

Judgment

dated 24 June 1998 (K. 3/98)

The Constitutional Tribunal sitting with the full bench composed of Chairman Marek Safjan, Zdzisław Czeszejko-Sochacki, Teresa Dębowska-Romanowska, Lech Garlicki (Reporting Judge), Stefan J. Jaworski, Wiesław Johann, Krzysztof Kolasiński, Biruta Lewaszkiewicz-Petrykowska, Andrzej Mączyński, Ferdynand Rymarz, Jadwiga Skórzewska-Łosiak, Wojciech Sokolewicz, Janusz Trzcіński, Błażej Wierzbowski, Marian Zdyb(...)

held

I

1. articles 1, 2, 3, 4 and 10 of the Act dated 17 December 1997 on Amending the Act-Law on the System of Universal Courts and Some Other Acts conform with article 180 of the Constitution of the Republic of Poland dated 2 April 1997.

2. articles 7, 8 and 9 of the Act, mentioned in section 1 of the reasoning conform with articles 32, 78 and 186 of the Constitution.

article 6 of the Act, mentioned in section 1 of the reasoning, contravenes article 7 of the Constitution insofar as it was ratified by the Sejm without following the course of action required by the provisions of law for its issuance.

II

article 6 of the Act dated 17 December 1997 on Amending the Act-Law on the System of Universal Courts and Some Other Acts is not inseparably tied to this entire act as understood by article 122, section 4, sentence 2 of the Constitution.

Reasoning

(...)

IV

(...) Article 6 of the Act dated 17 December 1997 repeals the statute of limitations on the disciplinary proceedings for judges who – generally speaking – transgressed against the duty of issuing independent and impartial decisions in political trials conducted before 1989; it establishes a specific course for commencing such disciplinary proceedings and – if such a deed is deemed to have been committed – it establishes an obligatory punishment of disbarring the person from the ranks of the judiciary.

Without engaging in a more complete analysis of the stipulations of article 6 it may be asserted that it provides the grounds for removing a judge from his/her position on account of the contents of decisions handed down and the way in which court proceedings were conducted. The Constitutional Tribunal asserts that the permissibility for instituting these types of provisions may only be considered with reference to the legacy of the Polish judiciary from the period when – quoting the language in the Preamble to the Constitution „fundamentals freedoms and human rights were violated in our Homeland.” For there is no doubt that the decisions handed down now by judges in a democratic State ruled by law are subject only to evaluation and verification under the procedure of supervision at a given instance, but – in exceptional circumstances – they may be subject to the mechanisms of criminal or disciplinary liability. In turn, it would be impermissible to create extraordinary procedures to remove a judge from his/her position for the reasons stated above.

Restricting however our considerations to the period ending in 1989, one should remember that there were drastic abuses of independence at that time, ones that should still be

disclosed and explained. In this and only in this period it may turn out that the general principles of a judge's accountability, fitted to the conditions of the democratic rule of law are not a sufficient mechanism when referring to the legacy from before the turning point in 1989. As pointed out in its decision dated 9 November 1993, „the shift from an authoritative state to the rule of law may exceptionally assume forms which would not be justified in normal conditions” (K.11/93, Collection of the Constitutional Tribunal's Decisions, 1993, Part II, pp. 361).

The Constitutional Tribunal upholds this position, but in particular it deems it to be right to adopt the principle of a judge's independence as the starting point for creating and evaluating the regulations mentioned above, although it does also believe that the findings adopted in 1993 require not only confirmation but also further development. These findings should be considered in light of Resolution Number 1096 (1996) of the Parliamentary Assembly of the Council of Europe, especially when pointing to the necessity of overcoming the legacy of totalitarian communist regimes.

The concept of judicial independence was used in the Constitution dated 1997 without any further definition but there is no doubt that the lawmaker used a „pre-existing term, whose significance had been formed in Poland in the time between the two world wars; today, it is confirmed in numerous international documents. Polish doctrine indicates that (see Z. Czeszejko-Sochacki: *Prawo do sądu w świetle Konstytucji RP* [Access to Court in Light of the Constitution of the Republic of Poland] PiP, 1997, Number I 1-12 pp. 99-100 and the works mentioned there by A. Murzynowski, A. Zieliński), independence entails a series of elements: 1) impartiality in relationship to the participants in proceedings, 2) independence from non-judicial bodies (institutions), 3) a judge's independence from the authorities and other judicial bodies, 4) independence from the influence of political factors, especially political parties, 5) the judge's internal independence. It is the constitutional duty of all bodies and persons coming into contact with the operation of courts to respect and to defend all these elements of independence, such is also the judge's constitutional duty. If a judge violates this duty, it may signify the transgression against the principle of judicial independence, which is tantamount to a very grave derogation against the basic principles of the operation of the judiciary.

A particularly drastic form of transgressing against the duties linked to the principle of independence is for a judge to violate the duty of maintaining impartiality which *inter alia* may mean molding the contents of decisions to suggestions or orders given to a judge from elsewhere, or, if a judge anticipates such suggestions, with an eye to the benefits to be accrued. This leads to a phenomenon known as a „discretionary judge,” which precludes meting out justice. This subjective partiality – as P Hofmański calls it: *Prawo do sądu w sprawach karnych...* [w] *Podstawowe prawa jednostki i sądowa ich ochrona* [Access to Court in Criminal Cases]..., *An Individual's Basic Rights and Their Judicial Protection*. ed. L. Wiśniewski, Warsaw 1997, p. 206) – on the part of the judge is always the negation of the correct exercise of justice, where it assumes a particularly dramatic dimension if – which was and is a rule in totalitarian states – it is used in political processes when the judge becomes the executor of the State's political will to eliminate those persons who are attempting to go against that will.

As demonstrated in the „Basic Principles of the Independence of the Judiciary” adopted in 1985 in the United Nations „the independence awarded to the judiciary not only authorizes but also forces judges to conduct trials justly and to enforce fully the rights of the parties taking part in them.” The Constitutional Tribunal gave an expression of the treatment of the principle of independence in its decision K. 11/93 in which it fully upholds the position that if there are judges in the Polish judiciary who under the previous system transgressed against

the duties ensuing from the principle of judicial independence (in particular if they violated the duty of impartiality whereby „the contents of the decisions made by the judge were dependent upon the influence of an external entity” – *ibid.* p. 359), or – what's more – if they used the courtroom to perpetuate political repression, then removing them from the profession of a judge is justified. Situations in which a judge subordinated the legal contents of his/her decisions to his/her political views or ideological preferences should be seen as a violation against maintaining impartiality.

Judicial independence is not just a judge's right but also his/her – fundamental duty. Just as the constitutional duty of the lawmaker and the bodies of judicial administration is to protect the independence of a judge, similarly, a judge ought to exercise this independence in the practice of making decisions. If then today's democratically legitimized lawmaker acknowledges that there are situations from the past remaining to be handled then in order to explicate them and to apply the necessary sanctions, it may institute extraordinary procedures for a judge's accountability which would not be permissible with reference to the present times.

But even in these instances the lawmaker must demonstrate particular diligence so as not to traverse the boundary of intervening in the independent sphere of a judge's independence which existed to a great degree before 1989. The lawmaker must then formulate special procedural guarantees and exercise particular precision and clarity in its formulations avoiding everything which could link the particular mechanisms of accountability to the deeds and actions which took place after 1989 as well as to the deeds and actions which remained within the framework of filling an office and did not constitute a violation of the duty of impartiality motivated by political causes. For once again it is necessary to emphasize that the above instances of transgressing against the duty of independence and impartiality have always constituted a derogation of a judge's dignity, and thus a violation of the duties which – even according to the then binding legislation – were binding upon every judge. This was therefore always a basis for conducting disciplinary proceedings and – in keeping with the gravity of the violation – meting out a punishment inclusive of disbaring him/her from the judicial service.

The extraction of these situations by the lawmaker in which the principles of independence and impartiality were abused, motivated by political causes is – in the opinion of the Constitutional Tribunal – permissible; all the more so since these situations were usually associated with infringing upon the most basic human rights and freedoms, especially the freedom of expressing views and communicating them to other persons. Provided then that the lawmaker captures these situations with the appropriately precise and explicit legal phrases one cannot claim that the Constitution forbids the adoption of such regulations. The Polish judiciary's past entails many glorious pages but opposite cases are widely known. The Constitutional Tribunal believes that the gravity of the judiciary in a democratic State ruled by law demands that those judges leave who subordinated the most basic values of the judiciary – independence and impartiality – to the purposes of political repression. It is necessary, however, to emphasize once again that such regulations must be exceptional in nature and applied only to drastic circumstances (one must also remember that only those situations may be considered in which a judge's deed was not at the same time a criminal offence, since accountability for a criminal offence may be pursued according to general principles) and must be interpreted in keeping with the principles governing the interpretation of exceptions. Judicial independence is an extraordinarily delicate mechanism; it is very easy to destroy it and very difficult to reconstruct.

The foregoing findings which, to a large degree, constitute a repetition and a furtherance of the hypotheses entailed in the decision dated 9 November 1993 must constitute the grounds

for evaluating the constitutionality of all regulations which even in the name of a constitutionally justified public interest-open the door to removing a judge from his/her post.

2. The Constitutional Tribunal investigated the course of work on the act dated 17 December 1997 and ascertained the following.

(...) First, before completing legislative work in the Sejm a stance was not expressed by the National Judiciary Council as stated in article 6 of the Act under examination herein as a meeting of the Council was not convened on this topic; in any case the Sejm did not officially invite the Council to express its stance. Second, it was not possible to express this stance since 4 days expired from when the amendment introducing a new article 6 was proposed to when the Act was ratified in its third reading, while over this period – as the Chairperson of the National Judiciary Council stated at a sitting of the commission – the Council could not respond to this amendment. Third, the Council's stance could not be used in respect of the government draft because article 6 includes new subject matter which was not regulated in the government draft.

3. The Constitutional Tribunal asserts that when investigating the constitutionality of the Act, it may evaluate not only its material (content-oriented) conformity with higher ranking norms but it may investigate – notwithstanding the contents and the scope of the application, where these acts became effective by following the course of action required by the provisions of law to issue them. As it stated in its decision dated 9 January 1996 (K. IS/95, OTK ZU Nrl/1996, p. 17), „The Constitutional Tribunal is bound by the application in this sense that it investigates the constitutionality of the provisions challenged by the applicant.” In the current state of legal affairs this clearly stems from article 42 of the Constitutional Tribunal Act dated 1 August 1997.

Without delving into the considerations of the full scope of meaning inherent in the phrase „provisions of law” and especially its relation to the formulation of the former article 2 of the Constitutional Tribunal Act dated 29 April 1985, the following findings must in any case be adopted:

- first, they give the Constitutional Tribunal the legitimacy to investigate whether all elements of the legislative course of action have been followed and which have been regulated at the constitutional level. The Constitutional Tribunal believes that it is its duty to investigate whether these elements were followed, notwithstanding the scope of allegations placed by the applicant;

- second, they give the grounds for the Constitutional Tribunal to investigate whether all of the elements of the legislative procedure were followed in full and which in particular have been formulated in provisions at the statutory level and in the provisions of parliamentary bylaws. The regulations adopted in article 42 of the current Constitutional Tribunal Act were supposed to bring about an expansion and not a narrowing in the former criteria of review (P. Sarnecki: [The New Constitutional Tribunal Act], *Przegląd Sejmowy*, 1998, Number 1, p. 15);

- third, the violation of the aforementioned elements of procedure may always be reviewed within the categories of a concurrent contravention of article 7 of the Constitution insofar as this provision imposes upon all public bodies the duty of acting pursuant to, and within the boundaries of, the law.

The provisions setting up the rights of some entities to take a stance and to express their opinion about the draft versions of acts before these acts are ratified by the Sejm are statutory in rank. Article 19 of the Act on Trade Unions contains *inter alia* these types of provisions, as does – in an important area for this case – article 2, sub-sections 7 and 8 of the National Judiciary Council Act dated 20 December 1989. These provisions stipulate that the National

Judiciary Council „shall express its stance on proposals to amend the system of courts as well as on other matters pertaining to the conditions of its operation” and that it „shall familiarize itself with the draft versions of normative acts concerning the judiciary.” The Constitutional Tribunal asserts that these provisions were ratified in 1989 in a different constitutional context when the principle of the separation of powers had not yet been adopted in the constitutional provisions. At present, however, they should be read in strict conjunction with the stipulations of the Constitution dated 1997, which emphasizes very resolutely the separateness and independence of the judiciary authorities, where the protection of these values is linked *inter alia* to the objectives of the National Judiciary Council. The formulations of the Act dated 1989 must then be interpreted today in such a way so as to bring the Council's role into life as fully as possible as a body that stands guard over the independence of the courts and judges (article 186, section 1 of the Constitution) and *inter alia* has a legitimate power to commence proceedings before the Constitutional Tribunal in this area (article 186, section 2).

The Constitutional Tribunal therefore believes that the Council's right to take a stance towards all the draft versions of acts pertaining to the system of courts, in particular to those draft versions whose contents are linked to the constitutionally demarcated scope of action discharged by the National Judiciary Council, is nestled in the formulations set forth in article 2, sub-sections 7 and 8 of the National Judiciary Council Act – notwithstanding the absence of precision in their wording. After all, the Prosecutor General took a similar stance showing that the duty of consulting draft versions of acts stems from – with reference to the National Judiciary Council- „article 2, sub-sections 7 and 8 of the National Judiciary Council Act. The failure to follow the statutory course for ratifying this Act is therefore subject to evaluation by the Constitutional Tribunal from the point of view of article 7 of the Constitution of the Republic of Poland” (p.10).

The new regulation of a judge's legal situation with reference to retirement and especially with reference to the creation of an additional mechanism of disciplinary accountability for judges is indubitably included in this subject matter since after all the principles governing the removal of a judge from his Mer position are of fundamental importance for the independence of courts and judges. It is also a part of the subject matter termed by the National Judiciary Council Act as the „system of courts.” This stems not only from formal concerns but also since the provisions under discussion here are set forth in an act amending the Act – Law on the System of Universal Courts. The substantive concerns are more important; they indicate that a judge's professional stability is one of the fundamental keystones in the entire structure of judiciary authorities. Thus all regulations which either introduce new principles whereby judges retire or establish additional procedures making it possible to remove a judge from his/her position is a regulation dealing with the „system of courts” as understood by article 2, sub-section 7 of the National Judiciary Council Act. The issuance of such a regulation (the ratification of the Act) should therefore only take place after the Council has been afforded the opportunity to take a stance. Since then article 2, sub-section 7 and 8 refer the statements of the National Judiciary Council to the „proposals” or „drafts,” then these statements must be formulated before these drafts or proposals become statutes which occurs – according to article 121, section 1 of the Constitution – at the very moment when the Sejm ratifies them but before they are forwarded to the Senate for further legislative proceedings.

The power of the National Judiciary Council to „take a stance” does not signify its ability to impose any solutions whatsoever upon the Sejm, nor does it give it in any degree whatsoever the right to veto the parliament's decisions. This is only the right to formulate a stance to the legislative solutions being drafted and to forward it to the Sejm such that the Sejm be aware of the views and proposals of the body which has been established by the

Constitution to protect the independence of judges and the courts when it drafts the final version of a statute. The National Judiciary Council Act does not in any way curtail substantive liberty in regulating the judiciary system; it merely presumes that when the lawmaker becomes acquainted with the stance of the National Judiciary Council it will be inclined to reflection and this will help it avoid regulations which are not fully thought through and fully drafted in a legislative sense.

The power of the National Judiciary Council to take a stance creates certain duties on the part of the Sejm (its bodies), in particular the duty of transmitting to the National Judiciary Council all draft versions concerning the system of courts, the duty of allotting sufficient time to the National Judiciary Council to take a stance and the duty of considering this stance if it is forwarded to the Sejm. In light of article 9, section 1 of the National Judiciary Council Act there is no doubt that this stance may be taken only in the form of a resolution adopted by the Council, which commands one to stay within the time frame of the opinion-giving proceedings to allow the Council the ability to collect and to take a stance. In turn, exceeding the time frame and the failure of the Council to take a stance cannot detain legislative work since the Council is not a full legal participant in these proceedings as it only holds opinion-giving rights.

In its heretofore jurisprudence the Constitutional Tribunal has investigated the observance of opinion-giving procedures several times (trade unions were always involved); however, it has not only never asserted that they brought about a violation of the relevant provisions of the legislative procedure but also not attributed an excessively rigorous interpretation to these provisions. In its decision dated 19 November 1996 (K. 7/95, OTK ZU Number 6, 1996, p. 412) the Tribunal reviewed under what circumstances it is necessary to send a draft version of an act to the trade unions to obtain their opinion. It was demonstrated that the duty of obtaining the opinion of trade unions may be performed in the earlier stages of legislative proceedings and thus within the framework of the Government's work on a statute's draft version. This cannot, however, lead to a situation in which the Government „could not alter the statute's draft version after receiving the opinion [of the trade unions] before submitting it to the Sejm, nor that any amendment would necessitate the re-commencement of the [opinion collecting] course of action envisaged in article 19, section 2 of the Act on Trade Unions. As long as the draft version is the result of the same premises, it is not necessary to send it again to the relevant trade union authorities as prescribed in their articles of association after making amendments or supplements to the draft.”

4. A similar complication is present in this case since the absence of the National Judiciary Council's stance concerns only a fragment of the act which was introduced – as an amendment – during the final stage of parliamentary work. As the Prosecutor General points out, „the duty of consultation should be referred to draft versions of acts in their entirety, but not to individual provisions thereof, especially to amendments proposed by deputies exercising their constitutional rights as specified in article 119, section 2 of the Constitution of the Republic of Poland” (p.10).

The Constitutional Tribunal concurs with the direction of thought displayed by the Prosecutor General. One should concur with the hypothesis that there should be a certain boundary in realizing the opinion-giving powers of the National Judiciary Council (and other similar entities) for there is no doubt otherwise that forwarding to it all the amendments proposed in all of the phases of the legislative process would excessively draw out this process and it would make the Council a co-author of the body of statutes. The Constitutional Tribunal explicitly emphasizes that the ratification of statutes belongs to the Sejm by the power of the Constitution, while the role of the entities which have been granted the right to

express their opinion is curtailed to taking a stance whereby the Sejm can gain an orientation on their viewpoints.

The evaluation whether everything was done to meet the requirement for the National Judiciary Council to take a stance in the legislative proceedings must be made in light of the course of concrete legislative work. Nevertheless, it is plausible to state certain criteria which the Constitutional Tribunal should always have in mind when making this evaluation.

The necessity and scope to which the Council's stance is obtained on the draft version of the Act and the amendments introduced thereto should be evaluated first and foremost in light of the nature of these amendments. Once again it is necessary to recall the viewpoint of the Constitutional Tribunal expressed in its decision dated 19 November 1996 that „as long as a draft version is the result of the same premises it does not have to be directed again after making amendments and supplements thereto to the relevant trade union authorities as stipulated in the articles of association.” For this point of view of basic importance is distinguishing between the breadth and depth of the amendments proposed. The necessity of requesting another stance from the National Judiciary Council has not come into existence in principle since the amendments proffered still fit within the same topic of regulation concerned by the draft version and to which the Council made reference or could have made reference in its original opinion. Omitting situations in which the amendments would lead to a complete change in the premises of the draft version (which is not the case here since the regulations incorporated in the original draft did not undergo such substantial modification), one should accept that the evaluation, and then the adoption or – possibly – transformation of the contents set forth in the draft legislation is the essence of legislative proceedings. But transformation is carried out with awareness about the viewpoint of the National Judiciary Council about the matter under regulation; thus there are no grounds to curtail the lawmaker's freedom in shaping the final contents of the Act. The depth of intervention in the solutions proposed in the draft version is up to the law maker just as through the remaining stages of the legislative proceedings. The Senate may even transform the contents ratified by the Sejm provided that the Senate's amendments do not extend beyond the scope of matters (substance) as regulated in the Act ratified by the Sejm (decision dated 22 September 1997, K 25/97, OTK ZU Numbers 3-4,1997, pp. 301-302).

Circumstances are different if the amendments to the draft legislation entered during the course of parliamentary work deal with substance which was not governed by the draft version, and thus with material which extends beyond the breadth of the regulations embodied in the draft legislation. The Constitutional Tribunal is of the opinion that the law on presenting amendments cannot turn into a legislative initiative surrogate law, and that there are certain boundaries which the contents of the amendments proposed by deputies should not cross.

The Constitutional Tribunal has already dealt with the issue of the permissible extent of amendments in its jurisprudence. In its decision dated 9 January 1996 (K. 18/95, OTK ZU Number 1, 1996, p. 2 ff) it considered the permissibility of amendments proposed to draft legislation considered under the urgent legislative path. The Tribunal indicated *inter alia* that „deputies cannot introduce amendments which would arbitrarily expand the extent of a statutory regulation in the urgent course of legislative proceedings if they go beyond the substance incorporated in the urgent draft version of the Act originating with the Council of Ministers” (p. 14); if the contents of the amendments „are new in nature and have been added in the course of Parliamentary Commission work... and thus they fundamentally extend beyond the purpose and the subject of the regulation proposed by the Council of Ministers” (p. 15). In its decision dated 23 November 1993 (K. 5/93, Collection of the Constitutional Tribunal's Decisions,1993, Part II, p. 376 and the following pages) it considered in turn the

permissible extent of amendments proposed by the Senate to acts previously ratified by the Sejm. The Tribunal deemed *inter alia* that the Senate's amendments „must directly concern the substance which was the subject of regulation in the text which was forwarded to the Senate” (p. 387). „The Senate's right to introduce amendments... is exercised in one of the final phases of the legislative process, partitioned from the realization of the right of legislative initiative at the stage when reviewing the draft legislation in the readings and its adoption (ratification) by the Sejm. Any omission of any one of the stages would constitute a violation of the Constitution...” (p. 389). In turn, in its decision dated 22 September 1997 (K. 25/97, OTK ZU Number 3-4/1997, p. 302), it demonstrated that the „Senate is not authorized to replace the contents... of the Act with totally different contents when speaking of the topic and subject of regulation since that would signify the circumvention of the provisions on the Senate's legislative initiative.”

The Constitutional Tribunal naturally perceives the distinct nature of the problem decided on in the decisions indicated above since a portion thereof concerned the Senate's powers and was based on the hypothesis – still current in light of the Constitution dated 1997 – about the „inequity between the Sejm and the Senate in the course of the legislative process and in particular the decisive role played by the Sejm therein.” (K. 5/93, as above, p. 385; decision dated 17 November 1992, U 14/92, Collection of the Constitutional Tribunal's Decisions, 1992, Part II, p. 63). The Constitutional Tribunal believes, however, that there is a constitutional justification for awarding more universal significance to the consequences which in the current jurisprudence were deduced by differentiating between the institution of an amendment and the institution of a legislative initiative. Articles 118 and 119, sections 2 and 3 of the Constitution distinguish between these procedures on the grounds of two fundamental criteria: the entities entitled to exercise them and the stage of the Sejm procedure during which they are used. It is first necessary to indicate that even though this has never been unequivocally prejudged in constitutional texts – Polish parliamentary law has always recognized the collective nature of the legislative initiative right and the individual nature – of the right to present amendments. The existence of these procedures should not therefore blot out the differences between them but rather the contents which the deputy – on account of insufficient quantitative support – could not present to the Sejm in the form of a legislative initiative, could be presented in the form of amendments without any limitations whatsoever. Substantially greater significance should however be ascribed to the criterion dealing with the stage of the parliamentary proceedings since the Constitution dated 1997 introduced the requirement whereby the Sejm reviews draft legislation in three readings (article 119, section 1). This signifies a constitutional order for the basic contents which finally make their way to the act to traverse the entire path of the Sejm's procedure such that time and opportunities to think through the accepted solutions will not go missing and such that a stance can be drafted for them. The application of the amendment procedure goes against this order as it allows one to introduce new essential contents to draft legislation at the last stages of the Sejm's procedure. This may concern especially amendments proposed during the second reading which were not considered previously in Commissions.

The topic of the amendment must be of decisive significance in this area. The Constitutional Tribunal is of the opinion that especially in situations when the contents and the size of the proposed amendments lead to the transfiguration of the amendments into a new legislative initiative, it is permissible to consider whether article 118, section 1 of the Constitution are violated in this manner. Indubitably, substantially more liberty in modifying the contents of the original draft version must be permitted than if the urgent legislative course of action were being employed or – especially – with reference to the Senate's amendments. There is, however, a certain boundary beyond which the utilization of the right

to make amendments does not fit within any of the parliamentary proceedings. The Constitutional Tribunal believes that this boundary is crossed in particular when the amendment constitutes a draft version of a new legal regulation, while its contents gives expression to a normative novelty devoid of a direct link to the draft version's purpose and topic as originally defined.

It should be added that a similar stance has already been sketched in the doctrine (see comment 25 to article 15 of the Small Constitution [in:] *Komentarz do Konstytucji Rzeczypospolitej Polskiej* [A Commentary to the Constitution of the Republic of Poland], Warsaw 1997; opinions B. Szepietowska and W. Odrowąż-Sypniewski [in:] *Komentarz do Regulaminu Sejmu RP* [A Commentary to the Bylaws of the Sejm of the Republic of Poland], Warsaw 1997, pp. 9,15 and 19 comments to article 40). The parliamentary law of some other countries also demarcates the definition or framework for amendments launched by deputies. In general, they are met with the powers of a chamber or its chair to disqualify the amendments exceeding the draft version's framework (see e.g. A. Szmyt, *Stanowienie ustaw w RFN* [Making Laws in the Federal Republic of Germany], Gdańsk 1993, p.145 ff). In turn, in France the Constitutional Council has also been authorized to speak out on these issues acknowledging that the amendment's total exit from the text of the draft legislation would signify an infringement upon the constitutional distinction between the right of legislative initiative (which is individual in nature anyway in France) and the right to amend and thereby gives the grounds to rule on the unconstitutionality of the provision introduced by way of such an amendment (see e.g. decisions of the Constitutional Council dated 22 July 1980, 80-117 DC; 28 December 1985, 85-199 DC; 29 December 1986, 86-21 DC; 23 January 1987, 86-225 DC – procedural unconstitutionality was ruled on here for the first time; further decisions on unconstitutionality -12 January 1989, 88-251 DC; 25 July 1990, 90-277 DC; 16 January 1991, 90-287 DC; 20 January 1993, 92-317 DC; 21 January 1994, 93-335 DC – see L. Favoreu, L. Philip, *Les grandes decisions du Conseil constitutionnel*, Paris 1997, pp. 748-750).

5. The evaluation of the contents introduced to the original draft version of the Act under examination as a result of adding the current article 6 leads one to the conclusion that in this instance the content-based scope and the premises of the original piece of draft legislation were traversed. The content of the original draft version was to change the age limit up to which it was possible for a judge to occupy his/her position and to curtail judges' rights to pension-related privileges. The deprivation of the ability to obtain these privileges was to be linked to the judge having committed certain deeds or with other legacies from his Mer professional life. In turn, article 6 refers to a totally different issue as it opens the path to discipline working judges and to expel them from the judiciary service for deeds which they committed when performing their office. This is a new topic. The topic is no longer just (it is not even first and foremost) shaping the situation of judges who have ceased to perform their service but shaping the situation of working judges. This is also a regulation which is an expression of a totally different premise – while the original text of the draft version expressed two ideas: making the age of retirement from actively performing their office and curtailing pension benefits for judges who are not worthy of them, whereas the addition of article 6 gave expression to a third idea, namely – the evaluation of working judges and „cleansing” the profession of those persons who should not occupy judge positions. There is no reason to dispute the suitability of the idea. It features such an explicit degree of difference from both of the original ideas that the regulation finally incorporated in article 6 cannot be treated as one that has retained the same purpose as the regulations set out in the government's draft version. If one takes into consideration that the amendment introducing the new article 6 was introduced at a very late stage in the legislative proceedings then this leads one to the conclusion that in this instance the boundaries which the Constitution delineates for the

institution of amendments have been traversed and that article 118, section 1 of the Constitution was thereby infringed upon which requires a separate form of legislative initiative for this type of legislative undertaking.

In light of this argument it is not possible to agree with the view expressed by the Prosecutor General that the duty of obtaining the opinion of the National Judiciary Council (and – respectively – other authorized entities) does not concern the amendments proffered during the Sejm's proceedings. For insofar as the modification under discussion of a government draft version has extended – in respect of the matter at hand – beyond the scope of permissible amendments, then it could not have been accepted by the Sejm without first having given the National Judiciary Council the opportunity to take a stance. The viewpoint expressed by the National Judiciary Council itself is similar. It acknowledges that the provision in article 6 „is independent and bears only an indirect relationship to the regulations which were consulted,” while the rank of the amendments introduced by way of this provision is sufficiently important that it requires separate consultations (p. 6 of the stance of the National Judiciary Council dated 11 March 1998).

In the conviction of the Constitutional Tribunal the entity giving an opinion on the original draft version of the Act did not have the chance to speak out in this issue since it did not have the grounds to predict that this topic will become the subject of regulation during this phase of legislative work. The Constitutional Tribunal is of the opinion that if an amendment introduced during the Sejm's work extends beyond the original content-based scope of the draft legislation in a manner that transforms the nature of the topic and the content based premises of the said draft version, then – notwithstanding the evaluation of whether it is still within the boundaries delineated by article 118, section 1 of the Constitution – it may once again update its duty of obtaining the opinion of the entitled entities on the topic at hand. For if the content-based scope of the amendment is sufficiently autonomous and distinct from the original text of the draft legislation that the entity rendering an opinion does not have any rational causes to predict that the scope of the Act will entail these new issues then the opinion-giving entity could not have taken a stance with respect thereto and thereby the Sejm did not have the opportunity to make a final legislative decision based on familiarity with the stance of those entities to whom the provisions of legislative procedure have granted the right to take such a stance.

6. An additional theme appears in this case which ultimately prejudices the recognition by the Constitutional Tribunal that the procedure required by the provisions of law for the proper ratification of the Act dated 17 December 1997 was violated. The scope of the duty to obtain an opinion, but especially the consequences of violating this duty, should be evaluated in light of the general nature of the regulated topic and the scope of regulatory liberty which is left in this topic to the lawmaker by the constitution or international law. The Constitutional Tribunal is of the opinion that besides the topic – by the nature of things as it were – statutory regulations are left to political liberty (this concerns in particular social and economic topics governed on the basis of a specific political vision of social growth), there are topics in which the Constitution assigns much tighter boundaries to the lawmaker, and nearly every statutory regulation requires a diligent evaluation from the point of view of the permissibility to institute it and the contents therein. This refers first to regulating „classical” (personal and political) human and civil rights, since the constitutional premise is to leave the individual with the maximum amount of liberty while all regulations curtailing these rights and freedoms must correspond to particular requirements instituted especially in article 31 of the Constitution. This affects the procedure whereby these regulations become effective and in all the instances in which the law demands the opinions of external entities, the absence of such an opinion may be deemed to be a grave violation of the course of proceedings since it

inhibits the parliament from making a decision based on all the elements which it has to have at its disposal. If the contents of the Act were to predicate the introduction to the system of law a regulation extending beyond the areas treated by the constitution as particularly inaccessible to the lawmaker Such a violation of procedure can and should be ascribed more serious consequences than in other situations.

The Constitutional Tribunal is of the opinion that the areas above include the independence of judges and courts. For one need not reiterate that the retention of this independence is a necessary pre-requisite for executing the principle of the democratic rule of law. As was mentioned above, legislative regulations intervening in that area are permissible, but only on an exceptional basis, to the necessary extent and in order to protect the gravity, authority and distinct nature of the third branch of authority. Scrupulously abiding by all the rules and procedural requirements is thus of particular significance here since they should be treated as one of the guarantees that the lawmaker has not gone too far

The regulations incorporated in article 6 concern the direct link to the principle of judicial independence as has been stated numerous times. For opening additional extraordinary opportunities to remove a judge from office touches the very core of the principle of independence, especially since they are associated with *inter alia* the contents of the decisions made. The Constitution places unusually high requirements on such statutory regulations and subjects them to a very heavily outlined framework and limitations even if their permissibility finds constitutional grounds. Thus the procedure of accepting them must be evaluated with a substantially higher amount of meticulousness, and the violation of this procedure must be treated with substantially more gravity. This concerns in particular violations of the role of the National Judiciary Council in taking stances on legislative solutions. The excessive acceleration of the pace of work in the Sejm and desisting from asking the Council to take a stance on the new article 6 and desisting from waiting for the relevant period until the Council takes its stance has not just contributed to the violation of the stipulations set forth in article 2 of the National Judiciary Council Act. It has also lead to the ratification of a statutory provision with significant meaning in a way that did not allow the National Judiciary Council to perform its constitutional objective to „safeguard the independence of courts and judges.”

The Constitutional Tribunal is of the opinion that the special weave of material factors (the content separateness of the regulation adopted in article 6), procedural factors (the contents of article 6 go beyond the permissible scope of amendments mentioned in article 119, section 2 of the Constitution) and the constitutional factors (the particularity of the issue pertaining to judicial independence) does not allow one to acknowledge that it was constitutionally permissible to omit the Council's opinion-giving rights in introducing the supplement to the body of the Act which is currently incorporated in article 6. The Constitutional Tribunal once again emphasizes that one cannot exclude the existence of a constitutional justification for currently accepting this type of regulation whose purpose is to bring final closure to the Polish judiciary's settlements with its past. If, however it is to be adopted, then it must take place according to a procedure which is fully consistent with the requirements established by law and with the full – within legally defined boundaries – participation of the National Judiciary Council. The current parliament has unimpeded legal and political capabilities in this field and there are no impediments against it exercising them. There is no way of predicting whether and possibly to what degree such a new regulation would have departed from the detailed contents spelled out in article 6; this cannot, however be ruled out, especially in light of the stance taken by the National Judiciary Council in this matter. Hence the Constitutional Tribunal believes that taking a substantive stance on the applicant's allegations against the current formulations in article 6 would constitute premature

intervention in future legislative work, and that could not be reconciled with the principle of judicial temperance incumbent upon the Constitutional Tribunal.

V

The Constitutional Tribunal then considered the allegations launched against the remaining provisions of the Act dated 17 December 1997 on Amending the Act – Law on the System of Universal Courts and Some Acts.

The applicant contends nonconformity with the Constitution on the part of article 1, subsection 1 of the Act (with which, in its opinion, the following provisions are also related: article 1, sub-section 2, article 2, article 3 and article 10 of the Act and – partially – article 4 of this Act), which abolishes the uniform (fixed) age of 70 for a judge to retire from service replacing it with an additional age limit of 65, after which a judge may continue to fulfill his/her post only with the consent of the National Judiciary Council.

The Constitutional Tribunal notes that the provision under examination here was the subject of an opinion issued by the National Judiciary Council, which – in legislative proceedings did not voice any objections, and – in proceedings before the Constitutional Tribunal recognized that it conforms with the Constitution. The Prosecutor General took a similar stance, as did all the other entities – except for ZG ZPP and the „Iustitia” Association – which the Constitutional Tribunal asked to take a stance in this case.

The Constitutional Tribunal believes that the stipulations of article 180 of the Constitution must be considered in their entirety and in light of the principles for the operation of the judiciary authorities. The guarantees of judicial independence lodged in this provision are not autonomous in nature; they should be treated as one of the instruments used to safeguard the independence of the judiciary authorities and their ability to mete out justice independently. The principle of a judge's irremovability is of fundamental importance in this area, in particular precluding any unilateral decisions on the part of the executive authorities about a judge's legal situation. Hence the Constitution orders the lawmaker to state the age limit above which judges must retire. According to the provisions of the Act – Law on the System of Universal Courts, this age limit was and is 70 years of age; after reaching it no one can perform the judicial office in the courts mentioned in article 175 of the Constitution. This does not signify however that the Lawmaker cannot institute other additional age limits where after they are reached a judge may be retired, even if he/she does not express his/her consent to do so. In light of article 180, section 4 of the Constitution it is only necessary for these limits to be founded on a judge reaching a certain age, while in light of the general constitutional principles for the judiciary system it is necessary for such a regulation to be instituted in a way that respects the principle of judicial independence and which serves the realization of constitutionally legitimate goals.

The Constitutional Tribunal does not believe that the system introduced by article 1, section 1 of the Act dated 17 December 1997 fails to meet these requirements. It still retains the maximum (and uniformly stated) age limit (70 years of age), after which a judge must retire. In turn, the introduction of an additional age limit (65 years of age), after which the consent of the National Judiciary Council is required to continue to occupy this office, even though it does implement a certain dosage of flexibility is nevertheless founded on an age-related criterion. The basic question in this case is whether the institution of the said flexibility can be reconciled with the principle of judicial independence. It would of course be impermissible if – as during the period of the People's Republic of Poland consent to continue occupying the office of a judge were to be issued by a political body (Minister of Justice) from outside the organizational system of the judiciary authorities. The current provision, however, awards the right of decision to the National Judiciary Council whose constitutional

objective is precisely to protect the independence of judges and its composition guarantees that the decisions about a judge's fate will be made first and foremost by other judges. There are not grounds for claiming that the composition, method of acting and the objectives of the National Judiciary Council create a danger of using this form to undertake actions violating the principle of judicial independence. The National Judiciary Council already has held a similar power for many years and one cannot assert any instances in which it was abused or deformed.

The increased flexibility in the principles for a judge to leave office must also be reviewed in light of the general principles whereby the judiciary authorities operate, *inter alia* this authority's duty to mete out justice competently and effectively. Human bodies wear out at different paces but if the lawmaker believes that reaching the age limit of 65 should command the first analysis of a judge's capability to continue to discharge his/her office then – in light of its experience and practice – it is difficult to negate such an evaluation. After all, there may be a number of intermediate states between full capacity to discharge duties and an illness or the loss of strength mentioned in article 180, section 3 of the Constitution. A situation may also arise when the proper operation of the judiciary will demand the retirement of a judge who weathers the flow of time worse than his/her peers. Not all of these situations can be resolved with medical procedures, sometimes the evaluation and the decision may be handled better without excessively branching out beyond the framework of the judiciary authorities themselves.

The Constitutional Tribunal asserts that – in the current state of knowledge and experience there are no grounds to claim that awarding the National Judiciary Council the powers to express consent for a judge to fulfill office after completing 65 years of age would constitute a violation or a threat to the principle of judicial independence. The Constitutional Tribunal recalls that this decision is issued as a procedure of preventative review where the supposition of the constitutionality of the regulations under investigation takes on an especially strong nature (see decision dated 20 November 1995, K. 23/95, OTK ZU Number 2, 1995, p.133). The formulation itself of the provision by the lawmaker does not give grounds to deem it to be inconsistent with the Constitution. Only if in the practice of applying this provision it were to turn out that it has taken on contents and consequences infringing upon the principle of judicial independence or any other constitutional provision, the opportunity to dispute this provision under the procedure of subsequent review will appear (by application, legal question or constitutional grievance). Some other approach would lead to an excessive growth in rigorous evaluations carried out by way of preventative review (decision dated 17 July 1996 K. 8/96, OTK ZU Number 4, 1996, p. 273).

The recognition of the constitutionality of article 1, sub-section 1 of the Act dated 17 December 1997 prejudices the recognition of the constitutionality of article 2, article 3 and article 10, as well as article 4 to the extent to which it refers article 1, sub-section 1 to the judges of military courts.

2. The applicant contends nonconformity with the Constitution by article 7 and article 8 of the Act dated 17 December 1997 (which must partially shed light on the evaluation of article 9 of this Act). Article 7 strips the right to special pension benefits away from those judges and prosecutors who from 1944 to 1956 and even from 1939 to 1956 served or were employed in formations exercising repression against the Polish Nation or persons acting in favor of Poland's independence and sovereignty (article 7, section 1, sub-sections 1 to 4 – except that section 3 introduces certain mitigating circumstances), who were convicted by a legally binding verdict handed down by a court penalized by losing public rights for a criminal offence committed during the period of service or if they were expelled from service with fault when performing this service (article 7, section 1, sub-section 5) or who filed false

„scrutiny” statements under the procedure envisaged by the Act dated 11 April 1997 (known as the „Scrutiny Act” – article 7, section 1, sub-section 6). The deprivation also refers to surviving family members of the deceased judges and prosecutors specified in section 1 (article 7, section 2). The National Judiciary Council shall assert the circumstances mentioned in article 7, section 1, sub-sections 1-5 – in relationship to judges – by way of a decision against which the interested parties will be able to lodge a complaint to the administrative court (article 7, section 4). The circumstances mentioned in article 7, section 1, sub-section 6 will occur according to the course envisaged by the Act dated 11 April 1997 (article 7, section 7), except that the Act dated 17 December 1997 further imposes the duty of filing statements of scrutiny upon judges who have obtained the right to retirement or disability pensions (article 7, section 6).

The provision in article 8 applies the same principles to the judges and prosecutors who have retired permitting the possibility that they and the members of their families will be stripped of privileged pension and disability status (sections I – 2), as well as imposing the duty of filing statements of scrutiny upon those judges and prosecutors who did not do so during their service (section 4).

In the opinion of the applicant these provisions introduce „*sui generis* scrutiny of judges where the result of scrutiny is supposed to affect their professional status”; the result of „scrutiny” also deprives the family members of deceased judges and prosecutors of the right to family benefits which „infringes upon the principle of equality expressed in article 32 of the Constitution.” The applicant also believes that giving the National Judiciary Council the right to make the individual decisions mentioned in article 7, sub-section 4 of the Act contravenes article 186 of the Constitution while the single instance course of making decisions in these matters is in contradiction with article 78 of the Constitution.

The Constitutional Tribunal takes note that the provisions under examination here were the subject of an opinion drafted by the National Judiciary Council which – in legislative proceedings – did not voice any objections, while – in the proceedings before the Constitutional Tribunal – it acknowledged that they conform with the Constitution. The Prosecutor General took a similar stance as did all the other entities – besides ZG ZPPi which the Constitutional Tribunal asked to take a stance in this matter.

The Constitutional Tribunal does not concur with the applicant's allegations referring to article 7 of the Act dated 17 December 1997.

The principle of equality currently flowing from article 32 of the Constitution is stable in the Constitutional Tribunal's jurisprudence. The following statement in particular must be viewed as continually current: „the constitutional principle of equality is based on the fact that all legal bodies (the addressees of legal norms) characterized by a given essential trait I (relevant) are supposed to be treated equally to a varying degree” (decision dated 9 March 1988, U. 7/87, Collection of the Constitutional Tribunal's Decisions, 1988, p. 14). The basic issue to evaluate the observance of the principle of equality „is thereby the determination of the essential trait on account of which the provisions of law variegated the legal situation of its addressees... The variegation of the legal situation of citizens contravenes the Constitution if it treats similar entities or situations differently if the differences in treatment are not duly justified in the constitution” (decision dated 16 December 1997, K. 8/97, OTK ZU Number 5-6, 1997, p. 502).

Based on these premises it is not possible to defend the allegation whereby the principle of equality was violated by the regulations in article 7 of the Act dated 17 December 1997. This provision envisages the loss of the right to particular benefits linked to retirement by some categories of judges and prosecutors. It is manifest that the scope of circumstances

mentioned in article 7, section 1 is distinct from the scope of circumstances mentioned in the „Scrutiny Act” dated 11 April 1997; only article 7, section 1, sub-section 6 makes reference to this Act. One must, however, remember that the subject of the „Scrutiny Act” is to create access to information for the public about the past of those persons applying for high-ranking government jobs (including persons filling the offices of judges and prosecutors), while the subject of this Act is the introduction of a particular regulation on ; the pension status of judges and prosecutors. There is no direct logical connection between them and there is no doubt that the lawmaker may subject a different scope of entities to the „scrutiny” mentioned in the Act dated 11 April 1997 since the purpose and subject of this Act differ. The regulation of 1997 concerns only judges and prosecutors; it does not, however, constitute a violation of equality, since – by power of individual provisions of law – only judges and prosecutors are vested with the special privileges stemming from retirement. The lawmaker’s decision that the special criteria in article 7, section 1 are to be referenced only to judges and prosecutors does not give rise to any constitutional reservations since the general situation of these professional groups was treated in a special fashion. There are therefore no reservations to referencing these more precise regulations to family members since their legal situation must be a derivative of the legal situation of the persons directly entitled to the benefits stemming from retirement.

The observance of equality may thus be considered only in light of the question whether variegations are constitutionally permissible such as the ones which article 7 of the Act dated 17 December 1997 introduced among judges (prosecutors). The starting point here must be the statement that the institution of retirement constitutes a special privilege guaranteed to judges by the Constitution. One may, however, demand that the ability to exercise this privilege fully be restricted to persons worthy of its receipt. This circle cannot in any event include persons who acted within the framework of bodies making up the apparatus of violence responsible for the crimes of the system. Service or work in bodies of repression indubitably belonged to them, especially since the lawmaker restricted the consequences thereof to what is known as the Stalinist Period ending in 1956. The definitions used by the lawmaker in article 7, section 1, sub-sections 1 to 4 are precise in nature while the scope of entities included in the terms used in sections 2 and 3 is a further restricted requirement that the structures, departments, organizational units or positions be associated with the exercise of repression against persons acting for the sovereignty and independence of the Polish State. The burden of proof that a given person was employed, or worked in a service or filled a function in such structures, departments, organizational units or positions is incumbent upon the body asserting that the circumstances occurred. Another guaranty is the ability to point to the circumstances mentioned in article 7, section 3 which should ensure that the decisions undertaken will conform to the principle of justice. The variegation of the legal situation of judges and prosecutors is effected on the basis of the criterion of their former work or service in Polish and Soviet bodies of repression. One cannot say that this criterion is devoid of support in constitutional principles and values even in light of the references to our ancestors’ struggle for independence to the times „when fundamental freedoms and human rights were violated in our Homeland” incorporated in the preamble to the Constitution. The Constitutional Tribunal also took a similar stance in its decision dated 15 February 1994, K. 15/93 (Collection of the Constitutional Tribunal’s Decisions, 1994, Part I, p. 21 ff), concerning the scope to which combatant rights will be taken away from persons employed in the public security apparatus. Differentiation based on the foregoing criterion cannot be charged with the allegation of being arbitrary, nor can the allegation of a lack of proportionality be lodged against the consequences of this variegation. The result of applying the solutions embodied in article 7 is only to strip away special disability and pension rights

and to apply to a given person the general provisions on pensions for employees and their families (article 9 of the Act).

The same may be said of the reasons in article 7, section 1, sub-sections 5 and 6. They have been precisely captured and they are related to violations of law subjecting them to additional sanctions. This does not oppose the principle of equality since it makes it possible to treat a judge (prosecutor) who violated the law differently from all the other judges and prosecutors. The variation of the legal situation of the judges and prosecutors based on the criterion in article 7, section 1, sub-sections 1-6 finds support in the constitutional argument of justice and there are no reasons to deem them devoid of rational grounds. In this manner it is not possible to consider this provision to be in contradiction with article 32 of the Constitution.

Nor does the Constitutional Tribunal believe that article 7, section 4 of the Act is contradictory to article 186 of the Constitution. article 186 specifies the overall objective of the National Judiciary Council, namely to protect the independence of judges and the independence of the courts, but – besides having awarded the National Judiciary Council with the right to initiate proceedings before the Constitutional Tribunal – it does not specify the means and the procedures serving to achieve this objective. This has been left to the ordinary lawmaker and one must acknowledge that there are no constitutional hindrances to prevent it from entrusting the Council with making various types of decisions on individual matters related to the professional circumstances of individual judges. On account of the principle of independence this may even be advantageous since the Council – unlike any other constitutional government body – has been founded to protect this independence. In connection with this it is not possible to accept the applicant's allegation that involving the Council in decisions on individual cases of a peculiar nature warps its constitutional role. The Council has been entrusted with deciding on many individual affairs (in particular, it has been given a monopoly in making motions to appoint judges); thus awarding it the right to assert that the circumstances incorporated in article 7, sections 1 and 3 of the Act dated 17 December 1997 have occurred does not go beyond the previous understanding of the Council's tasks found to be in place by the constitutional lawmaker in 1997.

The provision set forth in article 7, section 4 sentence 3 prejudices the conformity of the regulation under discussion with the Constitution as it guarantees interested parties access to the administrative court which will ultimately decide on the legality of the Council's decisions. One may not make the allegation against this procedure that it violates article 78 of the Constitution and the right guaranteed the rounder to lodge a complaint against decisions and decisions issued in the first instance. This guaranty does not have an absolute nature because article 78 permits the act to specify exceptions from the principle of dual instances. The Constitutional Tribunal does not believe that the mechanism deduced from article 7, section 4 is irrational or insufficient in this area, especially since that as time goes by it will be enriched with dual instances of proceedings before the Administrative Court (article 176, section 1 in connection with article 236, section 2 of the Constitution).

The foregoing findings prejudice the constitutionality of article 8 of the Act dated 17 December 1997. For this provision repeats the mechanism envisaged in article 7; it refers to judges and prosecutors who have retired. There are no grounds to draw different conclusions from article 32, article 78 and article 186 of the Constitution with reference to article 8 from the ones deduced above from article 7. The stipulations of article 8 may only be considered from the point of view of protecting acquired rights (since this issued deals with people who have already acquired higher benefits but who are now to be deprived thereof), but the applicant did not raise this allegation since it did not even refer to article 2 of the Constitution. One must also remember that the Tribunal's current jurisprudence refers the foregoing

principle to the protection of rights acquired „equitably” (decision dated 22 August 1990, K. 7/90, Collection of the Constitutional Tribunal's Decisions, 1990, pp. 51-52; *decision , dated 15 February 1994, K 15/93*, Collection of the Constitutional Tribunal's Decisions, 1994, Part I, pp. 24-27).

The only additional element in article 8 is the introduction of the duty of filing statements of scrutiny by judges and prosecutors who are already retired. This is a certain change in the concept of scrutiny itself as – in keeping with the Act dated 11 April 1997 – it is supposed to inform public opinion about the past of persons occupying high ranking governmental positions or who are applying for them, and thus to attribute a greater degree of transparency to the process of governance and to hinder the phenomenon of extortion. These concerns cannot be applied to persons who have retired from active government service. Subjecting them to the process of scrutiny will only be informational in nature, especially since the consequences of admitting to cooperation with state security bodies will not affect pension and disability benefits. It will rather assume the dimension of a sanction that is moral in nature. Since however article 8, section 4 expands the range of entities covered in the essence of things by article 40 of the Scrutiny Act, the evaluations of its constitutionality will be a derivative of the evaluations of the constitutionality of the Scrutiny Act, which is the subject of other independent proceedings in the Constitutional Tribunal. (...)