. On 6 May 2008, the Ombudsman submitted an application to the Tribunal for it to determine the non-conformity of Article 80(2b), first sentence, of the Act 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended; hereinafter: the Law on the Organisation of Common Courts), to the extent to which the term "an obviously groundless motion for permission to call a judge to criminal responsibility" includes a motion for permission to call a judge to criminal responsibility with regard to a judge who - while adjudicating on criminal cases at the time when the Constitution of the People's Republic of Poland, dated 22 July 1952, was in force (Journal of Laws - Dz. U. No. 33, item 232, as amended) - applied retroactive criminal provisions, being statutory provisions, to Article 7 and Article 42(1) of the present Constitution (hereinafter: the Constitution), to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284; hereinafter: the European Convention on Human Rights), as well as to Article 15 of the International Covenant on Civil and Political Rights (Journal of Laws - Dz. U. of 1977 No. 38, item 167; hereinafter: the ICCPR).

Substantiating his application, the Ombudsman presented the following arguments:

In accordance with the well-established line of jurisprudence of the Constitutional Tribunal, when examining the constitutionality of a provision, one should take into account not only its literal content, but also the interpretation thereof which has been adopted in the process of applying the law, and in particular adopted in the jurisprudence. In the light of the above, Article 80(2b), first sentence, of the Law on the Organisation of Common Courts should be subject to constitutional review, to the extent the term "an obviously groundless motion for permission to call a judge to criminal responsibility" is assigned content by the Resolution of the Polish Supreme Court of 20 December 2007 (Ref. No. I KZP 37/07, OSNKW No. 12/2007, item 86). Such an interpretation of the challenged provision eliminates the possibility of calling judges to criminal responsibility, as regards the judges who convicted the organisers of the strikes and protests against the imposition of martial law in 1981, applying the retroactive provisions of the Decree of the Council of the State on the Imposition of Martial Law, dated 12 December 1981, (Journal of Laws - Dz. U. No. 29, item 154; hereinafter: the Decree on the Imposition of Martial Law).

The principle of *lex retro non agit*, with regard to criminal law, is among the fundamental standards of a democratic state ruled by law. The principle of *nullum crimen, nulla poena sine lege* – the prohibition on retroactivity in criminal law – is explicitly expressed in Article 42(1) of the Constitution, and also repeated in Article 1(1) of the Polish Penal Code. The above principle is also stated, *inter alia*, in Article 15 of the ICCPR and Article 7 of the European Convention on Human Rights. This principle has been recognised for centuries and is commonly applied in civilised societies.

The principle of *nullum crimen, nulla poena sine lege* was not explicitly expressed in the Constitution of the People's Republic of Poland of 1952. During the period of the People's Republic of Poland, the principle was binding on the basis of Article 1 of the Penal Code of 1969, pursuant to which: "Penal liability shall be incurred only by a person who commits a socially dangerous act which is prohibited by a statute in force at the time of its commission". The above principle was also binding after the ratification of the International Covenant on Civil and Political Rights (Article 15) in 11977 (3 March 1977) by the People's Republic of Poland.

Likewise, since the establishment of the Constitutional Tribunal, the line of its jurisprudence has been consistent with regard to the meaning and proper understanding of the principle of *lex retro non agit* in the Polish legal order.

In the judgement of the Constitutional Tribunal of 28 May 1986 (Ref. No. U 1/86), it is stated that: "Although the principle of non-retroactivity of law has not been expressed in the Constitution of the People's Republic of Poland, it does constitute a fundamental principle of the legal order. It is supported by such values as legal security, reliability of legal transactions and respect for acquired rights" (OTK of 1986, item 2).

The principle of *nullum crimen, nulla poena sine lege*, expressed in Article 42(1) of the Constitution, as well as in international law, does not have an absolute character. Article 42(1) of the Constitution provides for punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law. Likewise, exceptions to the prohibition on retroactivity are admissible pursuant to Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR. Therefore, it is admissible to introduce retroactive penalising of acts which, at the time of their commission, were not prohibited and penalised under a statute in force, provided that such an act constituted an offence within the meaning of international law.

In the opinion of the Ombudsman, it should be emphasised, that in the context of international law, it is inadmissible to depart from the principle of *lex retro non agit* even

"in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" (Article 4(1) of the ICCPR). It may be admissible to limit the application of the principle of *lex retro non agit* only in unusual and extraordinary situations, as well as where this is justified by serious reasons, such as *inter alia* settling accounts with the totalitarian past.

Article 61 of the Decree on the Imposition of Martial Law stipulated that the Decree shall enter into force on the day of its promulgation, but shall be binding from the day it was passed. The retroactivity of the Decree stemmed not only from the adoption of the above principle, but also from the fact that there was a considerable delay in publication of the Journal of Laws of 14 December 1981. The Journal of Laws was printed as late as on 17-18 December, and was sent to its subscribers no earlier than on 19-23 December 1981. In that state of affairs, it needs to be assumed that the persons who, on 13 December 1981, organised protests against the imposition of martial law were not aware of unlawfulness of their actions. Moreover, in its Resolution of 1 February 1992 on recognising the decision to impose martial law as illegal and on appointing an Extraordinary Commission, the Sejm of the Republic of Poland stated unambiguously that the decision on the imposition of martial law on 13 December 1981 was illegal (M.P. No. 5, item 23).

When sentencing persons involved in organising protests on 13 December 1981, courts infringed on the principle of *lex retro non agit* and the principle of *nullum crimen, nulla poena sine lege.* The above jurisprudence of courts which involved applying retroactive provisions of the Decree on the Imposition of Martial Law infringed on civil rights and freedoms. During that period, in numerous instances, the judges did not remain independent and made the penalties adjudged by the courts of lower instances more severe, in accordance with the guidelines of political authorities.

In the light of the above, a motion for permission to call a judge to criminal responsibility, in the case of a judge who adjudicated on the basis of the Decree on the Imposition of Martial Law, may not be regarded as obviously groundless. The formal immunity of a judge may not be regarded as a "licence" for breaching the law by the members of the judiciary.

The aforementioned Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, clashes with the so-called rehabilitation jurisprudence of the Supreme Court. What is meant here is a considerable number of judgements, since 1990, in which the Supreme Court has changed the previous judgements sentencing for the acts committed on 13 December 1981, which had been delivered on the basis of the Decree on the Imposition of Martial Law, and acquitted the accused. In the reasoning of the above-mentioned rehabilitation rulings, the Supreme Court relied on the facts that the principle of *nullum crimen sine lege poenali anteriori*, as expressed in Article 1 of the Penal Code of 1969, had been binding and so had the principle of *nullum crimen sine lege*, by virtue of ratification of the ICCPR in 1977 by the People's Republic of Poland. (see e.g. the judgements of: 27 September 1990, Ref. No. V KRN 109/90, OSNKW No. 4-6/1991, item 29; 17 October 1991, Ref. No. II KRN 274/91, OSNKW No. 3-4/1992, item 19; 24 October 1991, Ref. No. II KRN 273/91, Lex No. 22068; 21 January 1992, Ref. No. WO 135/91, OSNKW No. 9-10/1992, item 71; 1 February 2007, Ref. No. III KK 469/06, OSNwSK No. 1/2007, item 342).

The above historical and legal analysis of the principle of *lex retro non agit*, has inclined the Ombudsman to conclude that the interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts - to the extent to which the term "an obviously groundless motion for permission to call a judge to criminal responsibility" includes a motion for permission to call a judge to criminal responsibility

with regard to a judge who, while adjudicating on criminal cases at the time when the Constitution of the People's Republic of Poland of 22 July 1952 was in force (Journal of Laws - Dz. U. No. 33, item 232, as amended), applied retroactive criminal provisions, being statutory provisions - is inconsistent with the principle of *lex retro non agit* as well as with the views on the place of that principle in the Polish legal order and the views on the application of retroactive norms at the time when the Constitution of the People's Republic of Poland of 1952 was in force, which have been presented in the said application. Thus, the challenged provision – within the meaning prescribed by the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07 – is inconsistent with Article 7 and Article 42(1) of the Constitution as well as with Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR.

2. In a letter of 23 February 2009, the Marshal of the Sejm took a stance in the case, requesting the Tribunal to determine that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, within the scope indicated in the Ombudsman's application, was consistent with Article 7 and Article 42(1) of the Constitution, as well as with Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR.

Substantiating his stance, the Marshal of the Sejm put forward the following arguments:

It does not follow from the Ombudsman's application how exactly Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, also within the meaning assigned to it by the Ombudsman, is inconsistent with Article 7 and Article 42(1) of the Constitution. The Ombudsman has limited himself only to presenting the views of the doctrine on the indicated provisions of the Constitution. In this situation, it may be assumed that the object of the Ombudsman's application is the allegation of defective legal interpretation by the Supreme Court in the Court's Resolution of 20 December 2007, Ref. No. I KZP 37/07, as the Ombudsman has argued that the Court erroneously interpreted the law which was in force during the period of martial law. An allegation formulated this way may not be the object of review by the Constitutional Tribunal, as it concerns the non-conformity of a particular ruling of the Supreme Court to the law. The object of proceedings before the Tribunal may only be a normative act. However, it should be stressed that the Ombudsman does not regard the Resolution of 20 December 2007 as a normative act, since in his argumentation he challenges a specific provision of the Act, and not the Resolution itself. That allegation may not be analysed with regard to its conformity to Article 42(1) of the Constitution, as that provision of the Constitution was not binding during the period which is the object of the interpretation by the Supreme Court.

Regardless of the above, the Ombudsman has erroneously assumed that the indicated Resolution of the Supreme Court concerned Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. The Supreme Court has chosen the time-frame when the legal regulations of the Decree on the Imposition of Martial Law were binding to be the object of the Resolution. That Resolution may be of significance for assessing the unlawfulness of the actions of the judges who applied the Decree on the Imposition of Martial Law, by rendering it impossible to make an allegation that the offence of abuse of power was committed (Article 231 of the Penal Code). This rules out the possibility of lodging a motion to revoke a judge's immunity in order to call him/her to criminal responsibility – due to the non-fulfilment of the basic premisses of such a motion. In this regard, it is an "obviously groundless" motion.

The Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, does not contain an interpretation of the criteria which are included in the clause of

"obvious groundlessness" contained in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. The premiss of obvious groundlessness will always be fulfilled by a prosecutor's motion to revoke immunity as regards acts which do not bear the characteristics of an offence. The said Resolution has not changed, within that scope, the interpretation of Article 80(2b), first sentence, of the Laws on the Organisation of Common Court.

Even if it is assumed that the legal norm indicated in the *petitum* of the Ombudsman's application may be the object of review by the Tribunal, then the content of that norm still remains without relation to the content of Article 7 and Article 42(1) of the Constitution.

Article 7 of the Constitution stipulates that the organs of public authority shall function on the basis of, and within the limits of, the law. The consequence of assuming the interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, by the Ombudsman, as assumed in the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, is a legal regulation which constitutes the basis for the activty of organs of public authority, and in particular disciplinary courts. Therefore, by applying that interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, disciplinary courts would act on the basis of, and within the limits of, the law. Hence, the allegation that this provision infringes on Article 7 of the Constitution is inapt.

The legal impediment which consists in regarding, as obviously groundless, the motion to revoke the immunity of a judge who retroactively applied the provisions of the Decree on the Imposition of Martial Law, in order to call him/her to criminal responsibility - and thus rules out the possibility of punishing the judge - may not constitute an infringement of Article 42(1) of the Constitution. The said provision solely concerns the legal regulations which introduce or extend the scope of penalisation, but it does not rule out the possibility of introducing a norm that would exclude criminal responsibility for a specific category of acts.

3. In a letter of 16 March 2009, the Public Prosecutor-General requested the Tribunal to determine that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts was consistent with Article 7 of the Constitution, and was not inconsistent with Article 42(1) of the Constitution, Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR.

In the opinion of the Prosecutor, when requesting the constitutional review of a specific provision of the Law on the Organisation of Common Courts, the applicant himself does not argue for normativity of the criticised Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07. In that case, it is not possible to review the legitimacy of the solutions provided for in the Resolution. However, it should be considered whether the Supreme Court, by adopting the Resolution and granting it the power of a legal principle which is entered in the book of legal principles, acted on the basis of, and within the limits of, the law, i.e. in accordance with Article 7 of the Constitution.

Challenged by the applicant, Article 80(2b), first sentence, of the Law on the Organisation of Common Courts was applied within the scope of the procedure for granting permission by a competent disciplinary court to call a judge to criminal responsibility. Therefore, it was indicated as a legal basis, but only as the legal basis of the Order of the President of the Supreme Court of 26 July 2007, which was a refusal to accept the motion on the grounds that it was obviously groundless. The subsequent procedure, which was implemented after the Prosecutor of the Institute of National Remembrance had

lodged a complaint, moved away from the challenged provision. It concerned the actions regulated in the provisions of the Act on the Supreme Court (which concern the possibility of submitting a legal issue for resolution to an enlarged bench of the Supreme Court as well as the possibility of granting a resolution the power of a legal principle) and in Article 441(2) of the Code of Criminal Procedure, which the Supreme Court – the Disciplinary Court indicated as a legal basis for submitting a legal issue. Adopting the Resolution of 20 December 2007, Ref. No. I KZP 37/07, the Supreme Court did not act as a disciplinary court which was to determine the "obvious groundlessness" of the motion, as referred to in Article 80(2b), first sentence, of the Law on the Organisation of Common Court. Moreover, the Supreme Court itself refrained from such a supposition in the statement of reasons for the Resolution. The object of the Resolution was the question whether there was or was not an obligation to apply the Decree on the Imposition of Martial Law by the courts which adjudicated in criminal cases.

Even if the said Resolution of the Supreme Court concerned the interpretation of the content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, this would still be consistent with the constitutional and statutory powers of the court which enacted the Resolution. Thus, there are no grounds for challenging the conformity of the provision indicated in the Ombudsman's application to Article 7 of the Constitution.

In the opinion of the Public Prosecutor-General, Article 42(1) of the Constitution constitutes an inadequate higher-level norm for review. The indicated constitutional provision specifies the basic principles of criminal responsibility and has a character of a guarantee – it rules out the possibility of calling persons to criminal responsibility for acts which, at the time of their commission, were not prohibited and penalised under a statute. When applying that Article, what is subject to review is a set of provisions which have the character of a norm of criminal law which must specify an addressee, his/her conduct which is prohibited or ordered by statute and a sanction for the breach of the prohibition or order.

In the said case, the norms of criminal law are the provisions of the Penal Code which the Prosecutor of the Institute of National Remembrance indicated in his application as a legal qualification of acts. However, the applicant does not subject those provisions to review.

By contrast, the provision indicated in the Ombudsman's application specifies a preliminary procedure for examining a motion for permission to call a judge to criminal responsibility. Article 80(2b), first sentence, of the Law on the Organisation of Common Courts neither contains the characteristics of a prohibited act, nor does it refer to such characteristics set out in other provisions. The essence of the challenged provision is that, adjudicating in a specific case in the proceedings concerning immunity, a disciplinary court carries out examination, which resembles the Supreme Court's preliminary examination of cassation appeals, in which the court determines: whether the facts presented in a motion correspond to the relevant elements of the hypothesis of a legal norm, on the basis of which a common court would have to adjudicate; what the legal context was like at the time when the legal norm was applied; as well as whether the negative social consequences of the act are not insignificant. The decision of a disciplinary court to refuse the examination of a motion for permission to call a judge to criminal responsibility produces an effect merely at the level of procedural law – without eliminating the impediment to commencing criminal proceedings against a judge, at the same time it does not abolish the punishability of the act itself – which follows from the character of formal immunity.

Finally, the Prosecutor stressed that Article 42(1) of the Constitution did not prohibit enacting additional statutory conditions – which were beneficial from the perspective of the persons who may be called to criminal responsibility – which, if existed, would exclude guilt, and thus would undermine the criminality of the act. Hence, even if the indicated provision had the character of a norm of criminal law, it would still be consistent with Article 42(1) of the Constitution.

The inadequacy of Article 42(1) of the Constitution also leads to the inadequacy of the higher-level norms derived from the conventions, since they concern the same principles which that provision of the Constitution regulates.

4. In a letter of 17 April 2009, the Ombudsman extended his application of 6 May 2008, by requesting the Tribunal to determine the non-conformity of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts to the principle of specificity of legal provisions that arises from Article 2 of the Constitution.

In that letter, the Ombudsman put forward the following arguments:

The term "obviously groundless" which has been used in the challenged provision has the character of a typical term lacking sufficient specificity. In principle, using such terms does not constitute an infringement of the principle of appropriate legislation, since this facilitates the flexibility of the legal order.

In the Polish legal order, the term "obvious groundlessness" is quite common. Hence, on numerous occasions, its meaning has been decoded both in the doctrine as well as in the jurisprudence of courts. Bearing in mind the relatively uniform views on that subject, it may be stated that obvious groundlessness occurs where it is noticed *prima facie* by applying basic legal knowledge. Any doubts rule out the possibility of declaring the submitted motion or appeal to be "obviously groundless".

In the case which was the basis for the Ombudsman's application, the disciplinary court – examining the prosecutor's appeal by the against the refusal to accept the motion for permission to call a judge to criminal responsibility – stated that there was a need for the substantial interpretation of how the term "obvious groundlessness" should be understood in the context of that particular case.

By contrast, examining a legal issue within the scope of the case pending before the disciplinary court, the Supreme Court provided the substantial interpretation of the term "obvious groundlessness" for the application to a certain category of cases; namely, the cases where a motion for permission to call a judge to criminal responsibility concerns a judge who, while adjudicating on criminal cases pursuant to the Decree on the Imposition of Martial Law, applied retroactive provisions. Moreover, the Resolution has been entered in the book of legal principles.

Therefore, the adjudication adopted within that scope goes far beyond the boundaries of a single case under examination. In fact, each motion for permission to call such a judge to criminal responsibility must be regarded as obviously groundless. This means that the Resolution is binding for the Supreme Court not only in the case, with reference to which it was adopted, but also with regard to other cases which are of the same kind. This is of significance from the point of view of constitutional review of normative acts. The Tribunal does not examine the conformity to the Constitution with regard to the acts of applying the law. However, in the light of the jurisprudence of the Tribunal, if a given interpretation of legal provisions is commonly accepted by the organs of public authority which are responsible for applying the law, then the interpretation of provisions falls within the scope of jurisdiction of the Tribunal.

The substantial interpretation of the term "obvious groundlessness", which has been provided in the Resolution, constitutes departure from the previous understanding of

a given legal measure as a measure which is obviously groundless. Indeed, this term also encompasses the situations where there is a need for the substantial interpretation of the Act, and "obvious groundlessness" loses its inherent characteristics, which results in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts – interpreted this way – being inconsistent with Article 2 of the Constitution, and in particular with the principle of specificity of legal provisions, which is derived therefrom.

5. In a letter of 10 June 2009, the Marshal of the Sejm made reference to the extension of the Ombudsman's application and requested that the proceedings be discontinued with regard to the extension of the said application on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that the pronouncement of a judgement was inadmissible.

In the opinion of the Marshal, one may not agree with the Ombudsman's thesis that the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, concerned the interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, and in particular the interpretation of the term "obvious groundlessness" that has been used in that provision. The question of law submitted by the court concerned the Decree on the Imposition of Martial Law, i.e. the act that was to be the basis of possible criminal responsibility of a judge. The said Resolution did not bind the court which referred the question of law, as regards the assessment whether the motion to revoke a judge's immunity was obviously groundless.

Moreover, the Marshal stressed that even when one shared the Ombudsman's reservations as to the aptness of adjudication presented in the said Resolution, it might not be assumed that the interpretation of a legal provision adopted in this single court's ruling, issued with regard to a particular case, could constitute the object of the application to the Tribunal. Indeed, the Tribunal is not entrusted with the powers of a cassation court.

To sum up, the Marshal of the Sejm stated that the allegations presented by the Ombudsman in his application were, in fact, aimed at a specific interpretation of provisions of the Decree on the Imposition of Martial Law, maintained by the Resolution of the Supreme Court. Thus, due to the jurisdiction of the Constitutional Tribunal, which is specified in the Constitution, and which comprises solely normative acts, the proceedings within that scope should be discontinued on the basis of Article 39(1)(1) of the Constitutional Tribunal, on the grounds that the pronouncement of a judgement was inadmissible.

6. In a letter of 10 July 2009, the Public Prosecutor-General referred to the extension of the Ombudsman's application and requested the Tribunal to determine that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts was consistent with Article 2 of the Constitution.

In that letter, the Public Prosecutor-General based his stance on the following arguments:

In accordance with the jurisprudence of the Tribunal, the use of general clauses does not infringe on the Constitution, unless it is impossible to assign the content that is consistent with the Constitution to a given term or there is well-established jurisprudence which assigns unconstitutional meaning to that term. It follows from the jurisprudence of the Tribunal that specifying the terms which lack sufficient specificity falls within the scope of the competence of common courts, and more precisely within the scope of their jurisprudence.

The Ombudsman expects the Tribunal to specify the designatum of the term which lacks sufficient specificity, namely the "obvious groundlessness" of a motion to call a judge to criminal responsibility, in the context of the interpretation of that term, as assigned

by an act of applying the law, i.e. the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07. However, the applicant has not convincingly substantiated that the line of jurisprudence which is to be established as a consequence of the cited Resolution of the Supreme Court, assigned unconstitutional meaning to the challenged provision. The higher-level norm from Article 42(1) of the Constitution and the convention higher-level norms, indicated in the application, should actually been regarded as inadequate, which was indicated by the Prosecutor in his previous letter.

The Resolution indicated in the application does not refer to the wording of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. The said Resolution is useful for the assessment of the legal state of affairs, with regard to the facts presented in the applications. It does not unify the jurisprudence in that regard, since it was unified prior to the adoption of the Resolution. This is exemplified by the decision of 5 October 2007, Ref. No. SND 2/07 (OSNKW No. 10/2007, item 75), in which the Supreme Court – the Disciplinary Court, adjudicating as the appellate instance, deemed that the president of a disciplinary court was competent to issue a decision on refusal to accept the motion, pursuant to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, due to the "obvious groundlessness" of a motion in a case where legal considerations clearly indicated that instigating proceedings would be groundless.

7. In a letter of 27 January 2010, on the basis of Article 22 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended, hereinafter: the Constitutional Tribunal Act), the Presiding Judge requested the First President of the Supreme Court to provide information on the interpretation of law in the jurisprudence of courts; namely: "whether the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, has assigned the normative content challenged by the Ombudsman to the term »obviously groundless«, as referred to in Article 80(2b), first sentence, of the Act of 27 July 2001 – the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended)".

8. In a letter of 16 February 2010, the First President of the Supreme Court explained as follows:

Firstly, determining the normative content of a provision which is the object of an application for constitutional review not only exceeds the constitutional and statutory powers of the Supreme Court, but also does not fall within the range of activities which are reserved to the competence of the First President of the Supreme Court.

Secondly, the content of the resolutions of the Supreme Court may not be supplemented by the court which has issued them, by providing additional opinions or interpretations aimed at explaining the meaning thereof.

Consequently, thirdly, the assessment of the impact of the Resolution of the Supreme Court of 20 December 2007 on the normative content of Article 80(2b) of the Law on the Organisation of Common Courts would not only be a subjective view of the persons providing the answer, but would also constitute a kind of inadmissible official interpretation, which would not necessarily be consistent with the intentions of the adjudicating bench.

Fourthly and finally, Article 22 of the Constitutional Tribunal Act does not give any grounds for providing an answer to such a question, as it concerns cooperation between the Supreme Court and the Constitutional Tribunal as regards information on the interpretation of a specific provision of law in the jurisprudence of courts. The Article is only the basis for research and juxtaposition of jurisprudence.

In the opinion of the First President of the Supreme Court, regardless of the above, the object of the question and its wording do not give any grounds to assume that the intention of the court providing the answer was to interpret the term "obvious groundlessness" within the meaning of Article 80(2b) of the Law on the Organisation of Common Courts. What is more, contrary to the arguments raised in the case pending before the Constitutional Tribunal, the possibility of referral to the Supreme Court in accordance with Article 441 of the Code of Criminal Procedure (*quaestiones in concreto*) is not contingent upon the object of the case which is being examined by an appellate court, and theoretically exits also with regard to the provisions where the legislator has used the term "obvious groundlessness".

9. In a letter 8 March 2010, the Ombudsman again extended his application of 6 May 2008, by requesting the Tribunal to determine the non-conformity of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts to Article 10(1) and (2) of the Constitution.

In the substantiation of the above letter, he put forward the following arguments:

Adopting resolutions which resolve legal issues, by the Supreme Court, in order to provide the interpretation of law for the needs of the jurisprudence of courts, where the resolutions are then entered in the book of legal principles, manifests the merge of the competence of the judicial branch with the powers of the legislative branch, and constitutes an exception to the principle set out in Article 10 of the Constitution. Determining legal issues and providing the interpretations of legal provisions, the Supreme Court may not replace the legislator.

Had it been the intention of the legislator to exclude the possibility of examining the motions for permission to call judges to criminal responsibility – with regard to judges who applied the penal provisions of the Decree on the Imposition of Martial Law retroactively, as obviously groundless motions, he would have rendered that *expressis verbis* in the provisions of the challenged Act. Taking the above into consideration, it should be assumed that the interpretation of the norm contained in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, presented in the Resolution of the Supreme Court of 20 December 2007, goes beyond the intentions of the legislator, and the Supreme Court, when adopting the indicated Resolution, "not only went beyond the scope of the presented question of law, but also interfered with the exclusive powers (roles) of the legislative branch, thus infringing on the constitutional imperative for the tri-division of powers, set out in Article 10 of the Constitution".

This is particularly so, given that the Resolution of the Supreme Court of 20 December 2007 assigns a new meaning to the term "obvious groundlessness" and, at the preliminary stage of examining a motion, it allows to include the issues of substantive law in that term; the issues which require the substantial interpretation of the Act.

10. In a letter of 6 July 2010, pursuant to Article 19 in conjunction with Article 21 of the Constitutional Tribunal Act, the Presiding Judge requested the Director of the Chief Commission for the Prosecution of Crimes against the Polish Nation at the Institute of National Remembrance to update and present the information concerning all the Regional Commissions for the Prosecution of Crimes against the Polish Nation as regards the state of the cases which involved acquiring the permission to call judges to criminal responsibility, in particular after 20 December 2007, i.e. after the adoption of the Resolution, Ref. No. I KZP 37/07, by the Supreme Court.

11. In his letter of 21 July 2010, the Director of the Chief Commission for the Prosecution of Crimes against the Polish Nation explained as follows:

Firstly, after 20 December 2007, the prosecutors of the Regional Commissions for the Prosecution of Crimes against the Polish Nation referred one motion to the Chief Administrative Court, in which they requested permission to call a judge to criminal responsibility in the case S 49/08/Zk.

Secondly, due to the Resolution of the Supreme Court of 20 December 2007, the plans to submit motions for permission to call judges to criminal responsibility in the case of three proceedings by the Regional Commission for the Prosecution of Crimes against the Polish Nation in Katowice - in the cases with the following reference numbers: S 33/06/Zk, S 5/07/Zk and S 69/05/Zk – have been abandoned.

Thirdly, after the adoption of the Resolution of the Supreme Court of 20 December 2007, one order of the President of the Court of Appeal – the Disciplinary Court in Wrocław was issued, dated 18 January 2008, Ref. No. ASDo 23/07, which refused – due to obvious groundlessness – to accept and examine a motion for permission to call a judge to criminal responsibility. The above order has not been appealed against, due to the content of the aforementioned Resolution of the Supreme Court.

Fourthly, after the promulgation of the Resolution of the Supreme Court of 20 December 2007, as a result of hearing an appeal, a decision was adopted by the Supreme Court – the Disciplinary Court on 7 February 2008, Ref. No. SND 1/07, which maintained in force the order of the First President of the Supreme Court of 26 July 2007, which contained refusal to examine a motion for permission to call a judge to criminal responsibility, due to the motion's obvious groundlessness.

Fifthly, after 20 December 2007, in the context of two cases, there were resolutions of disciplinary courts which refused to accept the motions for permission to call judges to criminal responsibility. In the case S 49/08/Zk, by the resolution of 29 March 2010, Ref. No. I OW 19/10, the Chief Administrative Court – the Disciplinary Court refused to permit to call a judge to criminal responsibility. The above resolution was appealed against, and then it was maintained in force by the ruling of the Chief Administrative Court of 7 July 2010. Likewise, in the case S 70/05/ZK, the Constitutional Tribunal did not permit to call a judge to responsibility (due to the lack of the necessary two-thirds majority of votes).

Sixthly, since 20 December 2007, there have been no resolutions permitting to call a judge to criminal responsibility.

Seventhly, only in the case S 64/06/ZK against Janina K., criminal proceedings were carried out and were finalised, after the permission had been granted to call the judge to criminal responsibility. By the resolution of 18 December 2007 (Ref. No. ASDo 5/07), the Court of Appeal – the Disciplinary Court in Szczecin permitted to call the above-mentioned judge to criminal responsibility. Subsequently, on 9 April 2008, an indictment was filed against Janina K. in the District Court in Jelenia Góra. By the decision of the Supreme Court of 21 May 2008, the proceedings against Janina K. were referred to the District Court in Koszalin. In turn, the District Court in Koszalin, by its judgement of 11 August 2009 (Ref. No. I K 262/08) acquitted the accused of the charges. The above judgement was maintained in force by a judgement of the Regional Court in Koszalin, dated 14 December 2009 (Ref. No. V Ka 705/09). The said judgement is legally valid.

II

At the hearings on 30 June and 27 October 2010, the representatives of the Sejm and of the Public Prosecutor-General maintained the stances presented in their pleadings.

The representative of the applicant specified that the essence of the allegations against Article 80(2b), first sentence, of the Law on the Organisation of Common Courts

amounted to challenging the constitutionality of a legal norm which had been derived from that provision. Indeed, what is the case here is a peculiar normative novelty, which has been shaped by the practice of applying the law, which "is binding, and therefore departs from the principle of judicial independence, as the term »obvious groundlessness« should be specified in the context of a particular case". An evaluative term is safeguarded by flexibility of decision-making, and thus replacing such a term with specific wording results in an infringement of Article 2 of the Constitution.

As regards the allegation that the challenged provision has infringed on Article 10 of the Constitution – the principle of separation of powers, the representative of the applicant explained that this was related to the redefinition of the term "communist crime". Due to the content of the Resolution of the Supreme Court of 20 December 2007, a communist crime may be understood solely as an act which, at the same time, constituted an infringement of the Constitution of 1952. By contrast, in the light of the Act of 18 December 1998 on the Institute of National Remembrance - the Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws – Dz. U. of 2007, No. 63, Item 424, as amended), the term "communist crime" is related to the infringement of human rights and certain universal standards, and not to the infringement of the domestic law (see Article 2 of that Act). Therefore, the situation here is the change of constitutive elements of a punishable act in the process of applying the law. "In that regard, the judicial branch has interfered with the field which has been reserved for the legislative branch".

As regards other allegations, i.e. those concerning the infringement of Article 42(1) of the Constitution, Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR, they are focused on the application of law, and therefore the representative of the applicant is not going to support the allegations.

III

The Constitutional Tribunal has considered as follows:

1. General remarks.

As the object of constitutional review, the Ombudsman indicated Article 80(2b), first sentence, of the Act 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended; hereinafter: the Law on the Organisation of Common Courts), to the extent to which the term "an obviously groundless motion for permission to call a judge to criminal responsibility" includes a motion for permission to call a judge to criminal responsibility with regard to a judge who - while adjudicating on criminal cases at the time when the Constitution of the People's Republic of Poland of 22 July 1952 was in force (Journal of Laws - Dz. U. No. 33, item 232, as amended) - applied retroactive criminal provisions, being statutory provisions. In the opinion of the Ombudsman, the challenged wording of the term "an obviously groundless motion for permission to call a judge to criminal responsibility", as used in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, has been assigned by the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, (OSNKW No. 12/2007, item 86; hereinafter: the Resolution of the Supreme Court of 20 December 2007), which has been entered in the book of legal principles.

Pursuant to the challenged Article 80(2b), first sentence, of the Law on the Organisation of Common Courts: "Should the motion for calling the judge to criminal responsibility not correspond to the formal terms of a pleading specified in the Code of

Penal Procedure or be obviously groundless, the president of a disciplinary court refuses to accept the motion".

By contrast, the operative part of the indicated Resolution of the Supreme Court of 20 December 2007 stipulates that: "Due to the lack of regulations against creating retroactive criminal provisions (the principle of *lex retro non agit*) in the Constitution of the People's Republic of Poland of 1952, and the lack of a legal mechanism which allowed for a review of conformity of regulations, being statutory provisions, to the Constitution or international law, as well as due to the lack of regulations which specified the place of international agreements in the domestic legal order, the courts adjudicating on criminal cases concerning the offences under the Decree of the Council of the State on the Imposition of Martial Law, dated 12 December 1981 (Journal of Laws - Dz. U. No. 29, item 154), were not exempt from the obligation to apply retroactive criminal provisions, being statutory provisions".

In the present case, we do not deal with the literal meaning of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts being challenged. The object of review indicated by the Ombudsman is the content of the term "an obviously groundless motion for permission to call a judge to criminal responsibility", used in Article 80(2b), first sentence, of the Law on the Organisation of Common Court, assigned by the Resolution of the Supreme Court of 20 December 2007.

Therefore, the Constitutional Tribunal has considered it necessary to determine, in the first place, whether the object of review, formulated above, is suitable for the assessment of constitutionality, in the light of the higher-level norms for review indicated in the application.

What raises *prima facie* doubts as to the admissibility of the object of review, formulated in this way in the application, is the direct connection between the challenged Article 80(2b), first sentence, of the Law on the Organisation of Common Courts and the said Resolution of the Supreme Court. Therefore, it is indispensable to determine whether the object of review indicated in the application by the Ombudsman is not, in fact, the Resolution of the Supreme Court of 20 December 2007.

Already at this point, it needs to be emphasised that the resolutions of the Supreme Court, as well as other court rulings or the acts of applying the law may not constitute the object of review to be carried out by the Constitutional Tribunal. Indeed, the Constitutional Tribunal is a court of law, and not a court of facts. The constitutional jurisdiction of the Constitutional Tribunal, first of all, comprises adjudicating with regard to hierarchical conformity of normative acts (see Articles 188 and 193 of the Constitution). Therefore, it should be stressed that the Constitutional Tribunal is not competent to verify court rulings, including the resolutions of the Supreme Court providing the interpretation of law.

Thus, the admissibility of the substantive evaluation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, within the scope challenged by the Ombudsman, is contingent upon determining the following:

– firstly, whether the Resolution of the Supreme Court of 20 December 2007 has really assigned the normative content challenged by the Ombudsman to the term "obviously groundless", as used in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts,

– secondly, whether the content of a normative act assigned in the course of interpretation of law, and in particular the interpretation provided by a resolution of the Supreme Court which has been entered in the book of legal principles, may be the object of constitutional review.

Only positive resolution of the above issues will eliminate the doubts as to the admissibility of the object of review, and will allow to proceed to the substantive

evaluation of the normative content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, which has been challenged by the Ombudsman.

2. The connection between the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, and Article 80(2b), first sentence, of the Law on the Organisation of Common Courts.

In the first place, the Constitutional Tribunal has considered whether, and to extent, there is a direct connection between the Resolution of the Supreme Court of 20 December 2007 and the challenged Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. Indeed, in accordance with the stances presented by the Marshal of the Sejm and the Public Prosecutor-General, there is no connection between the said Regulation and Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, as the Resolution merely concerns the issue whether the legal regulations of the Decree on the Imposition of Martial Law, dated 12 December 1981, (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Decree on the Imposition of Martial Law) were binding.

With regard to that issue, first of all, one should take into consideration the manner and normative context of adoption of the Resolution of 20 December 2007 by the Supreme Court.

2.1. The above Resolution was adopted by the enlarged bench of the Supreme Court, with reference to the legal issue presented to the Supreme Court by the Supreme Court – the Disciplinary Court in relation to the case of Zdzisław B, a retired Supreme Court Justice.

The case was initiated by the Prosecutor of the Institute of National Remembrance (IPN), from the Regional Commission for the Prosecution of Crimes against the Polish Nation in Katowice (hereinafter: the Prosecutor of the IPN), who, on 23 July 2007, filed a motion with the Supreme Court – the Disciplinary Court for permission to call Zdzisław B., a retired Supreme Court Justice, to criminal responsibility. The Prosecutor of the IPN substantiated the above motion by the fact that there was a suspicion that Zdisław B. twice committed the offences set out in Article 231(1) and Article 189(2) of the Act of 6 June 1997 – the Penal Code (Journal of Law - Dz. U. No. 88, item 553, as amended; hereinafter: the Penal Code), with the application of Article 11(2) of the Penal Code in conjunction with Article 2(1) of the Act of 18 December 1998 on the Institute of National Remembrance - the Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws – Dz. U. of 2007, No. 63, Item 424, as amended; hereinafter: the Act on the IPN). In the opinion of the Prosecutor of the IPN, the arguments presented in the application, to a sufficient degree justified the suspicion that Justice Zdzisław B., as a Justice of the Supreme Court and, at the same time, a functionary of the communist state, while adjudicating in cases concerning offences under the Decree on the Imposition of Martial Law, adjudged preliminary detention for Eugeniusz R. and Henryk B., on the basis of acts which were not prohibited by law at the time of their commission, and thus he exceeded the scope of his powers and unlawfully deprived those men of liberty. Such adjudication had the attributes of political repression, which exhausts the characteristics of communist crime.

On the basis of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, the President of the Supreme Court – the President of the Disciplinary Court, by the order of 26 July 2007, refused to accept the motion as obviously groundless. In the substantiation of the refusal, the legal qualification of the acts – which Justice Zdzisław B. was alleged to have committed – was questioned. The President of the

Disciplinary Court made reference to the allegation of infringement on the principle of *lex retro non agit* by the Justice indicated in the motion, in relation to his application of the promulgation clause specified in Article 61 of the Decree on the Imposition of Martial Law, stating that judges had the formal legal bases for regarding the strikes as prohibited acts, unless they knew about the antedating of the Journal of Laws of 14 December 1981. However, the Prosecutor of the IPN did not present any evidence, even circumstantial which indicated that the Justice whom the motion concerned had such knowledge.

The above order was appealed by the Prosecutor of the IPN, who requested that it be revoked and the case be referred to the Disciplinary Commissioner in order to refer the case for further examination (the appeal dated 7 August 2007). In the substantiation of the appeal, the Prosecutor of the IPN indicated that the challenged order went beyond the scope of the preliminary review of a motion for permission to call a judge to criminal responsibility. Making reference to the jurisprudence of the Supreme Court, the Prosecutor of the IPN emphasised that the scope of the preliminary review did not include substantive evaluation of particular evidence and did not determine the guilt of the accused. By contrast, the obvious lack of actual grounds for an accusation is only such a situation, in which it is clear in an unambiguous, undeniable and visible way that the facts presented by a prosecutor do not justify the thesis of the accusation. The Prosecutor also noted that Eugeniusz R. and Henryk B. had been convicted of an offence, the period of which included 13 and 14 December 1981. Therefore, all the arguments concerning the antedating of the Journal of Laws with regard to the act committed on 13 December are deprived of meaning. The acts committed on that day could not be subject to any evaluation under criminal law on the basis of the provisions of the Decree on the Imposition of Martial Law, and taking different action grossly infringed on the principle of *nullum crimen sine lege anteriori*.

Examining the appeal by the Prosecutor of the IPN, the Supreme Court – the Disciplinary Court, in the bench of three Justices, decided to use the trial institution of criminal law provided for in Article 441 of the Code of Criminal Procedure, in accordance with which if, in the course of examination of appellate measures, a legal issue is disclosed which requires the substantial interpretation of the Act, the Supreme Court may adjourn hearing the case and refer the issue which is of significance for the case to an enlarged bench of that Court.

The Supreme Court in a bench of 7 Justices, in the Resolution of 20 December 2007, Ref. No. I KZP 37/07, expressed the view that: "Due to the lack of regulations against creating retroactive criminal provisions (the principle of *lex retro non agit*) in the Constitution of the People's Republic of Poland of 1952, and the lack of a legal mechanism which allowed for a review of conformity of regulations, being statutory provisions, to the Constitution or international law, as well as due to the lack of regulations which specified the place of international agreements in the domestic legal order, the courts adjudicating on criminal cases concerning the offences under the Decree of the Council of the State on the Imposition of Martial Law, dated 12 December 1981 (Journal of Laws - Dz. U. No. 29, item 154), were not exempt from the obligation to apply retroactive criminal provisions, being statutory provisions". The bench of seven Justices decided about granting the Resolution the power of a legal principle.

It should be clearly emphasised that, in the substantiation of the said Resolution, it was unambiguously stated that: "when analysing the referred issue, a conclusion should be drawn that the wording «is it obvious» which appeared therein in relation to the fact that the Supreme Court – the Disciplinary Court dealt with the appeal of the Prosecutor of the IPN against the order of the President of the Supreme Court which refused, pursuant to Article 80(2b), first sentence, [the Law on the Organisation of Common Courts], to accept

the motion for permission to call Zdzisław B., a retired Justice of the Supreme Court, to criminal responsibility (colloquially referred to as revoking a judge's immunity) as obviously groundless".

In accordance with the character of the measure provided for in Article 441 of the Code of Criminal Procedure, the resolution of the presented legal issue, contained in the Resolution of the Supreme Court of 20 December 2007, was used when issuing adjudication by the disciplinary court.

By the decision of 7 February 2008, the Supreme Court – the Disciplinary Court maintained in force the challenged order of the President of the Supreme Court – the Disciplinary Court, confirming that the motion - about the existence of actual and legal grounds for bringing the charge that the Justice had twice committed a communist crime – was obviously groundless. In the reasoning of the decision, the Court shared and repeated the argumentation presented in the order of 26 July 2007, once again emphasising that, in the disciplinary jurisprudence, the groundlessness of the motions to revoke the immunity of judges who had adhered to the clause of retroactivity of the Decree on the Imposition of Martial Law had never raised any doubts. All doubts in that regard were ultimately dismissed by the Resolution of the Supreme Court of 20 December 2007, cited in the reasoning. Based on that Resolution, the Disciplinary Court also stressed that the proper interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, in an unambiguous way, indicated that the president of a disciplinary court might refuse to accept a motion not only for purely formal reasons, but also for substantive reasons, and thus the reasons related to the extent to which the motion was justified.

Therefore, it follows from the content of the Resolution of the Supreme Court of 20 December 2007 itself, as well as from the manner of its adoption, that there is a direct connection between Article 80(2b), first sentence, of the Law on the Organisation of Common Courts and the content of the interpretation assumed in the operative part. There is no doubt that, challenged by the Ombudsman, Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, and in fact the premiss of "obvious groundlessness" contained therein, made it possible to adopt the above Resolution by the Supreme Court. Without the premiss of "obvious groundlessness", contained in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, it would have been impossible to adopt the said Resolution by the Supreme Court.

2.2. The direct connection between Article 80(2b), first sentence, of the Law on the Organisation of Common Courts and the Resolution of the Supreme Court of 20 December 2007 is also determined by the normative context of the adoption of the Resolution. That Resolution was adopted in relation to the legal issue referred by the Supreme Court – the Disciplinary Court, in accordance with Article 441(1) of the Code of Criminal Procedure.

Pursuant to Article 441(1) of the Code of Criminal Procedure, if - in the course of examination of an appellate measure - a legal issue is disclosed which requires the substantial interpretation of a statute, the Appellate Court may adjourn hearing the case and refer the issue to the Supreme Court. In turn, the Supreme Court may refer the issue for resolution to an enlarged bench of the Court (Article 441(2) of the Code of Criminal Procedure).

It is emphasised in the jurisprudence of the Supreme Court that the said regulation concerns the so-called concrete questions (*quaestiones in concreto*), i.e. the issues emerging when hearing a specific case due to serious doubts as to the interpretation of the provisions applicable in that case. This means that resolving the questions must be of significance for the ruling in the case where the legal issue has arisen. Moreover, the legal

issue should concern a provision, the interpretation of which has varied in the jurisprudence of courts, or a provision which is characterised by defective wording or vague formulation, so that the explanation of such a provision could have relevance to the future jurisprudence. It may not be assumed that the Article allows the Appellate Court to refer to the Supreme Court with a question of an abstract character which is not linked with the case, even though it was significant for the jurisprudence of courts (see the decisions of the Supreme Court of: 30 June 2008, Ref. No. I KZP 14/08, Lex No. 398511; 27 January 2009, Ref. No. I KZP 24/08, OSNKW No. 3/2009, item 20). The Supreme Court provides the interpretation of a given provision only in connection with a specific case where the elimination of doubts as to legal issues will allow for proper adjudication in the case.

Taking into consideration the above, it should be once again stressed that the doubts of the Supreme Court – the Disciplinary Court which posed the question of law as to the justifiability of the motion for permission to call a judge to criminal responsibility at the stage of preliminary review of the motion. The Resolution of 20 December 2007 was adopted not because of the need for determining whether to grant permission to call a judge to criminal responsibility, but due to the need to examine the appeal against the order of the President of the Disciplinary Court refusing to accept the motion, pursuant to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, due to the obvious groundlessness of the motion. This provision unambiguously indicates that the president of a disciplinary court may refuse to accept a motion if it does not correspond to the formal terms of a pleading specified in the Code of Criminal Procedure or if it is "obviously groundless". The formal terms of a pleading include *inter alia*: the proper indication of the authority to which such a pleading is addressed and the case to which it relates, the identity and address of the person filing the pleading, as well as the date and signature of that person (Article 119 of the Code of Criminal Procedure).

By contrast, in accordance with the well-established view in the doctrine and jurisprudence, the term "obvious groundlessness" entails that this groundlessness is unquestionable – it does not require a thorough analysis in respect of either facts or law, as its groundlessness is indeed "striking" (L. Paprzycki, "Oczywista bezzasadność i oczywista zasadność kasacji", [in:] *Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga pamiątkowa ku czci prof. K. Marszała*, P. Hofmański, K. Zgryzek (eds.), Katowice 2003, p. 320 and subsequent pages; Z. Kwiatkowski, "Glosa do postanowienia SN z dnia 24 czerwca 2004 r.", III KZ 15/04, the judgement of the Supreme Court of 20 October 1998, Ref. No. V KKN 314/97, OSNKW Issue 11-12/1998, item 60). Consequently, this is about the situations where there is the obvious lack of actual grounds for requesting that immunity be revoked, or where it is clear in an unambiguous, undeniable and visible way that the presented facts do not justify the thesis of an accusation.

Therefore, refusal to accept a motion is a preliminary action which precedes and prevents its examination. At this preliminary stage, the president of a disciplinary court has no grounds for evaluation whether there is a reasonable suspicion that a given judge has committed the offence indicated in a given motion for permission to call the judge to criminal responsibility; let alone, the president does not evaluate if the characteristics of the alleged offence presented in the motion meet the legal criteria, with regard to its scope ratione materiae and ratione personae.

The evaluation of a reasonable suspicion of an offence having been committed falls within the scope of powers of the disciplinary court carrying out immunity proceedings which lead to the examination of a motion for permission to call a judge to criminal responsibility. However, it should be emphasised that also the disciplinary court is

not competent to conduct substantive assessment of particular evidence and to determine the guilt of the accused. Before adopting a resolution which permits to call a judge to criminal responsibility, the obligation of a disciplinary court is indeed merely to consider whether the gathered evidence sufficiently justifies the suspicion of an offence having been committed by a given judge.

Therefore, regardless of the scope of the discussed Resolution of the Supreme Court, there is no doubt that it primarily concerns the content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, and the legal issue requiring the substantial interpretation of the Act, which has arisen from the application of the Article. Stating that the said Resolution of the Supreme Court does not concern Article 80(2b), first sentence, of the Law on the Organisation of Common Courts would entail that the Supreme Court undertook the analysis of the legal issue *in abstracto*, which is inadmissible, from the point of view of Article 441(1) of the Code of Criminal Procedure, being the basis of the adoption of the Resolution.

Thus, it should have been stated that the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, determines the term of "obvious groundlessness" to meet the needs of the preliminary stage of review of motions for permission to call a judge to criminal responsibility, i.e. it directly concerns Article 80(2b), first sentence, of the Law on the Organisation of Common Courts.

Consequently, it should be stated that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, to the extent it was challenged in the application, which includes reference to the term "obvious groundlessness", has acquired new normative content, due to the adoption of the Resolution of 20 December 2007, by the Supreme Court, which was subsequently entered in the book of legal principles. The object of review indicated by the Ombudsman does not include the Resolution as such, although it does remain in a direct relation therewith. Therefore, contrary to the views of the Public Prosecutor-General and the Marshal of the Sejm, the Constitutional Tribunal has stated that the Resolution of the Supreme Court of 20 December 2007 directly refers to the content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, which was challenged in the application.

For the substantive evaluation of constitutionality of the challenged solution to be admissible, it is necessary to subsequently determine whether the object of constitutional review may be the content of a normative act which has been assigned in the course of interpretation of law, in particular the interpretation provided in a resolution of the Supreme Court, which has been entered in the book of legal principles.

3. The object of review by the Constitutional Tribunal – challenging the content contained in a normative act due to a resolution of the Supreme Court.

3.1. There is no doubt that, from the point of view of hierarchical conformity of norms, the object of review by the Constitutional Tribunal comprises only normative acts.

However, one should not overlook the fact that the stance of the Constitutional Tribunal concerning the understanding of the term "a normative act", which was initially strict, and then with time it has evolved, which is exemplified by the jurisprudence of the Constitutional Tribunal concerning the assessment of constitutionality of the resolutions of the Sejm. It is worth recalling that in the early years of its activity, the Tribunal held the view that the rules of procedure and other resolutions of the Sejm were not subject to the jurisprudence of the Constitutional Tribunal (see the decision of the Constitutional Tribunal of 6 December 1994, Ref. No. U 5/94, OTK of 1994, item 41). The inclusion of the resolutions of the Sejm in the scope of the jurisprudence of the Tribunal, provided that they at

least partly met the requirements for a normative act, occurred in the judgement U 6/92 concerning the so-called lustration resolution. In the very judgement, the Constitutional Tribunal specified its stance as regards the understanding of a normative act, stating that the term "normative act" is understood as "every act that establishes legal norms, and thus all norms of a general and abstract character. To determine this, neither the form of the act nor its legal basis, nor the legality of its enactment may serve as the decisive factor" (the judgement of the Constitutional Tribunal of 19 June 1992, Ref. No. U 6/92, OTK of 1992, item 13). Also, the stance was repeated in numerous subsequent rulings (see e.g. the judgements of the Constitutional Tribunal of: 22 September 2006, Ref. No. U 4/06, OTK ZU No. 8/A/2006, item 109; 26 November 2008, Ref. No. U 1/08, OTK ZU No. 9/A/2008, item 160), the most significant of which is the judgement of 23 April 2008, Ref. No. SK 16/07, which declares certain provisions of the Code of Medical Ethics, which specify statutory provisions, to be unconstitutional (OTK ZU No. 3/A/2008, item 45).

As a result of the established jurisprudence, the jurisdiction of the Constitutional Tribunal comprises all legal acts which establish legal norms of a general and abstract character, i.e. those that correspond with the substantive definition, and not a formal one. Just to recapitulate: the normative character of a given legal act is determined neither by the form of the act nor its legal basis, nor the legality of the enactment thereof, but merely the content which is of a general and abstract character.

Moreover, the Constitutional Tribunal holds the view that the so-called presumption of normativity of legal acts should be assumed, the consequences of which, not necessarily legal ones, may lead to the infringement of the rights and freedoms of the individual. Therefore, if any normative content is found in legal acts, it should not be excluded from the review of constitutionality or legality. Otherwise, in the case of an immense number of such legal acts, issued by various organs of the state, a majority of them would remain outside any institutional and effective review of their constitutionality or legality (see the judgements of the Constitutional Tribunal of: 12 July 2001, Ref. No. SK 1/01, OTK ZU No. 5/2001, item 127, 18 December 2007, Ref. No. SK 54/05, OTK ZU No. 11/A/2007, item 158).

What is particularly significant for the present case is the stance which is prevailing in the jurisprudence of the Constitutional Tribunal, having been established by means of a uniform line of jurisprudence, that "if a particular interpretation of a provision of a statute has become well-established in an obvious way and, in particular, if it has unambiguously and authoritatively been manifested in the jurisprudence of the Supreme Court or the Chief Administrative Court, then it should be regarded that the provision – in the course of its application – has acquired the content which the highest judicial instances of our country have recognised therein" (see, first of all, the judgement of the Constitutional Tribunal of 28 October 2003, Ref. No. P 3/03, OTK ZU No. 8/A/2003, item 82, as well as e.g. the judgements of the Constitutional Tribunal of: 8 May 2000, Ref. No SK 22/99, OTK ZU No. 4/2000, item 107, 6 September 2001, Ref. No. P 3/01, OTK ZU No. 6/2001, item 163, 28 January 2003, Ref. No. SK 37/01, OTK ZU No. 1/A/2003, item 3, 3 June 2008, Ref. No. K 42/07, OTK ZU No. 5/A/2008, item 77). Thus, the Constitutional Tribunal states that the normative content of a provision may be assigned in the course of its application. A given interpretation of a provision which has been arrived at in the process of applying the law may diverge greatly from its literal wording which has been assigned to it by the legislator. The organs of public authority which are responsible for applying the law, and primarily all courts, may in the course of interpreting the law derive content from normative acts which would be incompatible with the norms, principles or values, the protection of which is required by the Constitution. For this reason, the Constitutional Tribunal has deemed it necessary that its

jurisprudence also include the normative content which has been, so to speak, creatively derived from a normative act by way of an interpretation thereof which has clearly been well-established. However, in such a situation, the jurisprudence of the Constitutional Tribunal does not obviously encompass court rulings or other decisions of the organs of public authority which are responsible for applying the law. The object of review of constitutionality is the content that the provisions of law have acquired in the course of the well-established practice of applying thereof.

Moreover, the Constitutional Tribunal assumes that what is equivalent to the clearly well-established practice of applying a provision is the situation where the provision has been interpreted by "the highest judicial instances of the Polish state". If a particular interpretation of a provision has been unambiguously and authoritatively manifested in the jurisprudence of the Supreme Court or the Chief Administrative Court, it should be regarded that the provision has acquired such content (see the judgements of: 12 January 2000, Ref. No. P 11/98, OTK ZU No. 1/2000, item 3; 3 October 2000, Ref. No. K 33/99, OTK ZU No. 6/2000, item 188).

3.2. As regards the evaluation of admissibility of the object of review indicated in the Ombudsman's application, what is particularly worthwhile is the set of rulings of the Constitutional Tribunal concerning the assessment of constitutionality with regard to the Supreme Court's preliminary examination of cassation appeals. There are two judgements here which were issued in the cases initiated by constitutional complaints where the object of allegations was a specific interpretation of Article 393 of the Code of Civil Procedure, adopted on the basis of the resolution by a bench of seven Justices of the Supreme Court, dated 17 January 2001, (Ref. No. III CZP 49/00, OSNC No. 4/2001, item 53), which was subsequently granted the power of a legal principle. In the first judgement of 28 January 2003, Ref. No. SK 37/01, the Constitutional Tribunal stated that, on the basis of the resolution of the Supreme Court of 17 January 2001, a uniform interpretation of the challenged provision has been arrived at, since the adjudicating benches of the Supreme Court are bound by the interpretation assumed in the resolution, and only the Supreme Court is competent to adjudicate on cassation cases (OTK ZU No. 1/A/2003, item 3). In the other judgement, the one of 9 June 2003, Ref. No. SK 12/03, for the same reasons, the Constitutional Tribunal assumed that the said resolution of the Supreme Court had assigned a uniform interpretation to the challenged provision (OTK ZU No. 6/A/2003, item 51). Moreover, due to the universal applicability of that interpretation, the Constitutional Tribunal stated that the content of the provision had been shaped in a particularly clear and unambiguous way, on the basis of the interpretation by the organ of public authority responsible for applying the law. Namely, the resolution of the Supreme Court bearing the said characteristics assigns "the content and characteristics (the scope of temporary application) as if the legislator himself had done it by means of an act of applying the law" to a legal provision (the judgement of 9 June 2003, Ref. No. SK 12/03).

It should not be overlooked that the relatively strict approach to the admissibility of constitutional review, as regards the content of the normative act which has been assigned by the resolution of the Supreme Court which has been entered in the book of legal principles, refers to a review before the Tribunal initiated, in relation to a specific case, by a constitutional complaint. As it has been clearly emphasised in the judgement of 9 June of 2003, Ref. No. SK 12/03: "In particular, in the event of constitutional review initiated by a constitutional complaint, where the review concerns a provision being the basis of final adjudication, the point is the norm with the content and the scope of applicability which stem from an established and common interpretation actually assigned to the provisions under review, rather than one of possible versions of an interpretation

arrived at *in abstracto*". Therefore, as regards a review before the Tribunal initiated in relation to a specific case, and in particular a review initiated by a constitutional complaint, in order to assume that a provision is assigned a specific interpretation, it does not suffice that the interpretation arises from an unambiguous and authoritative resolution of the Supreme Court which has the power of a legal principle. Moreover, the possibility of review reserved for constitutional complaints is contingent upon assuming that such a resolution of the Supreme Court has assigned a uniform interpretation to the challenged provision. Thus, in the case of a constitutional complaint, it is not sufficient to presume that there is an established interpretation of a specific provision which stems from unambiguous and authoritative jurisprudence of the highest judicial instances of Poland.

However, the strict approach discussed above is considerably more lenient in the context of a review initiated, in relation to a specific case, by referring a question of law to the Constitutional Tribunal. For a review concerning a question of law, it suffices that a certain interpretation of a given provision is unambiguously and authoritatively manifested in the jurisprudence of the Supreme Court. What is of significance here is the judgement of the Constitutional Tribunal of 28 October 2003, Ref. No. P 3/03, which concerns the constitutionality of the institution of usucaption, in the context of the interpretation assumed by the Supreme Court in the resolution by a bench of seven Justices, dated 31 January 2002, Ref. No. III CZP 72/01 (OTK ZU No. 8/A/2003, item 82). The Constitutional Tribunal stated that there were no grounds in that case to depart from a general established line of jurisprudence in that respect. The Tribunal also stated that: "The interpretation of a provision arrived at by the Supreme Court, in a bench of 7 Justices, is (...) recognised by the remaining benches of the Supreme Court, and in fact also other courts and participants of civil law transactions" (the judgement of the Constitutional Tribunal of 28 October 2003, Ref. No. P 3/03). Therefore, there is no requirement for a resolution of the Supreme Court to have uniform significance, i.e. to be binding for all the organs of public authority responsible for applying the law.

In the case of a question of law, and thus a review initiated in relation to a specific case, which primarily aims at protecting and ensuring the public interest, the Constitutional Tribunal may review a particular interpretation of a provision which is incompatible with constitutional norms, principles or values, and thus may enable the legislator to regulate a given issue in a more precise and explicit way (the judgement of 28 October 2003, Ref. No. P 3/03). This stance is even more applicable to an abstract review of constitutionality, the goal of which is to ensure the protection of the public interest.

3.3. Moving on to the assessment of admissibility of the object of review indicated in the Ombudsman's application, it should be emphasised that the challenged content is related to a resolution of the Supreme Court which has been entered in the book of legal principles.

What needs to be stressed is the fact that the resolutions of the Supreme Court are usually binding in the cases, in relation to which they have been adopted. Therefore, they are not binding for other benches of the Supreme Court or for other cases which are of the same kind. However, the situation changes when the said resolutions are granted the power of the so-called legal principles. Entering a resolution in the book of legal principles entails that it binds the Supreme Court not only in the case in relation to which it has been adopted, but also in other cases of the same kind. The benches of the Supreme Court may not adjudicate contrary to the legal principle until the law changes (the judgement of the Supreme Court of 8 August 2007, Ref. No. II UK 23/07, OSNP No. 19-20/2008, item 296). What is more, "legal principles are binding for the Justices of the Supreme Court, until the

time of departure from them, in the sense that they must be «applied» by the Justices and, as a matter of fact, they function as a category of legal norms which impose an obligation of a certain interpretation of (another) legal norm specified in a relevant resolution of the Supreme Court" (W. Sanetra, "Swoboda decyzji sędziowskiej z perspektywy Sądu Najwyższego", *Przegląd Sądowy*, No. 11-12/2008, pp. 24-25). Moreover, departure from a legal principle is only possible in accordance with a special procedure set out in Article 62 of the Act on the Supreme Court. In order for this to happen, there must emerge new arguments which have not yet been known or considered (the decision of the Supreme Court of 7 June 2005, Ref. No. II KK 55/04, Lex No. 151690).

It follows from the fact the Resolution of 20 December 2007 have been entered in the book of legal principles that it is binding not only for the case, in relation to which it has been adopted, but also for other cases which are of the same kind. Formally legal principles do not bind common courts, but only the adjudicating benches of the Supreme Court. There is no provision which would impose an obligation to adjudicate in accordance with these legal provisions adopted by the highest judicial organ of the Polish state. However, in practice, the resolutions adopted by the Supreme Court have a direct impact on the jurisprudence of common courts. Obviously, this follows from the role the Supreme Court plays as a chief organ of the judiciary in the system of justice. In particular, this concerns disciplinary issues, in the context of which the Supreme Court, pursuant to Article 110 of the Law on the Organisation of Common Courts, plays the role of an appellate court for the decisions issued by disciplinary courts. It is therefore hard to presume that the judges of the courts of lower instances – in that case those of courts of appeal – adjudicating in an analogical case, will adjudicate in a different way than the adjudication adopted by the Supreme Court, regardless of the view of the highest appellate instance.

This is particularly so in the situation which we have in the present case, i.e. when a resolution of the Supreme Court which has been entered in the book of legal principles has been issued as a consequence of referring a legal issue, pursuant to Article 441(1) of the Code of Criminal Procedure, by an appellate court. Indeed, one should not overlook that, as it is stressed in the jurisprudence of the Supreme Court: "The institution of questions of law, which entails binding the courts of lower instance in a given case with the view of the Supreme Court, is an exception to the constitutional principle of judges being subject to the Constitution and statutes (Article 178(1) of the Constitution). Due to its uniqueness, it should be applied in a very rigid way, without any concessions to the arguments focusing on usefulness and utilitarian aspects" (the decision of the Supreme Court of 19 January 2007, Ref. No. III CZP 135/06, Lex No. 272469; see also e.g. the decision of the Supreme Court of 12 January 2010, Ref. No. III CZP 106/09, Lex No. 565645).

3.4. Therefore, there is no doubt that the Resolution of the Supreme Court of 20 December 2007, entered in the book of legal principles, in practice, "has bound" not only the courts of lower instance (in this case, the courts of appeal), but also other organs of the state. Moreover, the fact that it is binding may result in the so-called chilling effect.

Making reference to the jurisprudence of the ECHR (see e.g. the case of Lombardo and Others v. Malta, Application No. 7333/06, the judgement of the ECHR of 24 April 2007, point 61 of the Court's assessment, which concerns the regulations providing for the award of damages with regard to the exercise of freedom of expression; or the case of Bączkowski and Others v. Poland, Application No. 1543/06, the judgement of the ECHR of 3 May 2007, point 67 of the Court's assessment, where the Court observes that the refusals to give authorisation to organise an assembly could have had a chilling

effect on the applicants and other participants in the assemblies), the Constitutional Tribunal - when evaluating the constitutionality of the challenged regulation – also takes into consideration potential consequences which the regulation may bring about in the practice of applying thereof, *inter alia*, the individual's decision to refrain from taking action or exercising his/her constitutional subjective rights (e.g. by auto-censorship) – the so-called chilling effect (see e.g. the judgement of the Constitutional Tribunal of 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129). However, a chilling effect may occur not only with regard to individuals, but also in relation to the organs of the state which, while facing actual inability to enforce the rights falling within the scope of their competence, refrain from taking action in that respect. As it has been indicated above, it is obvious that the Resolution of the Supreme Court of 20 December 2007 may effectively "discourage" law enforcement authorities from undertaking any attempts to call judges to criminal responsibility - as regards the judges who adjudicated on the basis of the retroactive provisions of the Decree on the Imposition of Martial Law – which is clearly confirmed by the practice of applying the law, presented in the letter of 21 July 2010 by the Director of the Chief Commission for the Prosecution of Crimes against the Polish Nation.

3.5. The present case concerns an abstract review, carried out on the basis of an application by one of the authorities whom the Constitution grants the power to initiate a review by the Constitutional Tribunal (Article 191(1) of the Constitution). By examining the Ombudsman's application, the Tribunal conducts an abstract review – that is a review where the primary criterion for assessment of constitutionality is the public interest, and the interests of the individual or of certain social groups are taken into account to a lesser extent than in the context of constitutionality review initiated in relation to a specific case. For that reason, challenging the interpretation of a provision which has been well-established in the practice of applying the law, it is not necessary to prove the consistency of its application. In accordance with the line of jurisprudence of the Constitutional Tribunal, it suffices to prove that a certain interpretation has become well-established due to the fact that it has been unambiguously and authoritatively manifested in the jurisprudence of the Supreme Court or of the Chief Administrative Court. In turn, the unambiguous and authoritative manifestation is confirmed by the adoption of a resolution by the supreme organ of the judicial branch in Poland. This is particularly so when a certain interpretation of a provision is established in a special way – i.e. is entered in the book of legal principles. Granting a resolution the power of a legal principle entails that the resolution is no longer an act of specific application of law, but becomes an interpretative act, carried out outside the application of law *in concreto*.

Consequently, it should be assumed that the object of constitutional review may also be normative content which a resolution of the Supreme Court, having the power of a legal principle, has assigned to a provision of law. Additionally, in the case of abstract review of constitutionality, and as regards a review initiated by a question of law, it is not required that the interpretation of the Supreme Court, entered in the book of legal principles, should be binding and impose the obligation of consistent practice, from the formal point of view, on all the organs of public authority responsible for applying the law.

Taking the above into consideration, the Constitutional Tribunal states that the presented reasoning confirms and continues the established – in the above rulings – line of jurisprudence of the Constitutional Tribunal.

Therefore, it should be concluded that the interpretation assumed in the Resolution of the Supreme Court of 20 December 2007 has assigned new normative content to the term "obvious groundlessness", as used in Article 80(2b), first sentence, of the Law on the

Organisation of Common Courts, within the extent challenged by the Ombudsman. The interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, provided by the Supreme Court, has been entered in the book of legal principles, which entails that it is a universally applicable interpretation, assumed by the other benches of the Supreme Court, and indirectly also by other courts in the cases of the same kind.

In conclusion, it should be emphasised that neither of the participants in the proceedings – neither the Public Prosecutor-General nor the Marshal of the Sejm - has questioned the principle which stipulates that it is admissible to carry out a constitutional review of normative content assigned to a provision of law by a resolution of the Supreme Court which has been entered in the book of legal principles. What is more, the Marshal of the Sejm has entirely agreed with the Ombudsman's view that it is admissible, before the Constitutional Tribunal, to challenge a given interpretation of legal provisions, which is commonly accepted in the jurisprudence of courts and he even stated that common acceptance may be presumed due to the adoption of a certain interpretation in the interpretative resolutions of the Supreme Court, and in particular those which have the power of a legal principle (see the pleading of 10 June 2009, p. 6).

Taking into account the above considerations, the Constitutional Tribunal has concluded that it is not only admissible but actually necessary to carry out a substantive review with regard to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, within the scope specified in the Ombudsman's application.

The Constitutional Tribunal may not refrain from the assessment of constitutionality when a particular interpretation of a provision is incompatible with fundamental constitutional norms, principles or values.

Taking the above into consideration, the Constitutional Tribunal has concluded that the normative content challenged in the application, which has been assigned by the Resolution of the Supreme Court of 20 December 2007 to Article 80(2b), first sentence, of the Law on Common Courts, may be subject to assessment of its conformity to the Constitution – the indicated higher-level norms of review.

4. The clause of obvious groundlessness in the proceedings on revoking a judge's immunity.

4.1. The proceedings on granting permission to call a judge to criminal responsibility – proceedings on revoking a judge's immunity.

Challenged Article 80(2b), first sentence, of the Law on the Organisation of Common Courts concerns the proceedings on the permission to call a judge to criminal responsibility, and thus the proceedings which may result in revoking a judge's immunity.

A judge's immunity constitutes an exception to common principles of criminal responsibility. Pursuant to Article 181 of the Constitution, a judge's immunity comprises a prohibition against calling to criminal responsibility and the prohibition against the deprivation of liberty, in particular against detention or arrest, without a prior consent of a court specified by statute. Therefore, this immunity has a formal character, and constitutes an impediment to legal action with regard to commencing and conducting criminal proceedings against a person whom the proceedings concern. Both a judge's immunity *sensu stricto*, as well as the guarantee of immunity have a relative character. Calling a judge to criminal responsibility or depriving him/her of liberty, and in particular apprehension or preliminary detention may only take place after the immunity has been revoked by a court specified by statute (Article 181 of the Constitution). As a constitutional exception, there is a sole possibility of apprehending a judge caught in the act of committing an offence, his/her apprehension is necessary for the proper course of proceedings (Article 181, second sentence,

of the Constitution). Revoking the immunity must take precedence, which means that until then it is only possible to conduct proceedings in a given case, but not against a person.

The function fulfilled by a judge's immunity is both the protection of the independence of courts and the protection of independence of judges. A judge's immunity undoubtedly constitutes an exception from the principles of criminal responsibility, and for that reason "it may not be subject to a broadening interpretation, and the manner of interpretation and application as regards provisions on immunity must be subordinate to the fulfilment of the functions of immunity" (L. Garlicki, *Komentarz do Konstytucji RP*, Vol. 4, Warszawa 2005, p. 2). However, the guarantees of independence of courts, including a judge's immunity should primarily be perceived in the context of the individual's fundamental rights to such a court.

In the judgement of 28 November 2007, Ref. No. K 39/07, the Constitutional Tribunal unambiguously stated that: "Formal immunity enjoyed by judges (...) is not a privilege of a certain court division. (...) A judge's immunity only makes sense, (...) as long as it does not serve creating «a group privilege»" (OTK ZU No. 10/A/2007, item 129). Therefore, a judge's immunity may not be regarded as a group privilege of non-responsibility, as it constitutes one of the guarantees of independence and protects individually every judge. It is emphasised in the doctrine that, due to the uniqueness of the institution of immunity, refusal to revoke it, aimed at ensuring a judge's impunity, would definitely be a gross infringement of that institution (L. Garlicki, *Komentarz do Konstytucji RP*, Vol. 4, Warszawa 2005, p. 5).

Immunity proceedings, i.e. proceedings on granting permission to call a judge to criminal responsibility, are regulated by Article 80 of the Law on the Organisation of Common Courts. The provision of Article 80(1) of the Law on the Organisation of Common Courts repeats a constitutional rule that a judge may not be detained or called to criminal responsibility without relevant permission of a competent disciplinary court. The above provisions shall apply accordingly with regard to the Justices of the Supreme Court (Article 8(1)) of the Act of 23 November 2002 on the Supreme Court; Journal of Laws - Dz. U. No. 240, item 2052, as amended; hereinafter: the Act on the Supreme Court).

Pursuant to Article 80(1) of the Law on the Organisation of Common Courts, the court which is competent to revoke immunity is a disciplinary court. The disciplinary courts are as follows: in the lower instance – a court of appeal which has jurisdiction over the circuit where the judge subject to proceedings performs his/her duties (in the case of the judges of courts of appeal or the judges of regional courts – a different disciplinary court, indicated at the request of a disciplinary commissioner by the First President of the Supreme Court), and in the higher instance – the Supreme Court (Article 110 of the Law on the Organisation of Common Courts). By contrast, pursuant to Article 53 of the Act on the Supreme Court, the following disciplinary courts shall be set up to hear disciplinary cases against the Justices of the Supreme Court: in the lower instance – the Supreme Court in a bench of three Justices; in the higher instance – the Supreme Court in a bench of seven Justices.

The procedure to revoke immunity in order to call a judge to criminal responsibility is initiated by a motion for permission to call the judge to criminal responsibility, if not lodged by a public prosecutor, should be executed by an attorney at law or a legal counsel being an attorney in fact (Article 80(2a) of the Law on the Organisation of Common Courts). A preliminary examination of the motion is conducted by the president of a given disciplinary court. The president of a disciplinary court refuses to accept the motion if the motion for calling a judge to criminal responsibility does not correspond to the formal terms of a pleading specified in the Code of Criminal Procedure or is obviously groundless (Article 80(2b), first sentence, of the Law on the Organisation

of Common Courts). The decision on refusal to accept the motion may be appealed against with a disciplinary court competent to consider the motion (Article 80(2b), second sentence, of the Law on the Organisation of Common Courts).

Where the motion meets the requirements set out in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, the president of a disciplinary court refers the case for examination to the disciplinary court. The disciplinary court considers the motion for permission to call a judge to criminal responsibility within fourteen days from the date of lodging it with the disciplinary court (Article 80(2d) of the Law on the Organisation of Common Courts). Prior to the issuance of a relevant resolution, the disciplinary court hears the disciplinary commissioner, as well as the judge, representative of the body or a person who filed for the permission, if such appear (Article 80(2e) of the Law on the Organisation of Common Courts). A judge whom the proceedings concern has the right to access documents enclosed with the motion. However, when bringing the motion to the disciplinary court, the public prosecutor may reserve that such documents or a part thereof, may not be disclosed to the judge due to the interest of preparatory proceedings (Article 80(2f) and (2g) of the Law on the Organisation of Common Courts).

The disciplinary court issues a resolution, which permits calling a judge to criminal responsibility if a reasonable suspicion exists that the judge has committed the offence. The resolution resolves the issue within the scope of permission to call the judge to criminal responsibility and includes the statement of grounds. When deciding in the above case, the disciplinary court may be satisfied with the statement of the judge that he/she puts forward a motion for the issuance of a resolution on the permission to call him/her to criminal responsibility (Article 80(4) of the Law on the Organisation of Common Courts).

Therefore, there is no doubt that the challenged regulation only appears to pertain to "insignificant" preliminary proceedings concerning the evaluation whether a given motion for permission to call a judge to criminal responsibility corresponds to the formal terms of a pleading. The examination carried out by the president of a disciplinary court, which resembles the Supreme Court's preliminary examination of cassation appeals, has a crucial impact on further immunity proceedings. Ending the proceedings for revoking a judge's immunity may lead, in an obvious way, to actually ruling out criminal responsibility for commission of certain prohibited acts.

For that reason, a preliminary review of a motion to revoke a judge's immunity should – as Article 80(2b), first sentence, of the Law on the Organisation of Common Courts stipulates – be limited to the evaluation *in casu* whether such a motion meets the formal requirements, i.e. whether the motion corresponds to the formal terms of a pleading specified in the Code of Criminal Procedure and whether it is not obviously groundless.

4.2. The clause of obvious groundlessness in immunity proceedings.

The general clause of "obvious groundlessness" occurs in many court procedures, *inter alia*, in criminal and civil proceedings. Just as in the context of immunity proceedings, it is applied to the pre-selection of cases in respect of their groundlessness which is undeniable *in casu*, in an obvious way.

As an example, it should be indicated that, in the context of criminal proceedings, the clause of "obvious groundlessness" is meant for the assessment whether an appeal (Article 457(2) of the Code of Criminal Procedure) or a cassation (Article 535(3) the Code of Criminal Procedure) is well-founded. Therefore, an appeal is obviously groundless, when *prima facie*, without a thorough analysis of the objections contained therein, it is clear that they are inapt. Thus, in each case, an appellate court should assess whether, and to what extent, the objections and motions of the appeal are well-founded or unfounded, and, depending on the assessment, it should determine whether the appeal is groundless or obviously groundless. A cassation is obviously groundless where a court determines, in a

way that leaves no doubt, that the case is free from the violations specified in Article 439 of the Code of Criminal Procedure, as well as from any other gross infringements of law, alleged in a cassation appeal. One may speak of obvious groundlessness of cassation when its groundlessness is "striking", without any need for a thorough analysis (see e.g. P. Hofmański, "Orzeczenie sądu kasacyjnego" [in:] *Aktualne problemy prawa i procesu karnego. Księga ofiarowana profesorowi Janowi Grajewskiemu*, *Gdańskie Studia Prawnicze* Vol. XI 2003, p. 345; see also the formulas indicated in *Komentarze do kodeksu postępowania karnego*, Z. Gostyński (ed.), Warszawa 2004, Vol. 3, p. 618, P. Hofmański (ed.), Warszawa 2007, Vol. 3, p. 272, J. Grajewski (ed.), Kraków 2006, p. 323, T. Grzegorczyk (ed.), Kraków 2005, p. 1257 and F. Prusak (ed.), Warszawa 1999, Vol. 2, p. 1445-1446 as well as in articles by R. A. Stefański, "Rozpoznawanie kasacji na posiedzeniu", *Państwo i Prawo* 2001, Vol. 2, p. 64 and by L. Paprzycki, "*Oczywista* bezzasadność i oczywista zasadność kasacji*"*..., p. 320 and subsequent pages).

By contrast, in the context of civil proceedings, the obvious groundlessness of a cassation appeal is the groundlessness determined by the Supreme Court *prima facie*, which leaves no doubt, and requires no analysis. Such an appeal is groundless when, without deeper consideration, it may be deemed that none of the indicated grounds justifies it (the decision of the Supreme Court of 20 December 2001, Ref. No. III CKN 557/01, Lex No. 53312). Likewise, the obvious groundlessness of an action or defence in the doctrine of law, as well as in jurisprudence, is defined *ad casum* as a state where it is clear to any lawyer, without any need to analyse the case in respect of its facts or legal aspects, that there are no grounds to grant legal protection to the person or entity requesting it (see the decision of the Supreme Court of 8 October 1984, Ref. No. II CZ 112/84, Lex No. 8631; K. Korzan, *Koszty postępowania cywilnego*, Gdańsk 1992, p. 82). What is meant here is the type of situations where the groundlessness of a claim or defence is absolutely certain and leaves no doubt (see the decision of the Supreme Court of 18 January 1966, Ref. No. I CZ 124/65, Lex No. 5925).

As it has been indicated above, the meaning of the clause of obvious groundlessness has, on a number of occasions, been decoded both in the doctrine as well as in the jurisprudence of courts. It is assumed that obvious groundlessness means the groundlessness determined *prima facie*, leaving no doubt, and requiring no analysis. In each case, a given court should determine whether allegations and motions are well-founded or unfounded and, depending on the assessment, it should determine whether the appeal is groundless or obviously groundless.

Therefore, the clause of obvious groundlessness allows, usually at an early stage of proceedings, to determine whether a given action, appellate measure, allegation or claim is – at first glance, without a thorough analysis, in a way that leaves no doubt – unfounded, inapt and misguided. Resorting to a certain mental shortcut, it should be concluded that the so-called trial request is thus groundless, when without deeper consideration, it can be stated that none of the indicated grounds justifies it (see e.g. the decision of the Supreme Court of 20 December 2001, Ref. No. III CKN 557/01).

What is more, obvious groundlessness is determined solely *in casu*, i.e. to meet the needs of a given case, taking into account its specific facts and legal aspects. Obvious groundlessness, being a term which lacks sufficient specificity, is naturally neither subject to definition *in abstracto* nor subject to specification in any general sense.

5. The assessment of conformity of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts - to the extent it has been challenged - to Article 2 of the Constitution, and in particular to the principle of specificity of law.

The Ombudsman has challenged the conformity of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, "understood in such a way that the obvious groundlessness of a motion for permission to call a judge to criminal responsibility encompasses issues which require the substantial interpretation of the Act" to the principle of specificity of law, which arises from Article 2 of the Constitution. As it has been stated before, the Resolution of the Supreme Court of 20 December 2007 has assigned new normative content to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, defining - within the challenged extent – the groundlessness of every potential motion for permission to call a judge to criminal responsibility – i.e. to revoke his/her immunity.

Moreover, defining the above clause, within the indicated scope, consisted in showing *in abstracto* that, with regard to certain individuals (the judges adjudicating in criminal cases concerning offences under the Decree on the Imposition of Martial Law), a given object (communist crimes which involved adjudicating the deprivation of liberty on the basis of retroactive criminal provisions of the Decree on the Imposition of Martial Law) as well as a specific period (related with the application of retroactive provisions of the Decree on the Imposition of Martial Law) – every motion of that same kind which fulfils these criteria should be deemed obviously groundless in advance and in an arbitrary way.

There is no doubt that the challenged normative scope of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, is subject to assessment, from the point of view of preserving the standards regarding the application of general clauses and terms which lack specificity – i.e. the principle of specificity of legal provisions (Article 2 of the Constitution).

In accordance with the jurisprudence of the Constitutional Tribunal, the principle of specificity of legal provisions constitutes a more detailed element of the principle of appropriate legislation, which in turn arises from the principle of citizens' trust in the state and its laws, which has been derived from the basic principle of a democratic state ruled by law, as referred to in Article 2 of the Constitution (see e.g. the judgement of the Constitutional Tribunal of 11 January 2000, Ref. No. K 7/99, OTK ZU No. 1/2000, item 2).

The constitutional principle of specificity of law, above all, determines the legislator's obligation to maintain due accuracy, precision and clarity of legal provisions. Legal provisions should be formulated accurately in respect of language and logic (the judgement of the Constitutional Tribunal of 21 March 2001, Ref. No. K 24/00, OTK ZU No. 3/2001, item 51). Therefore, it also follows from the principle of specificity of legal provisions that formulating provisions which are unclear and imprecise is prohibited.

However, the imperative of specificity of provisions does not rule out the possibility of using general clauses and imprecise terms i.e terms which lack sufficient specificity. As the Constitutional Tribunal has aptly stated in the resolution of 6 November 1991, Ref. No. W 2/91, "the use of (...) imprecise terms in the realm of law may not be *a priori* regarded as legislative negligence. Frequently, constructing a certain legal norm by means of such terms constitutes the only reasonable solution. The proper application of such a norm is safeguarded by trial norms which necessitate the indication of premisses that have been the basis for the application of a specific legal norm formulated with the use of such an imprecise term" (OTK of 1991, item 20).

Moreover, it is the constitutional principle of specificity of legal provisions that safeguards the legislative appropriateness of general clauses and terms which lack sufficient specificity. In its jurisprudence, the Constitutional Tribunal emphasises that in the course of applying general clauses, what is of significance is whether they have an axiological basis which is engrained in the mind of individuals, and from which arises a

specific normative imperative (...) [they] do not have a carte blanche character, and do not give grounds to shape their content freely" (the judgement of 15 September 1999, Ref. No. K 11/99, OTK ZU No. 6/1999, item 116). The terms are made more specific each time the law is applied by the organs of public authority responsible for applying the law, taking into account the basic principles of law, the general systemic values and the standards which are constitutionally protected.

On a number of occasions, the Constitutional Tribunal has analysed the problem of terms which lack sufficient specificity, used by the legislator, which – due to the fact that particular actual circumstances are subsumed by a court – give a possibility of assessment whether a given situation bears the characteristics of a phenomenon which is legally relevant, or whether it does not bear them. The Constitutional Tribunal has emphasised that the use of general terms by the legislator is indispensable in the cases where the application of a specific legal institution is based on evaluative terms (the judgement of the Constitutional Tribunal of 16 January 2006, Ref. No. SK 30/05, OTK ZU No. 1/A/2006, item 2). These terms shift the obligation to specify a norm to the stage of application of law, and thus they give courts complete freedom as regards decision-making (the judgement of the Constitutional Tribunal of 31 March 2005, Ref. No. SK 26/02, OTK ZU No. 3/A/2005, item 29). And therefore, pursuant to the jurisprudence of the Constitutional Tribunal, the principle of specificity of legal provisions safeguards the boundaries of certain "insufficient specificity" of general clauses and imprecise terms.

What deserves particular attention in that regard is the judgement of the Constitutional Tribunal of 16 January 2006, Ref. No. SK 30/05, in which the Tribunal made direct reference to the issue of specificity of the term "obvious groundlessness of cassation". Drawing attention to previous jurisprudence, the Constitutional Tribunal has stated that the principle of specificity of legal provisions does not exclude the use of the terms which lack sufficient specificity, such as "obvious groundlessness", if their designata may be specified (see the judgement of 12 September 2005, Ref. No. SK 13/05, OTK ZU No. 8/A/2005, item 91 and the judgement of 28 January 2003, Ref. No. K 2/02, OTK ZU No. 1/A/2003, item 4). "As the Constitutional Tribunal emphasises, the meaning of terms lacking sufficient specificity may not, in a concrete situation, be specified in an arbitrary way. Therefore, the use of an imprecise term requires that there will be procedural guarantees, which ensure the clarity and evaluative character of the practice to fill in an imprecise term with specific content by an organ of public authority which decides about such filling" (the judgement in the case SK 30/05, OTK ZU No. 1/A/2006, item 2). Moreover, it should always be taken into account that determining groundlessness of an obvious degree definitely ends the proceedings in a given case. Thus, it is necessary to maintain particular caution when interpreting *in casu* the term "obvious groundlessness" to serve the needs of a given case.

There is no doubt that, since the process of determining the content of the term which lacks sufficient specificity occurs during the process of applying the law, the procedure for the said application should be bound by more stringent requirements. The consequence of the application of a general clause or a term which lacks sufficient specificity is making the criteria more stringent as regards the procedure for the application of these terms in the process of applying the law. Proper practice in that respect means that "determining the meaning «obvious groundlessness» may be done in a reasonable way only on the basis of an analysis concerning the substantiation of existence of obvious groundlessness in a specific case" (the judgement of the Constitutional Tribunal of 16 January 2006, Ref. No. SK 30/05).

Therefore, taking into account the well-established jurisprudence of the Constitutional Tribunal, it should be stated that the term "obvious groundlessness" should

be specified in each individual case in the process of applying the law. Indeed, in accordance with the view adopted in the jurisprudence of the Constitutional Tribunal, it is primarily courts that should specify *in casu* the designata of general clauses or of the terms which lack sufficient specificity. "This is a certain warranty of procedural justice and the rule of law, which is undoubtedly referred to by Article 2 of the Constitution" (the judgement of the Constitutional Tribunal of 8 May 2006, Ref. No. P 18/05, OTK ZU No. 5/A/2006, item 53).

As presented above, obvious groundlessness, being a kind of general clause, and - more precisely - a term which lacks sufficient specificity, is not defined to serve general needs; the scope of its meaning is not specified either. Its undefined content is inherently filled in only to meets the needs of every individual case. Thus, the evaluation whether a particular case is groundless to an obvious extent takes place *in casu*, taking into account actual and legal circumstances. Moreover, specifying, in a very general way, at least the scope ratione personae, the scope ratione materiae or the time aspect of the obvious groundlessness is contrary to the purpose of the clause of obvious groundlessness, in the context of judicial procedures, is meant for.

In the present case, as a consequence of defining obvious groundlessness, in respect of its scope, and *in abstracto*, in the context of motions for permission to call a judge to criminal responsibility; indeed, every motion for permission to call a judge to criminal responsibility - in the case of a judge who, while adjudicating on criminal cases under the Decree on the Imposition of Martial Law, applied retroactive provisions – must be regarded as obviously groundless, and for that reason it will be subject to refusal of acceptance. Thus, the normative content assigned, pursuant to the Resolution of 20 December 2007, to the term "obviously groundless" which has been used in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, excludes an individual assessment of every motion to revoke immunity, which remains contrary to the function, established in the legal jurisprudence and doctrine, and assigned to this term which is evaluative in its character and is specified *in casu*. In this context, defining obvious groundlessness in respect of its scope becomes a pretext to arbitrarily exclude - with regard to a group of persons, and already at a stage of preliminary examination of a motion to revoke immunity - of the possibility of being called to responsibility for a certain type of offences related to the application of retroactive criminal provisions. Consequently, obvious groundlessness is not assessed *in casu*, since it is determined in a top-down and arbitrary way.

Taking the above into consideration, the Constitutional Tribunal has stated that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, to the extent it has been challenged, is inconsistent with the principle of specificity of law, which arises from Article 2 of the Constitution.

6. The assessment of conformity of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts - to the extent it has been challenged - to Article 42(1) of the Constitution and Article 7 of the European Convention on Human Rights, as well as to Article 15 of the ICCPR.

In the opinion of the Ombudsman, Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, to the extent to which the term "an obviously groundless motion for permission to call a judge to criminal responsibility" includes a motion for permission to call a judge to criminal responsibility with regard to a judge who - while adjudicating on criminal cases at the time when the Constitution of the People's Republic of Poland of 22 July 1952 was in force (Journal of Laws - Dz. U. No. 33, item 232, as amended) - applied retroactive criminal provisions, being statutory provisions, is also

contrary to Article 42(1) of the Constitution. Indeed, it requires that every motion for permission to call a judge to criminal responsibility be regarded as obviously groundless. Such an interpretation of the term "obvious groundlessness" is contrary to the constitutional imperative of *lex retro non agit* in the context of criminal law.

In accordance with Article 42(1) of the Constitution, only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible.

On numerous occasions the principle of *lex retro non agit* has been the object of the jurisprudence of the Constitutional Tribunal. Pursuant to the judgement of the Constitutional Tribunal of 19 November 2008, Ref. No. Kp 2/08: firstly, "the retroactivity of provisions of substantive criminal law is inadmissible; indeed, in that regard, the prohibition against retroactivity of law has an absolute character, which is unambiguously determined by Article 42(1) of the Constitution"; secondly, "retroactivity must be necessary (indispensable) for implementing (making real) (...) or protecting (...) specific constitutional values in that sense that the implementation (protection) of those values is not possible without the retroactivity of law. These other constitutional values must be particularly valuable (...) and more important than the value which is protected by the prohibition against retroactivity (...). In particular cases, such a value may be, for instance, social justice"; thirdly and finally, "retroactive provisions may be deemed constitutional if they improve the legal situation of certain addressees of a given legal norm and, at the same time, they do not deteriorate the legal situation of the other addressees of that norm" (OTK ZU No. 9/A/2008, item 157).

The constitutional prohibition against the retroactivity of law, proclaimed in Article 42(1) of the Constitution, has therefore direct reference primarily to the provisions of substantive criminal law. Hence, it may not constitute an appropriate or adequate higher-level norm for constitutional review with regard to the provisions which do not have such a character; nor may it be such a norm even with regard to the provisions, the application of which may lead to a certain "consent" to the retroactivity of criminal law, and thus may lead to an indirect infringement of the prohibition against retroactivity. What may confirm the adequacy of Article 42(1) of the Constitution, with regard to the prohibition of retroactivity in criminal law, is only a direct possibility of infringing on that higher-level norm for constitutional review; and such a possibility may only be ensured by a relation to a norm of substantive criminal law.

Both the Public Prosecutor-General and the Marshal of the Sejm share the view that the legal impediment which consists in deeming that every motion to revoke the immunity of a judge who retroactively applied the provisions of the Decree on the Imposition of Martial Law, in order to call him/her to criminal responsibility, is obviously groundless – results in ruling out the possibility of punishing the judge. On the other hand, they believe that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts does not regulate any of the elements which are typical for a criminal norm – it neither bears the characteristics of a prohibited act, nor does it refer to that type of characteristics specified in other provisions. "The appearance, in the legal system, of a legal norm which, in fact, rules out the possibility of calling to criminal responsibility for a certain category of acts – in no way constitutes an infringement of Article 42(1) of the Constitution" (the pleading by the Marshal of the Sejm of 23 February 2009, p. 8).

In the opinion of the Constitutional Tribunal, there is no doubt that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, in its previous wording, prior to assigning normative content by means of the Resolution of the Supreme Court of 20 December 2007, did not regulate any elements which were typical for a norm of substantive criminal law.

Also, it may not be stated that Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, since new, and then challenged, normative content was assigned thereto, has ceased to be a procedural provision and has acquired the characteristics of a substantive criminal law provision. Indeed, it still does not regulate any elements which are typical for a substantive criminal law norm. The new challenged normative content would not trigger the transformation into a substantive criminal law provision. Indirect acceptance of an infringement of retroactivity in the field of criminal law, which is a consequence of deeming the content which is contrary to the principle of specificity of legal provisions (Article 2 of the Constitution) to be "obviously groundless", does not yet mean that we deal with a substantive criminal law provision.

Taking the above into account, the Constitutional Tribunal has stated that Article 42(1) of the Constitution is not an adequate higher-level norm for review with regard to challenged Article 80(2b), first sentence, of the Law on the Organisation of Common Courts.

The same should be stated as regards Article 7 of the European Convention on Human Rights and Article 15 of the ICCPR. Indeed, the higher-level norms cited from international law have analogical wording and content of Article 42(1) of the Constitution.

7. The assessment of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts - to the extent it has been challenged - to Articles 7 and 10 of the Constitution.

As a higher-level norm for review, the Ombudsman has indicated Article 7 of the Constitution and the principle of legality expressed therein, in accordance with which the "the organs of public authority shall function on the basis of, and within the limits of, the law". It follows from the substantiation of the allegations presented in the application that the obligation of every organ of public authority to act on the basis of, and within the limits of, the law obviously refers also to the judiciary. Not only does this mean respecting the prohibitions introduced by law, but also adhereing to the imperatives which arise therefrom. The obligation to remain within the boundaries of law concerns all forms of activity, i.e. creation of law, application of law as well as reinforcement thereof.

Such an allegation therefore, to a larger extent, concerns the critical assessment of the Resolution of the Supreme Court of 20 December 2007, and the procedure for its adoption, than it refers to the challenged extent of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts.

Siminar conlusions should be drawn with regard to the Ombudsman's allegation which concerns an infringement of the constitutional principle of tri-division of powers, as set out in Article 10 of the Constitution; especially that the Ombudsman refers to the Resolution of the Supreme Court of 20 December 2007, stating that the Supreme Court, while adopting the indicated Resolution, "interfered with the exclusive powers (roles) of the legislative branch", and this way the Court infringed on the constitutional imperative of tri-division of powers (Article 10 of the Constitution).

Taking into consideration that pursuant to Articles 188 and 193 of the Constitution, the jurisdiction of the Constitutional Tribunal, in principle, is limited to adjudicating on the hierarchical conformity of normative acts and does not encompass the application of law, the resolutions of the Supreme Court, as well as other court rulings and the acts of applying the law, may not be the object of review by the Constitutional Tribunal (see e.g. the judgement of the Constitutional Tribunal of 16 September 2008, Ref. No. SK 76/06, OTK ZU No. 7/A/2008, item 121, and the jurisprudence of the Constitutional Tribunal referred to therein). The Constitutional Tribunal is not competent to verify the rulings of other courts, including the interpretative resolutions of the Supreme Court.

Therefore, it should be concluded that Article 7, as well as Article 10, of the Constitution are not adequate higher-level norms for review in the present case.

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

Dissenting Opinion
of Judge Stanisław Biernat
to the Judgement of the Constitutional Tribunal
of 27 October 2010, Ref. No. K 10/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgement of 27 October 2010 in the case K 10/08.

STATEMENT OF REASONS

1. I hold the view that, in the present case, there were no grounds to adjudicate with regard to the substance of the case. Therefore, the Tribunal should have issued a decision on the discontinuation of proceedings on the grounds that the pronouncement of a judgement was inadmissible, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act.

The Tribunal has adjudicated that Article 80(2b), first sentence, of the Act of 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended; hereinafter: the Law on the Organisation of Common Courts), "understood in such a way that «the obvious groundlessness of a motion for permission to call a judge to criminal responsibility» encompasses an issue which requires the substantial interpretation of the Act".

The judgement has been formulated as the so-called interpretative judgement, which states the non-conformity of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, understood in a certain way. In my opinion, the interpretative judgements by the Tribunal are admissible and useful; however, not in this case.

2. The operative part of the judgement by the Tribunal has been formulated in an abstract way, and the reader may have difficulties with understanding its content and legal consequences. Undoubtedly, "an issue which requires the substantial interpretation of the Act" rules out "obvious groundlessness". Moreover, the Tribunal has determined that the challenged provision is inconsistent with only one of the higher-level norms from the Constitution and the Convention on Human Rights and Fundamental Freedoms; namely, with Article 2 of the Constitution, due to infringing on the requirement of specificity of legal provisions. In the statement of reasons, the Tribunal has stressed that the term "obvious groundlessness" is a term which lacks sufficient specificity, and the Tribunal has not questioned the admissibility of use of such terms. In such a state of affairs, alleging that a general clause or an insufficiently specific statutory term lacks specificity is not comprehensible. In fact, the Tribunal alleges that the challenged provision has been made excessively specific.

3. A contrast should be noted between a generally formulated operative part of the judgement and the detailed statement of reasons, which closely refers to the circumstances of the case which was the basis of the application referred to the Constitutional Tribunal by the Ombudsman. Formally, the object of the allegation in the application by the Ombudsman was Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. However, in fact, the application was aimed against the Resolution of the Supreme Court of 20 December 2007, adjudicated by a bench of seven Justices (Ref. No. I KZP 37/07, OSNKW No. 12/2007, item 86; hereinafter: the Resolution by 7 Justices of the Supreme Court). The main theme of the statement of reasons for the judgement of the

Tribunal is to prove a thesis that "the provision of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, to the extent it has been challenged in the application which refers to the term «obvious groundlessness», has acquired new normative content due to the adoption of the Resolution of the Supreme Court of 20 December 2007".

I consider such a view and such conclusions of the analysis carried out by the Tribunal to be inapt. As it follows from the explanations provided by the representative of the Ombudsman, at the first hearing before the Constitutional Tribunal, the reason for lodging the application with the Tribunal was that the Ombudsman did not agree with the content of the Resolution by 7 Justices of the Supreme Court. However, challenging that Resolution before the Supreme Court, in accordance with the procedure in Article 16(1)(4) of the Ombudsman Act of 15 July 1987 (Journal of Laws – Dz. U. of 2001, No. 14, item 147; hereinafter: the Ombudsman Act) has proved to be impossible. In accordance with that procedure, the Ombudsman may refer a motion to the Supreme Court "to issue a resolution aimed at explaining legal provisions that raise doubts in practice, or the application of which has led to discrepancies in jurisprudence". In the opinion of the Ombudsman, the doubts in practice or the discrepancies in jurisprudence could have justified the motion to the Supreme Court if they had occurred already after the adoption of the said Resolution by 7 Justices of the Supreme Court.

However, after the adoption of the said Resolution by 7 Justices of the Supreme Court, the prosecutors of the Institute of National Remembrance ceased to refer new motions to common courts and to the Supreme Court for permission to call judges to criminal responsibility, as well as to appeal against the orders of the presidents of courts or the decisions of disciplinary courts. This follows from the letter by the Director of the Chief Commission for the Prosecution of Crimes against the Polish Nation – Deputy of the Public Prosecutor-General, Ref. No. Ko 73/09 of 21 July 2010, to the Constitutional Tribunal, which has been cited in the statement of reasons of the judgement. I believe that such practice was based on an incorrect interpretation of the consequences of the Resolution by 7 Justices of the Supreme Court, which I am going to discuss further below. The lack of new motions filed in courts, and the appeals against the decisions of disciplinary courts or against the orders of presidents of courts, has made it impossible to determine what the subsequent judicial practice and jurisprudence would look like.

In such a state of affairs, the statements from the reasoning of the judgement may raise doubts, which are to justify the thesis that new "normative content" has been assigned to the challenged provision, and justify the jurisprudence of the Tribunal as regards the examination of the case. The statements are, in fact, varied and they do not overlap. Initially, the Tribunal cites the view which is known from previous jurisprudence that "if a particular interpretation of a provision of a statute has become well-established in an obvious way and, in particular, if it has unambiguously and authoritatively been manifested in the jurisprudence of the Supreme Court or the Chief Administrative Court, then it should be regarded that the provision – in the course of its application – has acquired the content which the highest judicial instances of our country have recognised therein". Next it states that what is equivalent to the clearly well-established practice of applying a provision is the situation where the provision has been interpreted by "the highest judicial instances of the Polish state". Further on, there is a statement that "challenging the interpretation of a provision which has been well-established in the practice of applying the law, it is not necessary to prove the consistency of its application. In accordance with the line of jurisprudence of the Constitutional Tribunal, it suffices to prove that a certain interpretation has become well-established due to the fact that it has been unambiguously

and authoritatively manifested in the jurisprudence of the Supreme Court or of the Chief Administrative Court".

All in all, the grounds for the assertion (which have been variedly formulated in the statement of reasons of the judgement) - that the "normative content" of a given legal provision has been changed by the jurisprudence of courts – have led the Tribunal to the conclusion that this was the effect caused by the Resolution by 7 Justices of the Supreme Court", regarded as "unambiguous and authoritative manifestation in the jurisprudence of the Supreme Court"; although since the adoption of the said Resolution, there has been no further practice of applying Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, either in common courts or in the Supreme Court.

Moreover, the Tribunal inconsistently formulates the potential consequences of the Resolution by 7 Justices of the Supreme Court for possible subsequent jurisprudence. First of all, it states that: "It is (...) hard to presume that the judges of the courts of lower instances – in that case those of courts of appeal – adjudicating in an analogical case will adjudicate in a different way than the adjudication adopted by the Supreme Court, regardless of the view of the highest appellate instance". Further on, the view is formulated in a more restrictive way: "Therefore, there is no doubt that the Resolution of the Supreme Court of 20 December 2007, entered in the book of legal principles, in practice, "has bound" not only the courts of lower instance (in this case, the courts of appeal), but also other organs of the state. Moreover, the fact that it is binding may result in the so-called chilling effect". And finally, in a another fragment: "The interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, provided by the Supreme Court, has been entered in the book of legal principles, which entails that it is a universally applicable interpretation, assumed by the other benches of the Supreme Court, and indirectly also by other courts in the cases of the same kind".

In my view, the above theses of the Tribunal have no legal bases and are also impossible to prove. Indeed, it is impossible to predict what the consequences of the Resolution by 7 Justices of the Supreme Court could have been, and to what extent the Resolution would have set uniform practice, as after the adoption of the said Resolution by the Supreme Court, such practice was virtually non-existent.

Thus, there are no sufficient premisses to assume that not only the particular benches of the Supreme Court, but also common courts which act as disciplinary courts, would have adjudicated in a uniform way, in accordance with the said Resolution by 7 Justices of the Supreme Court. Certainly, this would have been so in most cases; however, there are no grounds to claim that this would have been the case in all of them. It cannot be ruled out that there would have been doubts in practice or discrepancies in jurisprudence, which would have made it possible for the Ombudsman to refer a motion, pursuant to the above-mentioned Article 16(1)(4) of the Ombudsman Act, or for a bench of the Supreme Court to present a legal issue on the basis of Article 62(1) of the Act of 23 November 2002 on the Supreme Court (Journal of Laws - Dz. U. No. 240, item 2052). However, if the subsequent jurisprudence would have been uniform and consistent with the Resolution by 7 Justices of the Supreme Court, then the Tribunal would have had grounds to state that a legal norm had been assigned a particular meaning, as a result of the well-established jurisprudence of courts.

It should also be added that it was impossible for the Resolution by 7 Justices of the Supreme Court to have impact on the jurisprudence of administrative courts acting as disciplinary courts. And, indeed, as it follows from the above-mentioned letter by the Director of the Chief Commission for the Prosecution of Crimes against the Polish Nation that, a motion to revoke a judge's immunity was referred to the Chief Administrative Court

– the Disciplinary Court, after the adoption of the said Resolution by the Supreme Court; the motion was examined by the Disciplinary Court.

Therefore, I hold the view that the Resolution by 7 Justices of the Supreme Court was an act of applying the law, and so far there has been no sufficient evidence to support the thesis that it has given a new shape to the content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, which would have justified the admissibility of review by the Constitutional Tribunal.

4. Moreover, I have reservations about the stance of the Constitutional Tribunal concerning the relation between the Resolution by 7 Justices of the Supreme Court and the content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. In the statement of reasons for the judgement, the Tribunal has stressed the existence of such a relation, pointing out that the said Resolution of the Supreme Court was issued at the stage of the proceedings, at which it is decided whether to accept a motion for permission to call a judge to criminal responsibility; the Tribunal here makes reference to the Supreme Court's preliminary examination of cassation appeals.

I hold a different view on that issue. The content of the Resolution by 7 Justices of the Supreme Court indicates that it contains an interpretation of the provisions which set out the consequences of retroactive application of the Decree on the Imposition of Martial Law of 1981. This follows from the operative part of the Resolution, which does not contain any reference to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts or to the premiss of "obvious groundlessness". Additionally, in the substantiation of the Resolution, it is stated that "the term «obvious groundlessness» is adequate within the framework of decision-making in a specific case; whereas the question about the «obviousness» of the existence or non-existence of an obligation on the part of a court adjudicating in criminal cases under the Decree on the Imposition of Martial Law constitutes certain *superfluum*; the essence of the case is what the legal system was like at that time, regardless of the fact whether the interpreter of the statutory and constitutional provisions of that time regards the conclusion on this issue as obvious, or whether he/she arrives at it after a complex analysis of a legal text".

Therefore, the relation between the content of the Resolution by 7 Justices of the Supreme Court and the challenged provision of the Law on the Organisation of Common Courts has a situational character, which arises from the fact that the legal issue referred to the bench of 7 Justices of the Supreme Court, by the disciplinary court, was referred in relation to the examination of an appeal against the order of the president of the disciplinary court, pursuant to Article 80(2b), second sentence, of the Law on the Organisation of Common Courts. It could as well have happened (hypothetically) that the same question of law as the one which led to the adoption of the Resolution by 7 Justices of the Supreme Court, would have been directed by a disciplinary court which was examining the substance of the case on revoking a judge's immunity, or by a court in criminal proceedings, after permission to call the judge to criminal responsibility had been granted. Then, by analogy, the Resolution by 7 Justices of the Supreme Court could have been regarded as the interpretation of: Article 80(2c) of the Law on the Organisation of Common Courts or Article 231(1) and Article 189(2) of the Penal Code respectively.

Therefore, with regard to the judicial consequences of the said Resolution of the Supreme Court, I hold the view that previously it could not have caused, and that currently it may not cause, the consequences which consist in regarding a motion for permission to call a judge to criminal responsibility as obviously groundless.

5. As regards the present case, what I find to be the most vital is its general character. I believe that the judgement of the Tribunal, to which I submit my dissenting opinion, constitutes a turning point in an adverse direction, with regard to the previous jurisprudence. Indeed, the stance of the Tribunal opens up the possibility of appealing, indirectly to the Tribunal, against all the resolutions of the Supreme Court which have been issued by the enlarged benches of the Court, and in particular the resolutions which have been entered in the book of legal principles, as well as the resolutions by the enlarged benches of the Chief Administrative Court, almost right after they are adopted. If this were the case, it would result in extending the scope of the competence of the Constitutional Tribunal and blurring the borderlines between a review of the enactment of law and a review of the application of law, which would be inadmissible in the light of the Constitution, the Constitutional Tribunal Act and the previous jurisprudence of the Tribunal. This would be as undesirable as depriving or limiting the effectiveness of the rulings of the Constitutional Tribunal by the Supreme Court.

6. And finally, the last issue. The statement of reasons for the judgement of the Tribunal contains some criticism of the role which was played by the Resolution of the Supreme Court of 20 December 2007 in the procedure for revoking a judge's immunity, and not the content of the Resolution as such. This is understood, due to the adopted argumentation of the Tribunal.

As the author of the dissenting opinion, I enjoy somewhat greater freedom and I think it is possible to express a view on the content itself of the Resolution by 7 Justices of the Supreme Court. In my opinion, that Resolution is improper. I do not share the view of the Supreme Court that, on the day the Decree on the Imposition of Martial Law was issued, the principle of *lex retro non agit* was not binding in the legal order of that time. Without going into the controversies as to the interpretation of the provisions of the Constitution of the People's Republic of Poland of 1952 and the Penal Code, which were binding at that time, one should take into account the fact that Poland was bound then by the International Covenant on Civil and Political Rights, ratified in 1977. The principle of the prohibition against the retroactivity of law was introduced by Article 15 of the Covenant. Therefore, the judges were not exempt from the obligation to observe the said principle. Another issue is whether the infringement of the prohibition against retroactivity is to result in revocation of judges' immunity and their criminal responsibility. These issues should be resolved individually in particular disciplinary and criminal proceedings, taking into consideration the premisses of criminal responsibility and the assessment of facts.

I consider it proper to present my assessment of the Resolution by 7 Justices of the Supreme Court, as I would not like this dissenting opinion to be interpreted as an argument against the departure from the legal view contained in the Resolution or against the instigation of disciplinary proceedings.

For the above reasons, I submit this dissenting opinion.

Dissenting Opinion
of Judge Adam Jamróz
to the Judgement of the Constitutional Tribunal
of 27 October 2010, Ref. No. K 10/08

1. Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgement as a whole. I do not share the stance of the Constitutional Tribunal both as regards the operative part of the judgement and the statement of reasons thereof. I hold the view that the proceedings in the case mentioned above should be discontinued. The object of the Ombudsman's application which instigated the proceedings in this case is not, despite the formal wording of the *petitum* of the application, Article 80(2b), first sentence, of the Act of 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended; hereinafter: the Act), but the Resolution of the Supreme Court of 20 December 2007 (Ref. No. I KZP 37/07; hereinafter: the Resolution).

The Constitutional Tribunal is not competent to examine the conformity of the resolutions of the Supreme Court to the Constitution; they are not subject to the jurisdiction of the Tribunal.

2. The fact that the object of the allegation in the Ombudsman's application is the Resolution of the Supreme Court, and not the provision of Article 80(2b) of the Act, is confirmed, in the light of the principle of *falsa demonstratio non nocet*, by the arguments for the allegations in the application which refer to the Resolution. The Ombudsman challenges the interpretation of provisions which has been assumed in the Resolution, which refers to adjudicating by criminal courts in the cases concerning the offences under the Decree of the Council of the State on the Imposition of Martial Law, dated 12 December 1981, indicating that the Resolution results in acquitting the judges accused of sentencing the persons accused of offences under the said Decree, which infringes on the principle of *lex retro non agit.* For instance, the Ombudsman states that: "the interpretation of the provisions which have been assumed by the Supreme Court in the Resolution of 20/12/2007 clashes not only with the presented line of jurisprudence of the Constitutional Tribunal and of the European Court of Human Rights in Strasbourg, but also with the indicated views of the doctrine and the line of jurisprudence represented by the Supreme Court in the 1990s, which is called «the rehabilitation jurisprudence of the Supreme Court». In the judgements issued in the 1990s, the Supreme Court changed the previously issued sentencing judgements, under the Decree on the Imposition of Martial Law, for the acts committed on 13 December 1981 and acquitted the accused".

The operative part of the judgement of the Tribunal follows the reasoning of the Ombudsman. Criticising the interpretation of the problem related to adjudicating on the basis of the Decree on the Imposition of Martial Law, which has been assumed in the Resolution, the Ombudsman holds the view that this affects the consequences of the interpretation of Article 80(2b) of the Act, since a formal appeal against the Resolution would be in an obvious way groundless.

In the said Resolution, the Supreme Court (an enlarged bench) adjudicated on the legal issue, requiring the substantial interpretation of the Act, which had the following wording: "Is it obvious that, in the light of the provisions of the Constitution of the People's Republic of Poland (Journal of Laws - Dz. U. of 1976 No. 7, item 36 as amended) and, in particular, Article 8(2) and (3), Article 30(1)(3) and (8) as well as Article 62, at the same time with the lack of regulation of some fundamental legal principles, the court

hearing the case concerning an offence under the Decree of the Imposition of Martial Law, dated 12 December 1981 (Journal of Laws - Dz. U. No. 29, item 154 as amended) was exempt from the obligation to respect:

1) the date indicated in the organ of public authority which promulgated the Decree (14 December 1981) as the day of «legitimate promulgation» of the Decree, within the meaning of Article 3 of the Act of 30 December 1950 on publishing the Journal of Laws and the Official Gazette of the Republic of Poland - *Monitor Polski* (Journal of Laws – Dz. U. No. 58, item 524, as amended),

2) the norm of Article 61 of the said Decree, in the part which assigns retroactive force to the Decree «as of the day of its promulgation»,

and if so, then what are the legal basis and the circumstances?"

With regard to the legal issue formulated that way, the Supreme Court passed the following Resolution, which has been entered in the book of legal principles: "Due to the lack of regulations against creating retroactive criminal provisions (the principle of *lex retro non agit*) in the Constitution of the People's Republic of Poland of 1952, and the lack of a legal mechanism which allowed for a review of conformity of regulations, being statutory provisions, to the Constitution or international law, as well as due to the lack of regulations which specified the place of international agreements in the domestic legal order, the courts adjudicating on criminal cases concerning the offences under the Decree of the Council of the State on the Imposition of Martial Law, dated 12 December 1981 (Journal of Laws - Dz. U. No. 29, item 154), were not exempt from the obligation to apply retroactive criminal provisions, being statutory provisions".

In its judgement, the Tribunal had not taken into consideration the fact that the said Resolution of 20 December 2007, adopted due to the question of law referred by the Supreme Court – the Disciplinary Court, in accordance with Article 441 of the Code of Criminal Procedure, addressed the doubts related to the interpretation of the relevant provisions of the Constitution of the People's Republic of Poland (Journal of Laws - Dz. U. of 1976 No. 7, item 36, as amended), the Decree of 12 December 1981 on the Imposition of Martial Law (Journal of Laws - Dz. U. No. 29, item 154, as amended) as well as the Act of 30 December 1950 on publishing the Journal of Laws and the Official Gazette of the Republic of Poland - *Monitor Polski* (Journal of Laws – Dz. U. No. 58, item 524, as amended).

This follows from the Resolution itself, as well as from the letter of 16 February 2010 by the First President of the Supreme Court, in which he explains that: "the object of a question of law, specified normatively this way, as well as its wording do not give grounds to assume that the intention of the court which raised the issue, and thus the intention of the court which replied, was to provide the interpretation of the term «obvious groundlessness of a motion», within the meaning of Article 80(2b) of the Law on the Organisation of Common Courts. This is also emphasised in the reply of the Supreme Court, which holds the view that the term «obvious groundlessness» is adequate within the framework of decision-making in a specific case; whereas the question about the «obviousness» of the existence or non-existence of an obligation on the part of a court adjudicating in criminal cases under the Decree on the Imposition of Martial Law constitutes certain *superfluum*; the essence of the case is what the legal system was like at that time, regardless of the fact whether the interpreter of the statutory and constitutional provisions of that time regards the conclusion on this issue as obvious, or whether he/she arrives at it after a complex analysis of a legal text".

3. Following the line of reasoning of the Ombudsman, the Tribunal bases its argumentation on the statement that the Resolution of the Supreme Court of

20 December 2007 “has assigned new normative content” to Article 80(2b), first sentence, of the Act, “defining - within the challenged extent – the groundlessness of every potential motion for permission to call a judge to criminal responsibility – i.e. to revoke his/her immunity”. The Tribunal concludes such argumentation as follows: “There is no doubt that the challenged normative scope of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, is subject to assessment, from the point of view of preserving the standards regarding the application of general clauses and terms which lack specificity – i.e. the principle of specificity of legal provisions (Article 2 of the Constitution)”.

I hold the view that the Tribunal’s assertion about new normative content having been assigned to Article 80(2b), first sentence, by the Resolution is groundless. As it appears, it also follows from the statement of reasons of the judgement by the Tribunal (point 5) that the Tribunal undermines the Resolution of the Supreme Court, emphasising that it leads to “specifying” the general clause of “obvious groundlessness”, contained in the challenged provision of the Act, whereas the term “obvious groundlessness” should be “specified” each time “individually in the process of applying the law”. Making such statements, the Tribunal actually undermines the substance of the resolutions of the Supreme Court, which, by means of interpretation, must inherently “facilitate” the understanding of general clauses. However, they do not replace the application of the clauses in particular cases. Neither does this entail supplementing the normative content of provisions; in this case, the challenged provision of Article 80(2b), first sentence, of the Act, although the character of the interpretation of the Supreme Court in such a case goes beyond the interpretation in a specific case, which is obvious. Should it be assumed that this interpretation “creates quasi-norms”, one may not talk about supplementing the normative content of the challenged provision; whereas the operative part of the judgement is based on such argumentation, having the character of an interpretative judgement, which is – in my view – inadmissible.

In my opinion, the judgement, in its operative part and its statement of reasons, indicates that the Tribunal, being a court of law, interferes with the powers of the Supreme Court and the judiciary.

4. The judgement of the Tribunal, in its effects, confirms the above remarks. In the operative part, the Tribunal puts forward its own interpretation of Article 80(2b), first sentence, of the Act, asserting that, as a result of the Resolution of the Supreme Court, the challenged provision has gained new normative content. However, even if this were the case due to the Resolution of the Supreme Court, it is clear to see that the operative part of the judgement does not change anything in the challenged provision, but is aimed against the Resolution of the Supreme Court, which the Tribunal may not repeal for obvious reasons.

Dissenting Opinion
of Judge Ewa Łętowska
to the Judgement of the Constitutional Tribunal
of 27 October 2010, Ref. No. K 10/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgement of 27 October 2010 in the case K 10/08.
I hold the view that:

1. Article 80(2b), first sentence, of the Act of 27 July 2001 – the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended) is consistent with Article 2, Article 7, Article 10 and Article 42(1) of the Constitution of the Republic of Poland, and with Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284), as well as with Article 15 of the International Covenant on Civil and Political Rights (Journal of Laws - Dz. U. of 1977 No. 38, item 167).

2. The proceedings concerning the constitutional review of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts should be discontinued on the grounds that the pronouncement of a judgement is inadmissible.

STATEMENT OF REASONS

1. The challenged Article 80(2b), first sentence, of the Law on the Organisation of Common Courts stipulates that if a motion for permission to call a judge to criminal responsibility does not correspond to the formal terms of a pleading which are specified in the Code of Criminal Procedure, or is obviously groundless, the president of a disciplinary court refuses to accept the motion. The said judgement, to which I submit my dissenting opinion, states the non-conformity of the challenged provision to Article 2 of the Constitution, when it is "understood in such a way that «the obvious groundlessness of a motion for permission to call a judge to criminal responsibility» encompasses issues which require the substantial interpretation of the Act" (the formula of an interpretative judgement has been used here).

2. The challenged provision contains a rule governing competence: is addressed to the president of a disciplinary court, granting him the power to refuse to accept a motion for permission to revoke immunity, if the motion does not correspond to the formal terms of a pleading, and (what is essential to the present case) if the motion is obviously groundless. At the same time, the said provision leaves it within the remit of the president of a disciplinary court to assess the issue of groundlessness (subsumption *in concreto*).

3. Both the application of the Ombudsman as well as the judgement of the Constitutional Tribunal have their genesis in the fact that, in one case which attracted publicity and which was criticised in various publications, a motion to revoke a judge's immunity as rejected as obviously groundless, with regard to a judge who adjudicated in criminal cases on the basis of retroactive Decree on the Imposition of Martial Law. This is confirmed by the initial and modified wording of the Ombudsman's application, and by the substantiation provided therein, as well as by the reasoning presented by the Constitutional Tribunal in the judgement, to which I submit this dissenting opinion. Indeed, in both instances (the initial and modified application by the Ombudsman as well as the statement of reasons for the judgement by the Constitutional Tribunal), the axis of analysis is the

issue of the content and significance of the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07 (cf. in particular, the considerations of the Constitutional Tribunal with regard to the object of review and the points of the statement of reasons). The Resolution was issued when a disciplinary court (an immunity court) - acting in accordance with the procedure for a prosecutor's appeal against the refusal to accept a motion (the refusal issued by the First President of the Supreme Court, on the basis of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, challenged in the present case) - referred to the enlarged bench of the Supreme Court, being in doubt whether the term "obvious groundlessness", indicated in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, includes the motions to revoke the immunity of a judge who adjudicated on the basis of the Decree on the Imposition of Martial Law, issued in a way infringing on the principle of non-retroactivity. By the Resolution of 20 December 2007, Ref. No. I KZP 37/07, (entered in the book of legal principles), the Supreme Court stated that such a situation fell within the scope of the term "obvious groundlessness". This stance was also accepted by the disciplinary court, and it dismissed the appeal, which ended the proceedings in a particular case concerning immunity. The reply to the raised question of law, assigned the status of a recorded principle, has remained in the legal system.

4. The Tribunal states that raising doubts which require the substantial interpretation of law in the light of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts is unconstitutional (Article 2 of the Constitution, a provision lacking sufficient specificity), since the said provision regards the motions which are "**obviously** groundless". At the same time, there are attempts in the statement of reasons to establish a connection between the challenged provision and the content of the Resolution of the Supreme Court, Ref. No. I KZP 37/07.

5. I do not agree with the reasoning of the Tribunal. The addressee of the challenged provision is the president of the court which receives a motion to revoke immunity, and it is that court that deems the motion "obviously groundless", when assessing a specific situation presented in the motion. This was done by the First President of the Supreme Court, who deemed that particular motion obviously groundless. His decision (and assessment) was regarded as apt by the court hearing the appeal. Both acts are the acts of applying the law. The hearing of the appeal was accompanied – as a kind of interlocutory action – by the question which was posed before the enlarged bench as to whether the circumstances indicated in the motion actually justified deeming it "obviously groundless". That question (posed on a different legal basis than the provision challenged in the present case) was answered in the affirmative by the enlarged bench, providing judicial supervision, which generalised its answer by making it binding for all benches of the Supreme Court (entry in the book of legal principles). In the light of the Resolution of the Supreme Court, Ref. No. I KZP 37/07, what has been deemed "obviously groundless" is the category of the IPN motions for permission to call judges to criminal responsibility with regard to judges who (while adjudicating on criminal cases) applied the retroactive Decree on the Imposition of Martial Law. However, the point here is not to interpret the challenged provision but to determine, by subsuming the actual state of affairs, the qualification of a specific category of situations which correspond to "obvious groundlessness". In my view, which I have presented before in other rulings (cf. the decision by the full bench of the Constitutional Tribunal of 7 May 2008, Ref. No. SK 14/06, OTK ZU No. 4/A/2008, item 66), the instances of subsumption, as

related to specific application of law, are not at all subject to review by the Constitutional Tribunal.

6. The subsumption falls within the scope of applying the law (making the meaning of a given provision more specific, by taking into account an actual state of affairs, which is assigned legal relevance), and not by interpreting the meaning of the provision *in abstracto*. Unifying the practice, the resolutions of the Supreme Court may concern the interpretation of law as well as may determine the future subsumption of certain situations (in order to unify the practice of applying the law). However, it is dubious whether "subsumption resolutions", which include the Resolution of the Supreme Court, Ref. No. I KZP 37/07, may be regarded as the object of review by the Constitutional Tribunal, based on the thesis on the admissibility of constitutional review of a provision/norm, the content of which has been shaped by a common interpretation.

7. I agree with the judgement of the Constitutional Tribunal in the sense that if someone is to determine "what" is obviously groundless, that person may not have "fundamental doubts" about that very issue (another thing is whether this lack of consistency is itself unconstitutional). But, in the present case, one person decided (the president of the disciplinary court), and someone else had doubts (the disciplinary court reviewing the said president's decision). A separate issue is substantive inaptness of both subsumption decisions (which is discussed at the end of this dissenting opinion).

8. The application (and then the judgement of the Tribunal) incorrectly indicates the relation between the object of review (Article 80(2b), first sentence, of the Law on the Organisation of Common Courts) and the circumstances which seem to weigh in favour of the allegations of unconstitutionality. The action of the president of the court, taken on the basis of the challenged provision (even if it was inapt) was an act of applying the law, which, in principle, does not fall within the scope of constitutional review conducted by the Constitutional Tribunal. There is a similar situation with the Resolution of the Supreme, Court which was adopted as a result of an interlocutory action within the framework of immunity proceedings.

9. Moreover, the statement of reasons for the judgement, to which I submit my dissenting opinion, equates two separate situations with each other: the result of a consistent, common, and repetitive interpretation, which – in accordance with *acquis constitutionnel* – may lead to assigning the text with a meaning which is subject to constitutional review, and subsumption, which should be carefully distinguished. In the judgement, to which I submit my dissenting opinion, the Constitutional Tribunal equates interpretation with subsumption. It does this in a way that the *acquis* of the Constitutional Tribunal concerning interpretation (in the situation where it allows for the constitutional review of the wording of a provision, determined by a consistent, common and repetitive interpretation) refers to the instances of subsumption, so that a constitutional review can be carried out where the content of a motion indicates that there are no relevant premisses for that.

10. Generally, in the situations where the legislator grants the organs of public authority responsible for applying the law the right to adjudicate by applying terms which lack sufficient specificity (as in the case of "obvious groundlessness" in the context of the challenged provision of the Law on the Organisation of Common Courts), the court does not provide an interpretation, but resorts to subsumption. The court does not have the need

for an abstract interpretation of a provision (wording), but it carries out its assessment (categorisation) of a specific situation, qualifying it as one which exhausts the characteristics of a term which lacks sufficient specificity. This is a purposeful legislative solution, as the point is to enable a given organ of public authority responsible for applying the law to adjust the assessment to the situational context. Obviously, one may question, firstly, whether the legislator has aptly chosen the situations for that kind of competence and, secondly, whether he should have granted the competence to this particular organ of public authority, and not any other. For example, granting similar competence to organs of public administration is avoided, and it is regarded as more apt to shift it to the court as an organ of authority which is impartial and independent, and provides better procedural guarantees which protect against arbitrariness. In the case of a provision (such as Article 80(2b) of the Law on the Organisation of Common Courts) which contains the term that lacks sufficient specificity, the legislator actually assumes that a certain sphere (encompassed by the term which lacks sufficient specificity) will be made specific *ad casum*, as a result of revealing, assessing and weighing the actual circumstances by the entities responsible for applying the provision. Therefore, fewer doubts are raised by the use of the terms which lack sufficient specificity, where specifying (subsumption) is done by the courts (with all the procedural guarantees which accompany that process), and not by the organs of public administration, the actions of which are not subject to such guarantees. The Resolution of the Supreme Court, Ref. No. I KZP 37/07, has limited the freedom of subsumption of courts in the future (as regards the application of Article 80(2b) of the Law on the Organisation of Common Courts), which results in modifying the scope of application of that provisions by courts. The reasoning presented by the Supreme Court in the Resolution of 20 December 2007, Ref. No. I KZP 37/07, does not describe the designata of "obvious groundlessness" in the light of Article 80(2b) of the Law on the Organisation of Common Courts, but it specifies by means of subsumption, a certain group of situations, classifying them in advance, for the future, under the term "obvious groundlessness", which is contained in this provision. Specifying such a term as a result of the subsumption of indicated situations (as ones which either complete or do not complete its meaning), one may, as a result, extend (as is the case in this situation – with regard to Article 80(2b) of the Law on the Organisation of Common Courts) or narrow down the scope of application of a given norm. The solution adopted by the Supreme Court in the Resolution I KZP 37/07, did not consist in assigning a new meaning to Article 80(2b) of the Law on the Organisation of Common Courts, but in narrowing down the scope of its application, by determining for the future that the courts adjudicating on issues concerning immunity may not have the freedom of decision as regards the possibility of applying subsumption within the indicated scope.

11. Assessing the appropriateness of restricting the freedom of courts is, in principle, a totally separate issue (even if these were to be only the benches of the Supreme Court which were bound by the principle entered in the book of legal principles), as regards the situational specifying of the term which lacks sufficient specificity, by binding it with the subsumption-type legal provisions. However, this is a fact that the practice of adopting resolutions of the Supreme Court includes both the resolutions which provide interpretations of provisions as well as subsumption resolutions (in respect of terms which lack sufficient specificity). Both types of resolutions are undoubtedly acts of judicial supervision which, as a rule, may not be the objects of constitutional review carried out by the Constitutional Tribunal. In fact, the Constitutional Tribunal has not dealt, in the present case, due to the content of the application, with the assessment of restricting (by means of the resolutions of the Supreme Court entered in the book of legal provisions) the court's

freedom of subsumption, as regards supplementing the terms which lack sufficient specificity with specific content.

12. Making reference to the term "necessity for the substantial interpretation of the Act", as a reason for disqualification (due to the contradiction with Article 2 of the Constitution), in the judgement of the Tribunal, means generalisation of causes of unconstitutionality adjudicated in the judgement ("an issue which requires the substantial interpretation of the Act" – what issue?), which is too far-reaching and has no clear outline (as to which interpretation is substantial, and which is not). Moreover, the judgement (following the application) incorrectly links the unconstitutionality with the challenged provision concerning competence, which concerns the president of the court that carries out a preliminary review on revoking immunity. In the light of the judgement, to which I submit my dissenting opinion, particular actions of the court have been reviewed, as regards the subsumption done by the president of the immunity court as well as judicial supervision (the Resolution of the Supreme Court), which consisted in posing questions of law and explaining (by means of subsumption – whether negative or positive one) terms which lacked sufficient specificity which were addressed to the courts responsible for applying the law. The reason for such a solution was both the criticism of the content of a specific decision as well as of a subsumption resolution.

13. The judgement of the Constitutional Tribunal revokes, in particular:

– firstly, the courts' right to the necessary margin for evaluation while exercising their competence (which, indeed, may always be exploited or inappropriately used);

– secondly, their right to make errors. Indeed, if a court makes an error of judgement as to the "substantial" interpretation of the Act – this will lead to the inevitability of constitutional elimination of the competence of a court (the president thereof) within a given scope – if one were to take the wording of the operative part of the judgement literally.

14. Constitutional review is aimed at purging the legal system of the unconstitutional norms (provisions), due to hierarchical non-conformity. The judgement addressed to the Supreme Court does not attain that goal. The judgement, to which I submit my dissenting opinion, does not eliminate anything. It does not facilitate a dialogue and cooperation among courts, by carrying out an illusory constitutional review of norms with regard to an act which is not subject thereof. The judgement to which I submit my dissenting opinion may not bring about any practical effects with regard to norms. Obviously, it may affect the practice in that respect. However, it will not result in the "derogation" of the Resolution of the Supreme Court, Ref. No. I KZP 37/07, (as it does not have any grounds or possibilities in that regard); not to mention the view of the Supreme Court (the Resolution of the Supreme Court of 17 December 2009, III PZP 2/09, OSNP No. 9-10/2010, item 106) which undermines the binding force of interpretative judgements by the Constitutional Tribunal. Ineffective instruments should not be used in vain, as this wears out and trivialises effective instruments.

15. The judgement, to which I submit this dissenting opinion, also entails departing – with future consequences – from the previous prudent jurisprudence of the Tribunal, where it has been assumed that the review by the Constitutional Tribunal does not encompass terms which lack sufficient specificity, and the acts of specifying them (even inappropriately and erroneously) – remain within the scope of jurisdiction of courts. At present, the Constitutional Tribunal will have to establish new rules in that regard.

16. My dissenting opinion to the stance of the Constitutional Tribunal in the present case is not intended as approval of the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, with which I disagree as a lawyer. I share a critical view (formulated primarily by J. Zajadło in his commentary published in *Gdańskie Studia Prawnicze – Przegląd Orzecznictwa* of 2008, No. 1, p. 161) concerning the argument presented in the Resolution with regard to the lack of obligation to adhere to the principle of non-retroactivity, since it was not expressed in the Constitution of 1952, and the lack of constitutional judiciary as a factor which justified illegality of conduct constituting infringements of international law. In addition, the Resolution of the Supreme Court, Ref. No. I KZP 37/07, may raise procedural reservations of various types as to: the adjudication rules of the Supreme Court as a disciplinary court; referring a legal issue in that regard in order to trigger the adoption of a resolution; entering the result of subsumption into the book of legal principles (which does not bind *nota bene* e.g. the courts of appeal which also act as disciplinary courts). However, (even gross) defectiveness of the content of the Resolution, caused by the Supreme Court, does not justify "making up for" the defectiveness by the actions of the Constitutional Tribunal which are questionable from the point of view of the Tribunal's competence. An error should not be rectified by action which is, in itself, erroneous.

17. The path to settling accounts with the past in a state ruled by law leads through diligent adherence to procedures and standards which are appropriate for a state ruled by law, through the application of legal expertise and reasoning in a proper and acceptable manner. I fully agree with what the Constitutional Tribunal stated in the judgement of 11 May 2007, Ref. No. K 2/07, OTK ZU No. 5/A/2007, item 48: "In eliminating the legacy of former communist totalitarian systems, a democratic state ruled by law must implement formal-legal measures that have been adopted by such a state. It must not apply any other measures, since this would resemble activities undertaken by the totalitarian regime, which is to be completely dismantled. A democratic state ruled by law possesses all necessary means to guarantee that justice will be done and the guilty will be punished. It must not, and should not, satisfy the thirst for revenge, rather than serve justice. It must respect such fundamental human rights and freedoms as the right to a fair trial, the right to be heard or the right to defence, and apply such rights also to persons who failed to apply them when they were in power". Bearing in mind such axiology, I have presented dissenting opinions in the cases adjudicated by the Tribunal (see the judgements of: 24 February 2010, Ref. No. K 6/09, OTK ZU No. 2/A/2010, item 15, 14 December 2009, Ref. No. K 55/07, OTK ZU No. 11/A/2009, item 167, 2 December 2009, Ref. No. U 10/07, OTK ZU No. 11/A/2009, item 163, 11 May 2007, Ref. No. K 2/07), where I challenged the domination of axiological element over the legal one, stemming from the dogma of constitutional law. I am also doing this in the present case, for the same reasons. Disagreeing for substantive and formal reasons with the Resolution of the Supreme Court, Ref. No. I KZP 37/07 (which I consider to be a reprehensible way of using the instruments of dogma and legal interpretations), I do not think the defects of the Resolution legitimise the Constitutional Tribunal to commit the same error (improper application of legal dogma and legal interpretations which extend the scope of application of Article 188 of the Constitution) in order to express disapproval for the Resolution of the Supreme Court, Ref. No. I KZP 37/07, in the statement of reasons for the judgement of the Constitutional Tribunal.

18. Due to the object of the present case as well as the heated ideological and political disputes which surround it, I feel obliged – although this is not necessary for the

needs of this dissenting opinion – to indicate my view on revoking immunity of judges who adjudicated during the martial law period. Basically, in respect of substance, I advocate using Radbruch's formula, but in its entirety: both as regards the issue of unlawfulness as well as the Lack of guilt – this fragment of the formula is less popular in the legal discourse. If I had grounds to believe that revoking immunity would bring about a diligent, insightful assessment which would be free from any bias and opportunism, with regard to issues concerning immunity, I would opt, in similar situations, for a stance that would be clear-cut: revocation of immunity (due to actual unlawfulness) and the perspective of objective and unbiased adjudication on a specific act (guilt). Neither the Resolution of the Supreme Court, Ref. No. I KZP 37/07, nor the judgement of the Constitutional Tribunal, to which I submit my dissenting opinion, incline me to believe that, in such a case, we would arrive at a balanced and fair effect of Radbruch's formula in its extensiveness.

Dissenting Opinion
of Judge Marek Mazurkiewicz
to the Judgement of the Constitutional Tribunal
of 27 October 2010, Ref. No. K 10/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgement of 27 October 2010 in the case K 10/08 as a whole.

The object of the Ombudsman's application is the allegation about the unconstitutionality of the interpretation of the term: an "obviously groundless" motion for permission "to call a judge to criminal responsibility", as used by the legislator in Article 80(2b), first sentence, of the Act of 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended), in relation to the Resolution of the Supreme Court of 20 December 2007 (Ref. No. I KZP 37/07). The Ombudsman requests the Tribunal to provide the proper interpretation of the term, in the course of constitutional review of law. Due to the scope of the jurisdiction of the Constitutional Tribunal, specified by the Constitution, this is inadmissible. In my opinion, the proceedings within the scope of the motion should be discontinued on the basis of Article 39(1)(1) of the Constitutional Tribunal Act.

In my dissenting opinion, I do not refer to the substantive content of the Resolution of the Supreme Court of 20 December 2007, which has already been discussed by the authors of commentaries. The object of my allegations is the Tribunal's infringement of the rules of proceedings before the Constitutional Tribunal, when issuing the judgement, to which I submit my dissenting opinion.

STATEMENT OF REASONS

1. On 17 October 1997, the Constitution of the Republic of Poland of 2 April 1997 entered into force. In accordance with the principle expressed in Article 239(2) of the Constitution, proceedings in a case to formulate a universally binding interpretation by the Constitutional Tribunal, with regard to a statute indicated in a motion by a competent entity, which were instituted prior to, but which did not end by, 17 October 1997, are subject to discontinuation. And pursuant to Article 239(3), first sentence, of the Constitution, the resolutions of that date by the Tribunal which were to determine the interpretation of statutes ceased to be universally binding.

Pursuant to Article 188(1) of the Constitution, the Constitutional Tribunal adjudicates regarding the conformity of statutes and international agreements to the Constitution, as well as the conformity of legal provisions issued by central state organs to the Constitution, ratified international agreements and statutes.

2. The Constitutional Tribunal is not competent to adjudicate on the constitutionality of acts of applying the law, and such is the character of the Resolution of the Supreme Court of 20 December 2007, which underlies the application by the Ombudsman, and which was adopted as a result of a question of law referred to the Supreme Court, in accordance with Article 441 of the Code of Criminal Procedure, by the Supreme Court – the Disciplinary Court. The question of law was referred to the Supreme Court, within the framework of the Court's judicial supervision concerning extraordinary appellate measures, which is carried out with regard to a particular case, out of the initiative of the court which referred the question while examining an appellate measure.

The aim of the question was to determine - in the process of applying the law - the interpretation of the clause of "obvious groundlessness of a motion", contained in Article 80(2b), first sentence, of the Law on the Organisation of Common Courts.

3. Formulating the allegations in the application with regard to the Resolution of the Supreme Court, based on the general clause contained in Article 80(2b) of the Act, the Ombudsman uses the following terms: "... to the extent to which the term ... includes a motion ..." as well as "understood in such a way that ...".

As the Marshal of the Sejm points out in his pleadings of 23 February 2009 and of 10 June 2009, such an allegation of unconstitutionality may not be the object of proceedings before the Constitutional Tribunal, since it refers to a specific ruling by the Supreme Court (a resolution), alleging that the said ruling is inconsistent with the law. By contrast, the proceedings before the Constitutional Tribunal concern – as mentioned before – the allegations of non-conformity of normative acts to the Constitution (or another legal act of a higher level). As the Marshal of the Sejm has pointed out, such a stance is confirmed by the jurisprudence of the Constitutional Tribunal, which rules out the possibility of assessment of interpretative resolutions adopted by the Supreme Court (cf. the decisions of the Constitutional Tribunal of: 21 June 1999, Ref. No. Ts 56/99, OTK ZU No. 6/1999; of 12 September 2002, Ts 85/02, OTK ZU No. 4/B/2002, item 299; of 12 December 2002, Ref. No. Ts 99/02, OTK ZU No. 2/B/2003, item 97; of 11 September 2007, Ref. No. Ts 253/06, OTK ZU No. 5/B/2007, item 226).

4. Therefore, the Resolution of 20 December 2007 (Ref. No. I KZP 37/07), issued by the Supreme Court, even if it has a character of a legal principle, refers to the interpretation of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, and in particular in relation to the term "obvious groundlessness" used in that provision. As the Marshal of the Sejm has emphasised, the said Resolution has not led to the situation where there is a possibility, adopted in the common jurisprudence of courts, that the criterion of "obvious groundlessness" is used when there are serious doubts as to the content of legal regulations which are applicable to a given case. The Resolution of the Supreme Court clarified the doubts of the court which referred the question of law, as regards the normative content of regulations - contained in the Decree on the Imposition of Martial Law - which may be relevant for examining the case of a judge with regard to whom a motion for permission to call him/her to criminal responsibility has been filed.

As the Marshal of the Sejm states in his pleading of 10 June 2010, it seems that, by extending the scope of its original application, the Ombudsman actually wanted to persuade the Tribunal to verify the accuracy of the interpretation provided by the Supreme Court in a particular adjudication in the process of applying the law.

5. Pursuant to Article 183(1) of the Constitution, "the Supreme Court shall exercise supervision over common and military courts regarding judgments" – both in the proceedings involving ordinary appellate measures and within the framework of judicial supervision involving extraordinary appellate measures. This also pertains to the fact that, in accordance with Articles 60 and 61 of the Act of 23 November 2002 on the Supreme Court (Journal of Laws - Dz. U. No. 240, item 2052, as amended), the Supreme Court may challenge the conformity of resolutions - aimed at resolving discrepancies in interpretation of the law, also of those resolutions which have the power of legal principles - to the law. Article 61(2) of the Act on the Supreme Court stipulates that, if the bench of seven Justices finds it justified from the point of view of the court practice or the gravity of the doubts, it may submit the legal issue or the motion in question for resolution to a bench of a

chamber, while the bench of a chamber may submit them for resolution to a bench of two or more chambers, or to the entire Supreme Court bench.

The Ombudsman and the Public Prosecutor-General are entitled to refer such motions to the Supreme Court (Article 60(2) of the Act on the Supreme Court), and in the case referred to the Tribunal by the Ombudsman, "the gravity of the doubts" would justify such a motion and would make it effective.

Even if entered in the book of legal principles, a resolution of the Supreme Court does not yet prove the existence of "well-established and consistent practice of applying the law", and thus it may not be regarded as a source of law within the meaning of Article 87 of the Constitution. In the case under discussion, the Ombudsman has not used that option.

6. The acceptance of the Ombudsman's application - which is the object of the case under discussion - for substantive examination, infringing on Article 188 of the Constitution, set a dangerous precedent: usurping, by means of the judgement of the Constitutional Tribunal, the actual review of court rulings issued by the enlarged benches of the Supreme Court, which are considered to assign specified normative content to statutory norms. Such practice of the Constitutional Tribunal is an unauthorised extension of the jurisdiction of the Tribunal, which is not justified in the Polish legal order and is contrary to the principle expressed in Article 188(1) in conjunction with Article 7 of the Constitution, and which paves the way for conflicts between the Constitutional Tribunal on the one side and the Supreme Court and the Chief Administrative Court on the other.

For the above reasons, I submit this dissenting opinion.

Dissenting Opinion
of Judge Mirosław Wyrzykowski
to the Judgement of the Constitutional Tribunal
of 27 October 2010, Ref. No. K 10/08

1. Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgement of 27 October 2010 in the case K 10/08.

2. I do not share the stance presented in the operative part and statement of reasons of the judgement by the Constitutional Tribunal. I hold the view that the proceedings concerning the review of Article 80(2b) of the Act of 27 July 2001 - the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended; hereinafter: the Law on the Organisation of Common Courts), understood in such a way that "the obvious groundlessness of a motion for permission to call a judge to criminal responsibility" encompasses an issue which requires the substantial interpretation of the Act, are subject to discontinuation, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that the pronouncement of a judgement is inadmissible.

3. I do not share the reasoning presented in points 2-3 of the statement of reasons, which has led the Constitutional Tribunal to draw a conclusion that Article 80(2b) of the Law on the Organisation of Common Courts, in the challenged form, may be subject to constitutional review, from the point of view of higher-level norms indicated by the Ombudsman.

It follows from the statement of reasons that the Resolution of the Supreme Court of 20 December 2007 (Ref. No. I KZP 37/07, OSNKW No. 12/2007, item 86; hereinafter: the Resolution) shapes, in an unambiguous and authoritative way, the interpretation of the term "obviously groundless", contained in Article 80(2b) of the Law on the Organisation of Common Courts. Consequently, the said provision is to gain new normative content which thus may be the object of constitutional review. In the view of the Constitutional Tribunal, this is supported by the following arguments.

Firstly, the connection between the said Resolution and the challenged provision is confirmed by the manner and normative context of its adoption. The interpretation of the provision challenged by the Ombudsman is determined by the disciplinary character of the proceedings carried out by the Supreme Court.

Secondly, in the case of a review initiated by a constitutional complaint, it is necessary to prove that a challenged provision has been assigned new normative content as a result of an unambiguous and well-established interpretation arising from the jurisprudence of courts; whereas in the case of a review initiated by a question of law or an abstract review, it suffices that "a certain interpretation of a given provision is unambiguously and authoritatively manifested in the jurisprudence of the Supreme Court". In the opinion of the Tribunal, it is not necessary to prove the consistent practice of applying the challenged norm, since a constitutional review – initiated by an application or a question of law aims at "protecting and ensuring the public interest".

Thirdly, granting a resolution of the Supreme Court the power of a legal principle entails that "the resolution is no longer an act of specific application of the law, but becomes an interpretative act, carried out outside the application of law *in concreto*". The Tribunal also assumed that the entry in the book of legal principles entails that the interpretation of the Supreme Court is "a universally applicable interpretation, assumed by

the other benches of the Supreme Court, and indirectly also by other courts in the cases of the same kind" and – consequently - "it is therefore hard to presume that the judges of the courts of lower instances – in that case those of courts of appeal – adjudicating in an analogical case, will adjudicate in a different way than the adjudication adopted by the Supreme Court, regardless of the view of the highest appellate instance".

Fourthly, the Tribunal has expressed the view that the Resolution entered in the book of legal principles may have triggered the so-called chilling effect.

4. With regard to the argument that the connection between the aforementioned Resolution and the challenged provision confirms the manner and normative context of its adoption, and the interpretation concerning the provision challenged by the Ombudsman is determined by the disciplinary character of the proceedings of the Supreme Court, I state that the argument is based on an erroneous interpretation of the object of the Resolution adopted by the Supreme Court in the case I KZP 37/07, and a normatively unjustified interpretation of the "connection" between a norm and adjudication.

4.1. In the statement of reasons, the Constitutional Tribunal has stated that it is "unambiguously acknowledged" in the Resolution I KZP 37/07 that it concerns the interpretation of Article 80(2b) of the Law on the Organisation of Common Courts. To confirm this thesis, the following excerpt from the Resolution has been cited in the judgement in the case K 10/08: "when analysing the referred issue, a conclusion should be drawn that the wording «is it obvious» which appeared therein in relation to the fact that the Supreme Court – the Disciplinary Court dealt with the appeal of the Prosecutor of the IPN against the order of the President of the Supreme Court which refused, pursuant to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, to accept the motion for permission to call Zdzisław B., a retired Justice of the Supreme Court, to criminal responsibility (colloquially referred to as revoking a judge's immunity) as obviously groundless".

The excerpt of the reasoning adopted by the Supreme Court has been taken out of context and merely constitutes an element of discourse concerning the proceedings in the case I KZP 37/07. It clearly follows from the discourse that the issue of "obvious groundlessness" of a motion for permission to call a judge to responsibility has a character of an interlocutory action. It should be pointed out that the Supreme Court continues its argumentation, stating further on that "the term «obvious groundlessness» is adequate within the framework of decision-making in a specific case; whereas the question about the «obviousness» of the existence or non-existence of an obligation on the part of a court adjudicating in criminal cases under the Decree on the Imposition of Martial Law constitutes certain *superfluum*; the essence of the case is what the legal system was like at that time, regardless of the fact whether the interpreter of the statutory and constitutional provisions of that time regards the conclusion on this issue as obvious, or whether he/she arrives at it after a complex analysis of a legal text. Basically, the enlarged bench of the Court was faced with the question about the conformity of a statutory regulation which was binding at that time (i.e. at the moment of adjudication), and which required that a date placed on a particular issue of the Journal of Laws (*Dziennik Ustaw*) be regarded as the actual date of publication, to the Constitution of the People's Republic of Poland which was in force then and the international agreements which were binding for the People's Republic of Poland."

In the light of the above, I hold the view that the Constitutional Tribunal has erroneously reconstructed the object of the Resolution, ascribing, to the Supreme Court, the view which the Court had not voiced. The Resolution concerned the substantial

interpretation of Article 61 in conjunction with Article 3 of the Decree of the Council of the State on the Imposition of Martial Law, dated 12 December 1981 (Journal of Laws - Dz. U. No. 29, item 154; hereinafter: the Decree on the Imposition of Martial Law), in the light of Article 8(2) and (3), Article 30(1)(3) and Article 62 of the Constitution of the People's Republic of Poland as well as Article 15 in conjunction with Article 4 of ICCPR.

4.2. Moreover, what weighs in favour of such an interpretation is the argumentation related to Article 441(1) of the Code of Criminal Procedure, which was the basis of referring a question in the case I KZP 37/07.

Firstly, referring a question is justified when there is a connection between a reply thereto and a given case which is pending before the court which has referred the question. However, the legislator does not provide for an issue requiring the substantial interpretation of a statute to constitute the basis of adjudication, as the Constitutional Tribunal appears to have assumed in the present case. Pursuant to Article 441(1) of the Code of Criminal Procedure, a legal issue arises in the course of examination of an appellate measure (P. Hofmański, comment 3 to Article 441, [in:] *Kodeks postępowania karnego. Komentarz,* P. Hofmański, E. Sadzik, K. Zgryzek (eds.), Warszawa 2007). What is meant here is every norm – requiring a substantial interpretation – which an appellate court examines, or intends to examine, in order to seek adjudication in a particular case. Thus, this dependency has a broad character, and encompasses all legal issues requiring a substantial interpretation; the explanation of those issues has an impact on the adjudication of an appellate court.

The term "impact" is not equivalent to the term "the basis of adjudication". I hold the view that the point here is "the projection of a potential path of reasoning" in the case of a court which is only at the stage of seeking a resolution. A legal issue referred by an appellate court is an element of reasoning of the court which is about to examine an appellate measure. In other words, this is any legal issue which may become the basis of adjudication, provided this is justified by actual circumstances of the case.

Since the court posing the question indicated a different legal issue which raises doubts which may have impact on the examination of an appellate measure, then there are no normative grounds for the reasoning of the Constitutional Tribunal which states that supposedly a specific character of the question about a substantial interpretation meant that the Resolution was to directly concern a potential refusal to accept a motion for permission to call a judge to criminal responsibility.

4.2.2. Secondly, questions of law may be referred where there is a need for the "substantial" interpretation of a statute, which means that "they should solely pertain to general issues" (P. Hofmański, comment 3 to Article 441...; T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne,* Warszawa 2005, s. 791). Therefore, they may not "concern the legal qualification as regards the facts of a given case or the manner of specifying the disposition of a given norm with regard to the facts" (T. Grzegorczyk, J. Tylman, *Polskie...*, p. 792, and the stance of S. Wodyka and the Supreme Court cited therein with regard to the case I KZP 21/94). When providing an answer to a given question, the Supreme Court may not, on behalf of the court which has referred the question, resolve a particular case pending before that court.

Thus, there are no grounds for the reasoning of the Constitutional Tribunal that, allegedly, the Resolution I KZP 37/07 primarily concerned Article 80(2b) of the Law on the Organisation of Common Courts, as then the Supreme Court would have provided an unambiguous legal qualification of the facts of the case.

4.2.3. Thirdly, from the formal legal point of view, the object of a resolution – adopted by the Supreme Court in accordance with Article 441(1) of the Code of Criminal

Procedure – is determined by the operative part of the decision by the court referring the question. As Article 441(2) of the Code of Criminal Procedure provides for "referring" adjudication to an enlarged bench, thus the operative part of the decision by an appellate court remains relevant also for that bench. The point here is the resolution of the same issue which requires a substantial interpretation. Modifying the question about a substantial interpretation may not serve the purpose, for which it has been raised, and may lead to abstract resolution of the issue.

Referring a question about a substantial interpretation is not an obligation, but a right of the court referring the question (see P. Hofmański, comment 4 to Article 441...), which it may exercise when it has subjective doubts as to the interpretation of law (cf. the decision of the Supreme Court of 19 May 1999, Ref. No. I KZP 13/99, WPP No. 2/2000, item 177). The aim of answering a question about a substantial interpretation is to unify the interpretation of law, as well as to correctly identify an appellate measure by way of eliminating doubts of the court referring the question. Such a question prevents adjudicating on an appellate measure on the basis of provisions which are unclear and raise doubts. In that regard, the Supreme Court is bound by the operative part of the decision by the court referring the question.

Referring the above remarks to the present case, I wish to note that, when adopting the aforementioned Resolution, the Supreme Court was bound by the scope ratione materiae of the operative part of the decision, adopted by the court which had posed the question, which pertained to the legal status of the Decree on the Imposition of Martial Law, and did not concern the power to refuse to accept a motion for permission to call a judge to criminal responsibility on the grounds that it is obviously groundless. It has aptly been stated by the Sejm that the Resolution does not refer to that provision.

4.3. In this context, it should be emphasised that if the court referring the question had asked about the substantive interpretation of the term "obvious groundlessness", then such a question would not have fulfilled the requirements specified in Article 441(1) of the Code of Criminal Procedure. Lacking sufficient specificity, the term rules out the existence of a legal issue which requires a substantial interpretation.

5. The second argument of the Constitutional Tribunal assumes that, in the case initiated by a constitutional complaint, it is necessary to prove that the challenged provision has been assigned new normative content as a result of unambiguous and well-established jurisprudence of courts, whereas when it comes to a review initiated by a question of law, or an abstract review, it suffices that "a certain interpretation of a given provision is unambiguously and authoritatively manifested in the jurisprudence of the Supreme Court". In the opinion of the Tribunal, it is not necessary to prove that the practice of applying the challenged norm has been consistent, since the review of constitutionality – initiated by an application or a question of law - aims at "protecting and ensuring the public interest". I conclude that such argumentation is not confirmed in the previous constitutional jurisprudence, to the extent it allows for a review of the well-established "judicial interpretation of norms".

5.1. In the light of constitutional jurisprudence, the content of a specific legal norm comprises not only the wording of a challenged provision, but also its systematic determinants, the established views of the doctrine and the established line of jurisprudence. It is not disputable that "if a particular interpretation of a provision of a statute has become well-established in an obvious way and, in particular, if it has unambiguously and authoritatively been manifested in the jurisprudence of the Supreme

Court or the Chief Administrative Court, then it should be regarded that the provision – in the course of its application – has acquired the content which the highest judicial instances of our country have recognised therein" (the judgement of the Constitutional Tribunal of 3 October 2000, Ref. No. K 33/99, OTK ZU No. 6/2000, item 188). Carrying out a constitutional review of law, the Constitutional Tribunal takes into consideration the interpretation of a norm by the organs of public authority responsible for applying the law if the interpretation has been: consistent, common and unambiguous (see e.g. the judgement of 8 December 2009, Ref. No. SK 34/08, OTK ZU No. 11/A/2009, item 165, and the judgements of the Constitutional Tribunal of: 17 November 2008, Ref. No. SK 33/07, OTK ZU No. 9/A/2008, item 154; 16 September 2008, Ref. No. SK 76/06, OTK ZU No. 7/A/2008, item 121). Such a circumstance occurs, in particular, if the practice has been shaped by the activity of the Supreme Court, the resolutions of which – due to their authority and place within the judicial system – are (should be) taken into account in the jurisprudence (see e.g. the judgements of the Constitutional Tribunal of: 7 March 2007, Ref. No. K 28/05, OTK ZU No. 3/A/2007, item 24; 28 October 2003, Ref. No. P 3/03, OTK ZU No. 8/A/2003, item 82). Nevertheless, in the constitutional jurisprudence, the up-to-date stance is that "consistent practice of applying the law has unquestionably established the interpretation of a given provision" (the decision of the Constitutional Tribunal of 4 December 2000, Ref. No. SK 10/99, OTK ZU No. 8/2000, item 300).

5.2. The possibility of constitutional assessment of review concerning the well-established and unambiguous interpretation of a provision is interrelated not so much with the character of the application initiating the proceedings and the division into a review initiated in a relation to a specific case and an abstract review, but rather with the basic function of the constitutional judiciary which is the review of norms "encoded" in legal provisions (cf. e.g. the judgement of the Constitutional Tribunal of 15 December 2008, Ref. No. P 57/07, OTK ZU No. 10/A/2008, item 178). Within the scope of the jurisprudence specified in Article 188 of the Constitution, the Constitutional Tribunal adjudicates on the hierarchical conformity of norms derived from the provisions – components of a legal text. The indication of a particular legal provision is intended for identification of a particular problem (cf. Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym*, Warszawa 2003, p. 192).

In this context, the examination of a case with regard to its substance is contingent upon resolving whether the constitutional problem presented by the initiator of review arises from a legal norm. As a court of law, the Constitutional Tribunal is not competent to assess the constitutionality of acts of applying the law (see the decision of the Constitutional Tribunal of 26 October 2005, Ref. No. SK 11/03, OTK ZU No. 9/A/2005, item 110). In the cases of a constitutional complaint which has the character of "a complaint about a provision", a question of law, as well as an abstract review, each time it should be considered whether the content of a legal norm has been shaped in a consistent way in the process of applying the norm (see: with reference to constitutional complaints e.g. the judgement of 1 July 2008, Ref. No. SK 40/07, OTK ZU No. 6/A/2008, item 101, and cf. e.g. the decision of 13 October 2008, Ref. No. SK 20/08, OTK ZU No. 8/A/2008, item 146; as regards questions of law e.g. the judgement of the Constitutional Tribunal of 6 September 2001, Ref. No. P 3/01, OTK ZU No. 6/2001, item 163; with reference to applications e.g. the judgement of the Constitutional Tribunal of 7 March 2007, Ref. No. K 28/05, OTK ZU No. 3/A/2007, item 24).

5.3. In the light of the previous jurisprudence, when examining if there has been a "consistent, common and unambiguous" interpretation determining the content of a

regulation under review, an auxiliary criterion is the fact that such an interpretation has become the starting point for amending the law (see the cited judgement in the case K 28/05) or the fact that the only court competent to adjudicate on the basis of a norm shaped by a resolution entered in the book of legal principles has been the Supreme Court, the benches of which are bound by the resolution (see the cited judgement in the case SK 34/08).

5.4. Therefore, I find it unjustified to state that supposedly it has not been necessary to prove the consistent practice of interpreting the challenged norm, if – as the Tribunal claims – the primary criterion for the assessment of constitutionality is "the public interest", whereas the interests of the individual are of secondary importance in the context of constitutional review (see point 2.3. *in fine* of the statement of reasons for this judgement). Firstly, the presented distinction is unclear and normatively difficult to accept, since both procedures for review aim at protecting the public interest, which arises from the function of a constitutional court which consists in ensuring the conformity of normative acts to the Constitution (cf. Z. Czeszejko-Sochacki, *Sądownictwo*..., p. 205). A ruling issued in the proceedings initiated by a constitutional complaint is not aimed – as the Tribunal seems to perceive that – at protecting a particular interest of the individual, but "it separates itself from an infringement of a freedom or right which gave rise to a particular constitutional complaint, and the adjudication solely encompasses the hierarchical review of norms" (Z. Czeszejko-Sochacki, *Formy naruszenia konstytucyjnych wolności lub praw* [in:] *Skarga Konstytucyjna*, J. Trzciński (ed.), Warszawa 2003, p. 82). Secondly, the presented distinction does not take into account that, in the context of the consequences of adjudicated unconstitutionality, both the constitutional complaint and the question of law always constitute the tool for constitutional and legal protection of the individual (cf. e.g. the judgement of the Constitutional Tribunal of 14 June 2000 r., Ref. No. P 3/00, OTK ZU No. 5/2000, item 138 and the decisions of the Constitutional Tribunal of: 13 April 2010, Ref. No. P 35/09 OTK ZU No. 4/A/2010, item 39 and 10 June 2009, Ref. No. P 4/09, OTK ZU No. 6/A/2009, item 93). Thirdly, in order to carry out a hierarchical review of conformity of the normative acts of lower rank to the normative acts of higher rank, it is necessary to reconstruct the normative character of the object of review and the higher-level norm for review, rather than to determine whose interests, and in what order, are taken into consideration during a review of constitutionality of law. In jurisprudence, a view has been recurrent that the point is to determine whether the content derived from an excerpt of a statute by common courts become well-established - regardless of the intentions of the legislator – in an "obvious" way (the judgement of the Constitutional Tribunal of 28 February 2008, Ref. No. K 43/07, OTK ZU No. 1/A/2008, item 8).

In conclusion, the dogmatic statement of reasons adopted in the case reveals far-reaching discrepancies when juxtaposed with the previous jurisprudence, as well as it does not take into account the essence of constitutional review of law, and the legal instruments meant to facilitate that review.

6. The third argument of the Constitutional Tribunal assumes that granting a resolution the power of a legal principle entails that "the resolution is no longer an act of specific application of the law, but becomes an interpretative act, carried out outside the application of law *in concreto*". Also, the Tribunal has presumed that an entry in the book of legal principles means that the interpretation of the Supreme Court is " a universally applicable interpretation, assumed by the other benches of the Supreme Court, and indirectly also by other courts in the cases of the same kind and – consequently - "it is therefore hard to presume that the judges of the courts of lower instances – in that case

those of courts of appeal – adjudicating in an analogical case, will adjudicate in a different way than the adjudication adopted by the Supreme Court, regardless of the view of the highest appellate instance".

In my opinion, what underlies the above view is the legal significance of an entry in the book of legal principles, for which there is no basis in the Act of 23 November 2002 on the Supreme Court (Journal of Laws - Dz. U. No. 240, item 2052, as amended; hereinafter: the Act on the Supreme Court), and the erroneous statement that the resolutions of the Supreme Court have a universally binding character.

The interpretation provided by the Supreme Court, pursuant to Article 59 of the Act on the Supreme Court, has an operational character and, in principle, does not bind other courts. The answer to a question about the substantial interpretation is binding only in a given case and does not automatically bind the other courts. Undeniably, upon entering a given resolution in the book of legal principles, the assumed interpretation acquires a legal character – i.e. it is binding for the other benches of the Supreme Court, which – if they wish to depart from the legal principle – need to refer the legal issue to a relevant bench of the Supreme Court. It is indisputable that the resolutions entered in the book of legal principles constitute a key reference point for common courts which adjudicate in analogical cases.

From the formal point of view they are not binding for common courts. The courts may depart from the interpretation contained therein. Moreover, the entry in the book of legal principles does not entail that the resolutions of the Supreme Court become universally binding. Pursuant to Article 190(1) of the Constitution, only the judgements of the Constitutional Tribunal have such status (cf. the judgement of the Constitutional Tribunal of 8 May 2000, Ref. No. SK 22/99, OTK ZU No. 4/2000, item 107). Granting a resolution the status of a legal principle may not be confused with the competence to determine a universally binding interpretation of statutes, which was known in the Polish legal system before the entry into force of the Constitution.

I consider the adoption of the argumentation proposed by the Constitutional Tribunal to be unjustified in the light of judicial independence (Article 178(1) of the Constitution). There are no grounds for an abstract statement that one value being the consistency of jurisprudence of common courts takes precedence over another value being the freedom of judicial decision. Indeed, binding the benches of the Supreme Court with legal principles constitutes an exception to the principle of judicial independence, and may not be interpreted in a broader way without the indication of clear legal basis.

Bearing the above in mind, I conclude that as long as a given resolution entered in the book of legal principles is not manifested - *non ratione imperii, sed imperio rationis* – in the jurisprudence of common courts which reinforce its content by assigning an unquestionable and uniform interpretation to a given norm, one may not speak of "law-creating" consequences of the activity of the Supreme Court.

7. As to the statement of the Constitutional Tribunal that allegedly the Resolution I KZP 37/07 may have evoked the so-called chilling effect, I hold the view that this term – in particular in the context of criminal responsibility – may not be applied, without reservations and a thorough analysis, to the relations among the organs of public authority.

7.1. The organs of public authority shall function on the basis of, and within the limits of, the law (Article 7 of the Constitution). In other words, any type of their activity requires legitimisation which should, in particular, encompass determining the scope of powers. The powers of the organs of public authority may not be presumed, and they should be clearly and precisely stated in legal provisions (see e.g. the judgement of the

Constitutional Tribunal of 23 March 2006, Ref. No. K 4/06, OTK ZU No. 3/A/2006, item 32). Exercising the granted powers by an organ of public authority is restricted by the constitutional requirement to act "within the limits of the law" which should be understood broadly as observing not only prohibitions, but also following the obligations which are provided for by law (see W. Sokolewicz, comment 9 to Article 7, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), Warszawa 2007, Vol. 5, p. 10). The organ of public authority which will determine its competence in a given case may not refrain from action, if it is possible to reconstruct the obligation. Otherwise compensation liability may only apply for neglecting relevant action (Article 77(1) of the Constitution).

I hold the view that, in the light of the principle of legalism, the chilling effect may not constitute a premiss which justifies neglecting action by the organs of public authority. In accordance with the principle of legalism, formally rendered in Article 7 of the Constitution, (for more information see W. Sokolewicz, comment 8 to Article 7, [in:] *Konstytucja...*, p. 9), the said organs may not be – as the Tribunal has put it – "discouraged" from taking action, since there is an explicit obligation to take action or an overt prohibition against it.

7.2. Secondly, what undermines the admissibility of referring to a chilling effect with regard to the organs of public authority is its genesis and goal.

The term has been developed in the jurisprudence of the European Court of Human Rights in relation to the protection of subjective rights enjoyed by the individual against excessive and disproportionate interference from public authorities. In that regard, it is inextricably connected with the occurrence of an infringement on a particular right and freedom, which should be proved, in the first place, in order to speak at all of a chilling effect. The occurrence of a chilling effect may strengthen the argumentation for the protection of the individual's rights (e.g. the judgements of the ECHR of: 17 December 2004, in the case of Cumpănă and Mazăre v. Romania, para 115-116; 6 April 2006, in the case of Malisiewicz-Gąsior v. Poland, para 68).

It is stressed that the term "a chilling effect" has a character of a general indicator of an effect introducing restrictions, in particular if it goes beyond a particular situation which is the object of an application lodged with the ECHR, and may deter others from exercising the rights they are entitled to (see L. Garlicki, comments to Article 8, [in:] *Konwencja o ochronie praw człowieka i podstawowych wolności. Komentarz do artykułów 1-18*, L. Garlicki (ed.), Warszawa 2010, Vol. 1, p. 490; see also A. Wróbel, comments to Article 11, [in:] *Konwencja…..,* p. 706 as regards the case Bączkowski and Others v. Poland).

7.3. In the light of the above, the stance held by the Constitutional Tribunal is not justified by the construct of a chilling effect, adopted in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms; also, this has not been substantiated in the light of Article 7 of the Constitution. I hold the view that the said stance may create a dangerous construct which introduces discretion of the organs of public authority with regard to undertaking action.

7.4. Also, what is not without significance for the acceptance of the reasoning of the Tribunal is the circumstance, known from the materials collected with regard to the case, that after the adoption of the Resolution of the Supreme Court, the disciplinary courts for various types of courts, in a diversified way, adjudicated in the cases concerning judges who had ruled on the basis of retroactive provisions of the Decree on the Imposition of Martial Law. Emphasised by the Tribunal, "a chilling effect" refers to the actions of the

prosecutors of the Institute of National Remembrance. However, it is courts, and not prosecutors, that are the addressees of the provision of the Act, challenged by the Ombudsman. Assuming that the Resolution has had "a chilling effect" on the organs of public authority other than courts has no connection with the alleged significance of the Resolution as one assigning content to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts.

8. Apart from the above-mentioned reservations, I disagree with the arguments put forward in point 5 of the statement of reasons for this judgement. The findings of the Constitutional Tribunal are not confirmed by the previous constitutional jurisprudence and are based on evaluative statements.

8.1. With regard to the assessment of constitutionality of Article 80(2b) of the Law on the Organisation of Common Courts, in the context of the principle of specificity, I conclude that the Constitutional Tribunal, citing earlier rulings, has not correctly reconstructed the higher-level norm for constitutional review, resorting only to formulate a view that defining "obvious groundlessness" in the Resolution I KZP 37/07 infringes on the principle of specificity, by the fact that it rules out individual assessment of each motion to revoke immunity. Therefore, if I rightly understand the statement of the Tribunal, it has asserted that, by specifying the elements of a term which lacks sufficient specificity, the Supreme Court infringes on the principle of specificity.

Abstracting, at this point, from the fact that the object of the Resolution I KZP 37/07 was not to specify the designatum of the term "obvious groundlessness", I hold the view that the reasoning of the Constitutional Tribunal is not confirmed by the constitutional interpretation of the principle of specificity of legal norms. The previous *acquis constitutionnel* provides the criteria for specificity of a norm, which the Tribunal should have referred to or it should have departed from the earlier view.

In this context, the following assumptions are crucial for the assessment of constitutionality of a norm. Firstly, the requirement of specificity has a character of an order addressed to the legislator. In the latest jurisprudence, it has been assumed that the order "has a character of a general systemic directive, imposing an obligation on the legislator to optimise it in the legislative process. The legislator should aim at fulfilling the requirements comprising that principle to a maximum extent. For the above reasons, it is the legislator's obligation to create provisions of law which are specific, as it is possible in a given case, both in respect of their content as well as their form. Hence, the degree of specificity of particular regulations is relative with regard to the actual and legal circumstances that accompany each regulation. This relativity naturally results from the imprecision of language, in which legal texts are written, and from the variety of matter which is subject to regulation" (the judgement of the Constitutional Tribunal of 18 March 2010, Ref. No. K 8/08, OTK ZU No. 3/A/2010, item 23). Secondly, the said requirement applies to all regulations (directly or indirectly) which shape the legal situation of the citizen (cf. e.g. the judgements of the Constitutional Tribunal of: 20 November 2002, Ref. No. K 41/02, OTK ZU No. 6/A/2002, item 83; 29 October 2003, Ref. No. K 53/02, OTK ZU No. 8/A/2003, item 83; 9 October 2007, Ref. No. SK 70/06, OTK ZU No. 9/A/2007, item 103). Thirdly, it follows from the said principle that enacted provisions need to be formulated in a clear and lucid language, and must be comprehensible to its addressees (see e.g. the judgement of the Constitutional Tribunal of 21 March 2001, Ref. No. K 24/00, OTK ZU No. 3/2001, item 51). Fourthly, depriving a given provision of its binding force, due to its lack of clarity or imprecision has the character of *ultima ratio*. Given the principle which states that an interpretation applied needs to be consistent with

the Constitution, it is possible to declare unconstitutionality, by referring to the principle of specificity of provisions, where doubts, in no way, may be dispelled by applying the principles of interpretation. The imprecise wording or unclear content of a provision does not, in every case, justify eliminating it from legal transactions (see the judgements of the Constitutional Tribunal of: 28 June 2005, Ref. No. SK 56/04, OTK ZU No. 6/A/2005, item 67; 15 January 2009, Ref. No. K 45/07, OTK ZU No. 1/A/2009, item 3).

Considering that the term "obvious groundlessness", contained in Article 80(2b) of the Law on the Organisation of Common Courts has a character of a term lacking sufficient specificity, the above criteria should be supplemented with the proper application of the considerations which the Constitutional Tribunal put forward, while assessing the constitutionality of a general clause of "principles of community life". In the judgement of 17 October 2000 (Ref. No. SK 5/99, OTK ZU No. 7/2000, item 254), the Tribunal stated that "given that, in the case of general clauses, we deal with regulations which make reference to extra-legal evaluation, the semantic scope of which is imprecise – the requirement for sufficient specificity must take into account essential features of general clauses and the indispensability of their existence in the system of law. (...) in the said case, one may analyse the issue of ensuring the predictability of »the line of evaluation« primarily on the basis of experience ensuing from the process of applying the law. Indeed, only the evaluation of judicial understanding of Article 5 of the Civil Code may give an answer to the question whether such a general norm ensures the predictability of judicial adjudication. And what is meant here is not a particular case, but a well-established line of jurisprudence which provides an answer to the question. (...) an infringement on the requirement of predictability of a judicial ruling, with the application of a general clause, may occur in three situations. Firstly, if the premisses of the interpretation of that general clause had not only an objective, but also a subjective character. Secondly, if the content of that general clause did not create sufficient guarantees that its judicial interpretation would be consistent and cohesive, so that a possibility of predicting a given adjudication could be ensured. Thirdly, if it was possible to derive, from the wording of that general clause, the law-creating powers of courts which are, in particular, manifested in the right of a court to independently assign new content to Article 5 of the Civil Code".

Referring the above criteria to the present case, I hold the view that there is no logical and normative connection between the interpretation of the principle of specificity of law which has so far been assumed in the constitutional jurisprudence and the object of review that has been reconstructed in the case at hand. Neither the applicant nor the Constitutional Tribunal has proved that Article 80(2b) of the Law on the Organisation of Common Courts is unclear and ambiguous, as well as whether and why that provision allows for assuming a divergent and inconsistent interpretation or creating law in the course of resolving individual cases by courts. The term "obvious groundlessness" does not per se infringe on Article 2 of the Constitution (cf. the judgement of the Constitutional Tribunal of 16 January 2006, Ref. No. SK 30/05, OTK ZU No. 1/A/2006, item 2).

8.2. In addition, it is impossible to overlook the application of double standards by the Ombudsman and the Constitutional Tribunal to the assessment of constitutionality of actions of the organs of public authority. On the one hand, ascribing law-creating activity to the Supreme Court, the unconstitutionality of specifying the term "obvious groundlessness" is stated; on the other hand – constantly emphasising, in the statement of reasons, the need to define this term *a casu ad casum* – the Tribunal issues an interpretative adjudication. Consequently, it sanctions, in a universally binding way, a certain interpretation of the provision.

For these reasons, I have submitted this dissenting opinion.

Dissenting Opinion
of Judge Bohdan Zdziennicki
to the Judgement of the Constitutional Tribunal

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgement of 27 October 2010, Ref. No. K 10/08, as a whole.

1. The Ombudsman's application concerns the Resolution of 20 December 2007 by 7 Justices of the Supreme Court, Ref. No. I KZP 37/07. According to the Ombudsman, the said Resolution of the Supreme Court has exceeded the scope of interpretation of the binding law, by assigning normative content to the term "obviously groundless", as used in Article 80(2b), first sentence, of the Act of 27 July 2001 – the Law on the Organisation of Common Courts (Journal of Laws - Dz. U. No. 98, item 1070, as amended; hereinafter: the Law on the Organisation of Common Courts); in turn, the normative content is allegedly inconsistent with Article 2, Article 7, Article 10 and Article 42(1) of the Constitution, and with Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended), as well as with Article 15 of the International Covenant on Civil and Political Rights (Journal of Laws – Dz. U. of 1977 No. 38, item 167).

Due to the defective re-interpretation of the said Resolution of the Supreme Court, the Ombudsman's application should not be examined with regard to its substance, and the proceedings in this case should be discontinued on the grounds of inadmissibility, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act).

2. The Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, in no way refers to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. The above-mentioned Resolution was adopted as a result of a question of law, which was referred by the Supreme Court – the Disciplinary Court, in accordance with the procedure specified in Article 441 of the Code of Criminal Procedure. Its content comprised doubts related to the interpretation of applied provisions of the Constitution of the People's Republic of Poland, the Decree of 12 December 1981 on the Imposition of Martial Law (Journal of Laws - Dz. U. No. 29, item 154, as amended) as well as the Act of 30 December 1950 on publishing the Journal of Laws and the the Official Gazette of the Republic of Poland - *Monitor Polski* (Journal of Laws – Dz. U. No. 58, item 524, as amended). Such a scope of the question does not give grounds to assume that the intention of the court referring the question (the Supreme Court – the Disciplinary Court), and thus the court which provides the reply – an enlarged bench (7 Justices of the Supreme Court), was to interpret the term "obvious groundlessness" within the meaning of Article 80(2b) of the Law on the Organisation of Common Courts. The enlarged bench of the Supreme Court (composed of 7 Justices) was faced with the question about the conformity of a statutory regulation which was binding at the moment of adjudication, and which required that a date placed on a particular issue of the Journal of Laws (*Dziennik Ustaw*) be regarded as the actual date of publication, to the Constitution of the People's Republic of Poland which was in force then and the international agreements which were binding for the People's Republic of Poland.

The connection between the Resolution of the Supreme Court of 20 December 2007, Ref. No. I KZP 37/07, and Article 80(2b), first sentence, of the Law on the Organisation of Common Courts, which was challenged by the Ombudsman, is at most

indirect. Since there is no necessary functional premiss for the Constitutional Tribunal to examine the application submitted by the Ombudsman, the proceedings in this case should be discontinued as inadmissible, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act.

3. Pursuant to Article 188 of the Constitution, the Constitutional Tribunal adjudicates as "a court of law" (an exception is provided for in Article 188(4) – in particular when it comes to adjudicating on the conformity of the activities of political parties to the Constitution). An application to the Constitutional Tribunal may only regard the examination of constitutionality of a legal provision, and not the acts of applying the provision.

Adopted with reference to the questions of law referred in particular cases by appellate courts, the resolutions of the Supreme Court constitute a form of the Court's judicial supervision involving extraordinary appellate measures (the power to conduct such supervision has been assigned to the Supreme Court in Article 183(1) of the Constitution), which is carried out due to the initiative of the court examining an appellate measure. The Resolution of 20 December 2007 by 7 Justices of the Supreme Court, Ref. No. I KZP 37/07, provides the interpretation of provisions with reference to the questions which were referred by the Supreme Court – the Disciplinary Court, with relation to the case it was examining. The conclusions of the Supreme Court presented in the said Resolution manifest the Court's stance as regards legal issues which raise serious doubts, but in a specific situation that has occurred, and not *in abstracto*. The Resolution of the Supreme Court, challenged by the Ombudsman, is therefore an act of applying, and not enacting, the law. Hence, the assessment as to whether the Resolution is consistent with the Constitution does not fall within the scope of jurisdiction of the Constitutional Tribunal, which is strictly specified in Article 188 of the Constitution.

This is another reason why the application by the Ombudsman should not be examined with regard to its substance, and the proceedings in the case should be discontinued as inadmissible, on the basis of Article 39(1)(1) of the Constitutional Tribunal Act.

4. Challenged by the Ombudsman, the Resolution of the Supreme Court, entered in the book of legal provisions, is binding for the benches of the Supreme Court, but is not binding for the prosecutors of the Institute of National Remembrance (the IPN) and the courts of appeal which adjudicate in the first instance in the cases concerning the revocation of a judge's immunity.

Thus, the challenged Resolution of the Supreme Court does not have the attribute of a legal norm. Even if entered in the book of legal principles, one resolution of the Supreme Court does not yet prove the existence of "the well-established and consistent practice of applying the law". Numerous court rulings have previously been issued to the contrary.

Hence, in the case under examination, we do not deal with the situation which is discussed in the jurisprudence of the Constitutional Tribunal (the judgement of 2 June 2009, Ref. No. SK 31/08, OTK ZU No. 6/A/2009, item 83); namely that "if the interpretation of a given legal provision has been determined, in an indisputable way, in the course of the well-established and consistent practice of applying the law and, at the same time, the adopted interpretation is not challenged by the representatives of the doctrine, the legal norm decoded from a given provision, in accordance with the well-established practice, is the object of constitutional review. Indeed, at the beginning of this dissenting opinion, it is clearly indicated that the Resolution under examination does not at all directly

refer - as the Ombudsman asserts – to Article 80(2b), first sentence, of the Law on the Organisation of Common Courts. The assessment of indirect impact of the Resolution of the Supreme Court of 20 December 2007 on the normative content of Article 80(2b), first sentence, of the Law on the Organisation of Common Courts falls within the jurisdiction of the Supreme Court. *Nota bene* there is also a possibility of referring to the Supreme Court, in accordance with Article 441 of the Code of Criminal Procedure (*quaestiones in concreto*), as regards the provisions, in the content of which the legislator used the term "obvious groundlessness".

5. To sum up, it should be pointed out that the acceptance of the Ombudsman's application, to be examined as regards its substance, and consequently the examination thereof by the Constitutional Tribunal:

a) infringes on Article 188 of the Constitution, by extending the scope of jurisdiction of the Constitutional Tribunal in a way which is inconsistent with that basic rule governing competence,

b) infringes on the obligation of cooperation which – pursuant to the Preamble of the Constitution – is included in the assumptions of the system of government in the Republic of Poland. The Constitutional Tribunal, the Supreme Court and other Polish courts belong to the judiciary (cf. Articles 173 and 174 of the Constitution). Their individual scope of competence – determined by the provisions of the Constitution and relevant statutes – complement one another. What is indispensible for the system to work effectively is permanent cooperation among all its segments, and not igniting conflicts by totally arbitrary extension of their competence,

c) set a dangerous systemic precedent where the Constitutional Tribunal reviews the rulings of the Supreme Court (adjudicated by enlarged benches or benches of particular chambers, or benches of joint chambers of the Court), by assigning a normative character to those rulings, and thus not regarding them – in accordance with the binding legal order in the Republic of Poland – as acts of applying the law within the framework of the Supreme Court's judicial supervision involving extraordinary appellate measures, as referred to in Article 183(1) of the Constitution,

d) changes many key elements, as regards the actions related to the review of challenged regulations by the Constitutional Tribunal, by means of:

1) adopting the applicant's erroneous view as to the object of the challenged Resolution of the Supreme Court,

2) assigning an act of applying the law, in the said Resolution, with the character of an act creating legal norms,

3) assigning a provision of the law concerning systemic issues and court proceedings (Article 80(2b) of the Law on the Organisation of Common Courts) with the character of a provision of quasi-substantive law,

4) assigning – just as the applicant has done it – the role of a "higher instance" to the Constitutional Tribunal with regard to the rulings of the Supreme Court. The Constitutional Tribunal is not competent to correct the substantive views contained in the jurisprudence of the Supreme Court.