

JUDGEMENT
of 3 October 2001
Ref. No K. 27/01*

The Constitutional Tribunal, in a bench composed of:

Janusz Trzcíński – Presiding Judge
Jerzy Ciemniowski
Teresa Dębowska-Romanowska
Lech Garlicki
Stefan J. Jaworski – Judge Rapporteur
Krzysztof Kolasiński
Biruta Lewaszkiewicz-Petrykowska
Andrzej Mączyński
Janusz Niemcewicz
Jadwiga Skórzewska-Łosiak
Marian Zdyb,

Lidia Banaszekiewicz – Recording Clerk,

having considered at the hearing on 3 October 2001 an application by the President of the Republic of Poland submitted in the manner set forth in Article 122 paragraph 3 of the Constitution of the Republic of Poland, in the presence of duly authorised representatives of the parties to the case at hand: the applicant, the Sejm of the Republic of Poland and the Public Prosecutor-General, to determine the conformity of:

Article 51 of the Act of 6 July 2001 on Detective Services to Article 2 and Article 42 paragraph 1 first sentence of the Constitution of the Republic of Poland

adjudicates as follows:

1. Article 51 of the Act of 6 July 2001 on Detective Services does not conform to Article 2 and Article 42 paragraph 1 first sentence of the Constitution of the Republic of Poland.

2. Article 51 of the Act referred to in subparagraph 1 of the judgement is not inseparably connected with the entire Act.

Statement of Reasons:

I

1. On the basis of Article 122 paragraph 3 of the Constitution of the Republic of Poland, the President of the Republic of Poland submitted an application to determine the conformity of Article 51 of the Act of 6 July 2001 on Detective Services to Article 2 and Article 42 paragraph 1 first sentence of the Constitution. In the reasoning for his application, the President of the Republic of Poland stated that on 11 July 2001, acting in accordance with Article 122 paragraph 1 of the Constitution, the Marshal of the Sejm had submitted before him the Act on Detective Services for signing. This Act sets forth the new legal regulations for engaging in business involving the

provision of detective services. In the President's opinion, this Act not only sets forth the rights and duties of detectives, their required qualifications and the rules for engaging in this activity, but also lays down the provisions of criminal law for failing to perform the duties set forth in the Act. In the opinion of the President of the Republic of Poland, the Act, which was passed on 6 July 2001 and is meant to come into force as of 1 July 2001, violates the principle of *lex retro non agit*. The final provision of the Act, stating that it shall come into force on a particular calendar day, is connected with the legal requirement to obtain a concession under the terms of Article 96 paragraph 2 of the Act of 19 November 1999 on Business Activity (Journal of Laws – Dz.U. No. 101 item 1178, subsequently amended). However, according to the intertemporal provisions of Article 98 paragraph 2 of the Act on Business Activity, if the legislators fail to define by 1 July 2001 the scope and conditions of business activity for which a concession is required, the duty to obtain such a concession expires *ex lege*. Thus, the expiry as of 1 July 2001 of the duty to obtain a concession to engage in detective services is the legal result of the expiry of the deadline set forth in the transitional provisions of the Act on Business Activity. By means of its subsequent validity, the Act that is challenged by the President of the Republic of Poland intends to impose retroactively upon economic entities duties which expired as of 30 June 2001.

The President of the Republic of Poland observes that the principle of a state ruled by law requires the protection of citizens' trust in the state and its laws, whereas according to Article 2 of the Constitution, Poland is a democratic state ruled by law and implementing the principles of social justice. Therefore, a ban on the introduction of retroactive legal rules stems from the above provisions. In the opinion of the President of the Republic of Poland, in the light of recorded jurisdiction by the Constitutional Tribunal, the constitutional clause about a democratic state ruled by law is a collective expression of the principles which immanently result from the axiology of the Constitution. These principles also include the principles of reasonable legislation, among which the ban on retroactive legislation occupies a particularly important place. In the opinion of the President of the Republic of Poland, it is as a result of jurisprudence and jurisdiction that the principle of *lex retro non agit* possesses the great importance in criminal law. Criminal law doctrine stresses that the new Act, which makes crimes out of deeds that were not crimes before, cannot be applied to deeds committed before the Act came into force. Article 42 paragraph 1 of the Constitution says that only a person who has committed an Act prohibited by a law in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This provision combines the principle of *lex retro non agit* with that of *nullum crimen sine lege* (a ban on retroactive validity of criminal law), which is supported by the international legal instruments of which Poland is a signatory (Article 7 of the European Convention on Human Rights and Fundamental Freedoms and Article 15 of the International Covenant on Civil and Political Rights).

According to the President of the Republic of Poland, the Act introduces criminal responsibility in the form of deprivation of freedom for deeds which are not included in the catalogue of deeds prohibited under the Criminal Code and extra-statutory criminal law. Therefore the Act makes crimes out of actions which were never crimes before. The President of the Republic of Poland also raises an issue that the conditions to be fulfilled by a person seeking to obtain a concession, to the extent to which such a concession imposes new duties upon detectives and upon the performance of business activity involving detective services with retroactive effect, is a violation of the principle of citizens' trust in the state and its laws, stemming from

Article 2 of the Constitution. The President of the Republic of Poland believes that by signing a law whose date of coming into force violates the principle of *lex retro non agit*, he would violate the most important constitutional norms of legislation.

2. In a letter of 20 September 2001, the Public Prosecutor-General said that the misgivings of the President of the Republic of Poland about the date of coming into force of the Act are justified. In the Public Prosecutor-General's opinion, the principle of *lex retro non agit* is not expressly formulated in the Constitution, but was introduced by the Constitutional Tribunal out of the principle of a democratic state ruled by law (Article 2 of the Constitution). The purport of the principle of *lex retro non agit* is a ban on the passing of legislation whose provisions are applied to events that occurred before the legislation existed. The Constitutional Tribunal did not make this ban an absolute one, and permitted exceptions, when it assessed that there were circumstances in which an exception was justified. What is absolute, however, is the ban on retroaction in criminal law – *nullum crimen sine lege* – expressed in Article 42 par 1 first sentence of the Constitution, which is strictly linked to the principle of *lex retro non agit*. The Public Prosecutor-General claims that this principle applies only to those regulations concerning criminal responsibility in connection with Article 51 of the Act. The criminal regulations contained in chapter 5 (Article 44-46) define the characteristics of forbidden deeds that are not part of the catalogue of deeds prohibited by the criminal code and extra-statutory criminal law. From these regulations, it transpires that deeds involving a non-performance of the duty set forth in the Act are punishable. Provision of Article 44 of the Act concerns a non-performance of the duty set forth in Article 25 thereof (including a failure to notify a law-enforcement body of the conclusion of a contract with a detective bureau, if such a contract is connected with law enforcement). Article 45 of the Act envisages sanctions for actions that are by law reserved for state authorities and institutions, in other words despite the provisions of Article 2, setting forth the scope of detective services. On the other hand, Article 46 paragraph 1 of the Act concerns a violation of the duty to hold a license envisaged Article 4 thereof. On the basis of Article 51, these provisions will take force retroactively because it has been decided that they shall be applied to deeds that occurred before the Act itself was promulgated.

In the Public Prosecutor-General's opinion, the application of sanctions for deeds which were not crimes at the moment they were committed is a violation of one of the fundamental principles of criminal law expressed in Article 42 paragraph 1 first sentence of the Constitution, possessing prime importance among the principles of criminal responsibility.

II

During the hearing, the representatives of the President of the Republic of Poland and of the Public Prosecutor-General supported the opinion submitted to the Constitutional Tribunal in writing, whereas the representative of the Sejm said that the retroactive introduction of the Act would not cause harm to those to whom its provisions are addressed. However, on account of those criminal regulations in the law to which the principle of *lex retro non agit* applies rigidly, one is inclined to agree with the opinion of the remaining participants in the hearing who claim that these regulations are unconstitutional.

III

The Constitutional Tribunal established the following:

1. The President of the Republic of Poland claims that Article 51 of the Act of 6 July 2001 on detective services, placed before him for signing on 11 July 2001, does not conform to Article 23 and Article 42 first sentence of the Constitution. In the President's opinion, the signing of the Act in a legal situation which, on the basis of the challenged Article 51, permits the Act to come into force as of 1 July 2001 would signify approval for a retroactive introduction and validity of the Act, which lays down significant regulations for civil freedoms and, in particular, contains detailed regulations with respect to normative criminal law.

A reading of the transcripts of parliamentary legislative proceedings shows that the intention of the legislators was to harmonise the coming into force of this Act with the temporary and final provisions (Article 96 paragraph 2 subparagraph 2b and Article 98 paragraph 2) of the Law of 19 November 1999 on business activity (Journal of Laws – Dz.U. No. 101 Item 1178, subsequently amended) in such a way as to prevent the emergence of a legal loophole in the legal issues covered by these two legal instruments.

Examining the challenged provision, it should be stressed that in Article 51 the legislators applied a somewhat unfortunate date when the Act should come into force. As a result of the legislators' lack of foresight, there is a clear collision between the continuity of the legislative process, including promulgation and publication, and the established date when the result of this process comes into force. When deciding to lay down a calendar day when the act comes into force, the legislators should have allowed sufficient time not just for further stages of the legislative process, including the final stages thereof in the form of a proper publication of the act, but should also have ensured a sufficiently long *vacatio legis*. This latter requirement is not absolute and may be waived at the Constitutional Tribunal's discretion if there are sufficiently important public interests which justify this. On the other hand, no considerations may justify a breach of the requirements set forth in Article 88 paragraph 1 of the Constitution (*Judgement of 21 December 1999, Ref. No. K. 22/99, Constitutional Tribunal's Decisions – OTK 1999, part II, item 52, p. 326*). Such a manner of fixing the date for the coming into force of the Act is in breach of the principle, enshrined in Article 2 of the Constitution, of citizens' trust in the state and its legislation and the principle of *lex retro non agit*. These principles possess particular importance in the sphere regulated by the provisions of criminal and tax law.

The Constitutional Tribunal emphasises that the principle of *lex retro non agit*, an important feature of the legal culture of modern civilised countries and also a fundamental component of the modern constitutional systems, has its origins in Roman law. Although of course it did not actually bear this name, it already existed in the Code of Justinian (book 1, title 14, lex 7 and book 6, title 5, lex 12). In the medieval era, it also appeared in canonical law (e.g. *Clementinae* from 1317). In Polish law, the principle of *lex retro non agit* already appeared in the XIV century with the adoption of the statutes of King Casimir the Great *Cum omnes constitutiones et statuta legem imponant rebus et negotis presentibus et futuris et non preteritis*. Since then, this principle has been a permanent part of the Polish legal order. It has been applied to the legal order of both the I and the II Republics. That is why, since the very beginning, the Tribunal has referred in its jurisdiction to the rich intellectual fruits of Polish legal doctrine, including the principle of *lex retro non agit* and its place among the prime political principles of the Republic of Poland.

Since the very beginning, in its jurisdiction the Constitutional Tribunal has adhered steadfastly to a single interpretation of the ban on a retroactive application of

law. Already in its first judgement of 28 May 1986, in the case Ref. No. U 1/86, the Tribunal ruled as follows: „The principle of *lex retro non agit*, though not expressly mentioned in the Constitution of the Polish People’s Republic, is a fundamental principle of the legal order, supported in such values as legal security and the certainty of legal transactions, as well as a respect for acquired rights. For this reason, the principle may be abandoned only in exceptional cases and for very serious reasons, or if such an abandonment results from the nature of established relations (...). The principle of *lex retro non agit*, as a legislative directive addressed to the legislative authorities, contains a ban on the formulation of laws which might be applied to offences committed before these laws came into force and which carried no legal penalties under the previous law. A law is not retroactive if on its basis one must qualify events which occurred after its coming into force. When establishing the legal consequences of deeds which took place when a previous law was in force but also occur when the new law is in force, one must – according to the principle of *lex retro non agit* – qualify them according to the previous law ” (Constitutional Tribunal’s Decisions – OTK 1986 p. 32). Subsequently, in a judgement of 30 November 1988, case Ref. No. K. 1/88, the Tribunal said: „The Tribunal gives the principle of *lex retro non agit* a broader meaning than a mere ban on the formulation of laws which may be applied to events which occurred before these laws came into force and which carried no legal penalty under the previous law (*lex retro non agit* in the proper sense of the term). The Tribunal also takes this principle to mean a ban on the formulation of intertemporal regulations intended to define legal relationships that existed under a previous law but still exist during the period of introducing the provisions of the new law, if these provisions cause negative legal (and therefore social) consequences for legal security and for a respect for acquired rights. Thus principle, (...) not expressly mentioned in the Constitution, stems from (...) the constitutional principle of substantive rule of law. The principle of citizens’ trust in the state (...) is a constitutional principle which causes certain duties in the sphere of state activity. In the legislative sphere, it creates (...) a duty to establish law in such a way so as not to restrict civil freedom, if this is not dictated by important social or individual freedoms; the constitutionally protected duty to grant rights, with a simultaneous guarantee of a respect for these rights; the duty to create a cohesive law that is clear and comprehensible to citizens (...) and, finally, the duty not to make legal provisions retroactive. As far as this latter duty is concerned, the duty of confidence in the state requires that regulations which establish the rights and duties of citizens and deteriorate their legal situation must not be retroactive. Also, one must not formulate regulations which would somehow restrict the catalogue of rights that are based on the Constitution or serve to implement these rights. For citizens’ trust in the state and its social strength is the mainstay of the stability and development of civil rights and duties” (Constitutional Tribunal’s Decisions – OTK 1988, p. 84).

The Tribunal re-emphasised the link between the principle of *lex retro non agit* and the principle of citizens’ trust in the state in a judgement of 30 November 1988 in case Ref. No. K.3/88. Here, the Tribunal said: „ Also, one must not formulate regulations which would somehow restrict the catalogue of rights that are based on the Constitution or serve to implement these rights. For citizens’ trust in the state and its social strength is the mainstay of the stability and development of civic rights and duties. However, this also provided an important conclusion, already signalled in the general formula of the principle of protection of acquired rights, namely that this principle only protects those rights that possess a statutory basis and, at the same time, constitute an implementation of fundamental rights of citizens, and not others. However, when one considers that basic (constitutional) rights are broad determinant

(basis) of the subjective rights of citizens, it transpires that the constitutional protection of acquired rights extends to all primary areas of civil legal relationships” (Constitutional Tribunal’s Decisions – OTK 1988, p. 23).

Following the constitutional changes of December 1989, this is how the Tribunal, in a judgement of 22 August 1990, case Ref. No. K. 7/90, described the link between the principle of *lex retro no agit* and Article 1 of the constitutional rules in force at that time: „The principle of *lex retro no agit* is one of the fundamental elements of a state ruled by law (Article 1 of the Constitution). The principle of citizens’ trust in a state, resulting from the principle of a state ruled by law, requires, in accordance with hitherto jurisdiction by the Tribunal, that laws must not be formulated which may be applied to events which occurred before these laws came into force and which carried no legal penalty under the previous law ” (Constitutional Tribunal’s Decisions – OTK 1990, p. 42). In a subsequent judgement, the Tribunal explained the meaning of retroaction of a law thus: „A law is retroactive if the coming into force of its application is earlier than the date on which it become binding (the law has not just been adopted but has also been properly published)” (Constitutional Tribunal’s Decisions – OTK 1991, part I, p. 149). Recognising this principle as the basis of the legal order, the Constitutional Tribunal did not provide it with an absolute meaning, but did not rule out the possibility of waiving this principle in particular circumstances, e.g. when other constitutional principles, such as social justice, dictate such a waiver.

The Tribunal expounded this thought clearly in its judgement of 25 February 1992 in case Ref. No. K. 3/91, saying that „the principle of non-retroaction, not mentioned *expressis verbis* in the Constitution but implied in Article 1 thereof, though a basic principle of the legal order in a democratic state ruled by law, is nevertheless not an absolutely binding one. It possesses the strictest application in criminal law. However, there may be certain exceptions to it in other areas of the law ” (Constitutional Tribunal’s Decisions – OTK 1992, part I, p. 9; likewise in cases Ref. No. K. 14/92, OTK 1993 part II, p. 319; Ref. No. K. 18/92, OTK 1993 part II, p. 196; Ref. No. K. 7/93, OTK 1993 part II, p. 407; likewise OTK 1994, part I, p. 45). According to the Tribunal, legal guarantees of the protection of the interests of the individual are particularly important in tax law, both on a material-legal level and in the procedural sphere. Hence, one should ensure that the tax law applicable to annual taxation should not only be formulated with a respect for the principle of *vacatio legis* in the year preceding the tax year” (*Judgement of 29 March 1994, case Ref. No. K. 13/93*, Constitutional Tribunal’s Decisions – OTK 1993 part I, p. 45; likewise case Ref. No. K. 1/94, OTK 1994, part I, p. 71; Ref. No. K. 2/94, OTK 1994 part II, p. 41; Ref. No. K. 12/94, OTK 1995 part I, p. 16; Ref. No. P. 1/95, OTK 1995 part II, p. 5). In case Ref. No. 13/97, the Tribunal related to the already established line of jurisdiction thus: „The Constitutional Tribunal has already said on many occasions that those to whom laws are addressed must be given sufficient time to adapt to the changed legal rules and safely reach decisions as to further action. This is particularly important if the new legal regulations apply to business activity, whose freedom is guaranteed by the constitution, for the reaching of business decisions usually requires time so that no losses are caused. On the other hand, determining the constitutional conformity of new legal regulations must always involve considering what period of *vacatio legis* is <suitable> to the contents and nature of the regulations ” (Ref. No. K. 13/97, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No. 5-6/1997, item. 69, p. 490; likewise Ref. No. K. 15/95, Constitutional Tribunal’s Decisions – OTK 1996, part I).

Also during the current constitutional order, the Tribunal stressed that

„according to the Tribunal’s established line of jurisdiction (including in case Ref. No. K. 15/92, P. 2/92) the principle of *lex retro non agit* is a basis of the legal order. It creates the basis of citizens’ trust in the state and its laws. At the basis of this principle lies the principle of a democratic state ruled by law, expressed in Article 2 of the Constitution” (*Judgement of 17 December 1997, case Ref. No. K. 22/96*, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No. 5-6/1997, item 71, p. 506). In the Constitutional Tribunal’s opinion, the principle of a state ruled by law is not in itself a normative source of constitutional rights and freedoms. The principle of *lex retro non agit* stemming from this principle, as well as the principle of protecting rights that have been honestly acquired, possess the nature of subjective laws which set the limits for state intervention in objective rights. A violation of these principles may justify accusations of an unacceptable intervention by the state in the constitutionally protected rights and freedoms of the individual, which leads to a determination of an unconstitutional violation of these rights and freedoms” (*Judgement in case of Ts 154/98*; similarly in case Ref. No. K. 12/00, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No. 7/2000, item 255, p. 1221). A waiver of this principle is permissible only if „this is necessary in order to implement a constitutional; value, regarded as something more important than the value that is protected by the ban on retroaction.” Nevertheless, even though this principle is not expressly mentioned in the Constitution, it is one of the basic elements of the concept of a state ruled by law, adopted in Article 2 of the Constitution. The ban expressed in this principle is addressed not only to the legislative authorities, but also to the Constitutional Tribunal, which, in its role as a <negative legislator > has the authority to deprive the whole of or part of a legal instrument of its force of law, and thus cause a change to the legal situation resulting in not just a ban on applying a legal provision that is deemed in non-conformity to the Constitution, but also the possibility of re-examining cases that are already over” (Ref. No. P. 4/99, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No 1/2001, item 5, p. 69). The Constitution permits not only a departure, in certain circumstances, from the ban on making changes to the legal system while preserving a suitable *vacatio legis*, but also a departure from the requirement to protect acquired rights. What is more, in exceptional circumstances, it is even possible to depart from the principle of *lex retro non agit* if this is dictated by the need to realise a different constitutional principle and the realisation of this principle is not possible without a retroaction of the law. The permissibility of departing from the aforementioned constitutional principles depends on the importance of the constitutional values which the legal regulation in question is meant to protect (*Judgement of 7 February 2001, Ref. No. K. 27/00*, Official Collection of Constitutional Tribunal’s Decisions – OTK ZU No. 2/2001, item 29, p. 164).

3. The applicant challenges in particular the legislators’ intention to introduce retroactively a duty to obtain permission for the provision of detective services, which duty expired on 30 June 2001 on the basis of Article 98 paragraph 2 of the Act on Business Activity, and his intention to introduce retroactively criminal responsibility for the deeds categorised as misdemeanours in chapter 5 of the Act.

It should be noted that although both these objections refer to the violation of the principle of *lex retro no agit*, the degree of violation of this principle is not the same in both cases.

The first objection refers to a retroactive introduction of the entire law on detective services which sets forth the principles of business activity involving the provision of detective services, the rights and duties of detectives, and the principles

and procedures for acquiring a concession to provide detective services. (Article 1 paragraph 2).

Subjecting the provision of detective services to particular control, the legislators clearly refer to the purport of Article 96 paragraph 2 subparagraph 2b in the aforementioned Act on Business Activity, saying that business activity that is not mentioned in this Act but which, before it came into force, required a concession on the basis of the Act of 23 December 1988 on Business Activity „becomes activity that requires a concession” when the new Act on Business Activity comes into force. From this, it transpires that even under the old Act, the provision of detective services was subject to particular control by various widely-dispersed legal regulations, but no act defined the normative material concept and scope of detective services. But the desire of the current legislators is to subject this activity to particular statutory control. By the way, business activity involving the provision of detective services is still subject, in a restricted sense, to the provisions of the Act on Business Activity (e.g. Article 7-10, Article 63).

The Act on Detective Services is not just a separate act, as is made clear by Article 98 paragraph 2 of the Act on Business Activity but also has a special relationship to that Act. This relationship stems clearly from the purport of art 28 of the Act on Detective Services, which says that „the provisions of the Act of 19 November 1999 on Business Activity shall be applied to matters involving the issue, denial or revocation of concessions for the provision of detective services and controls over the provision of these services”. Without going into details over the scope of this referral, it is obvious that the provisions of the target Act are applied to matters not regulated by the source Act.

Such a result of an examination of the relationship of both Acts is important in order to determine the purport of the aforementioned Article 98 paragraph 2 of the Act on Business Activity. This provision says that „if, by the date on which this Act comes into force, the scope and conditions for providing detective services and for issuing the concessions discussed in Article 96 paragraph 2 and in separate legislation have not been introduced, and if no information and documents required to apply for these concessions are provided, then the duty to obtain a concession shall expire *ex lege*.” This issue remains in straight connection with the applicant’s objection whereby „the legislator, by means of his later activity, intends to impose retroactively upon economic entities duties which, under the terms of the aforementioned provision, expired as of 30 June 2001”. The provision concerns only the legal situation of those entities who, in the situation set forth in Article 98 paragraph 2, commenced business activity involving the provision of detective services after 1 July 2001 and are still engaged in it.

Proceeding to consider a solution to this problem, the Tribunal stresses firmly that in the light of the current law, detective activity as a statutory service does not exist between 30 June and today, for there has never been an act on detective activity. As has already been said, there has never been a statutory definition of detective services, nor a statutory definition of the scope of detective activity. In such a situation, in the Tribunal’s opinion, the expiry of the duty to obtain a concession has an effect opposite to the one in many other spheres of business activity, for in the case of detective services some of the prerogatives that normally belong to state authorities are transferred to private bodies. Such a transfer – just like in the case of security agencies which protect lives and public property – is permissible only in the form of an act of parliament. Because in no act of parliament have the legislators released the state authorities from the duties connected with some detective services, nor have they defined the extent to which they may be provided by private bodies, there has

been and there is no possibility of providing these services until the Act in question has come into force. The absence of an act on the provision of detective services means that in principle, after the expiry of the aforementioned duty as of 30 June 2001, the possibilities of action of detective agencies and detectives are the same as those of any ordinary citizen. Therefore, during this period the legal situation of persons engaged in business activity defined as detective services has not changed because it was not possible to engage in detective services to an extent permitted by the Act on Detective Services. Anyone who engaged in this activity to an extent exceeding that what is permitted to every citizen could suffer legal consequences connected with the protection of, for instance, personal goods or a violation of specific penal regulations.

The Tribunal stresses that the expiry of the duty, referred to in Article 98 paragraph 2 of the Act on Business Activity, to obtain a concession to engage in business involving the provision of detective services does not mean that the legislators have abandoned legal controls into this activity for good and deprived themselves of the right to introduce such controls if they have reason to believe that the need to protect other constitutional values, especially state security or the public order or civic rights and freedoms, justify the introduction of such controls.

The Constitutional Tribunal believes that the challenged Act, subjecting the provision of detective services to particular control, demonstrates a clear determination on the part of the legislators to protect the constitutional values that are important for the public order and civic rights without imposing any restrictions in violation of Article 31 paragraph 3 of the Constitution.

Obviously, the Act can take force after its promulgation even if it is deprived of the challenged Article 51. In such a case, the provisions of this Act – just like those of any other normative act under the provisions of the law on normative acts – will only apply to circumstances that occur after they have come into force. They will apply to circumstances that occurred before they came into force only according to the terms of the transitional provisions, in other words Chapter 6 (Article 47-50).

Referring once again to the legal situation of the above persons who have commenced business regarding the provision of detective services since 1 July 2001 without obtaining a concession, the Constitutional Tribunal believes that as soon as the law has come into force, their activity should undergo a certain adaptation, in other words they are obliged to adapt their activity to the terms and conditions of the Act. According to the Tribunal, the provisions of the Act, especially the transitional provisions, including those that lay down reasonable deadlines for adaptation, permit a gentle, trouble-free transfer from the provisions of the Act on Business Activity to the provisions of the Act on Detective Services.

However, an assessment of the second deviation is different. As has already been said, by setting forth provisions of criminal law, the Act creates new types of offences which penalise some of the actions of persons subject to the Act. The Act classifies them as mere misdemeanours, punishable under criminal proceedings. It should be stressed that compared to the old Act on Business Activity, which contained no criminal provisions, the new Act on Business Activity penalises the deeds set forth in Chapter 9 (Article 65 and 66) as misdemeanours, whilst the Act on Detective Services penalises new forms of conduct and increases the criminal responsibility of persons subjected to this law because the deeds set forth in chapter 5 (Article 44-46) are classified as misdemeanours subject to criminal proceedings.

The applicant mentions appropriately that the special rigours emanating from the principle of *lex retro non agit* make employers responsible for the formulation of standards which penalise human deeds. The requirements in this regard find support

in the contents of Article 42 paragraph 1 first sentence of the Constitution, referred to by the applicant, which says: "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." In this way, only today's Polish constitution-makers have raised a cardinal provision of the criminal code to the status of a constitutional guarantee of the rights of the individual. Previously, this provision was addressed to the authorities that lay down criminal law. The granting to this principle, setting forth the specific rights and freedoms of the individual, of the status of a constitutional principle suggests the materialisation of a directive for employers who, during the process of creating the law, are obliged to create norms which respect these constitutional guarantees. (comp. L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu [Polish constitutional law. Outlay of a lecture]* Warsaw 1999, Liber, p. 108). The dilemmas facing today's legislators in connection with the duty to respect this guarantee are not just a doctrinal issue because already before the war, when justifying Article 1 of the Criminal Code of 1932, the pre-war legislators considered the importance of this principle for the security of civic freedoms thus: „The provisions of Article 1 are not just a reflection of the principle of *nullum crimen sine lege penali anteriori* but also of *nulla poena sine lege penali anteriori*. In this way, these fundamental provisions lent full expression to guarantees of civic freedoms in the face of the penal rigours of the Republic of Poland. This provision is all the more necessary in the code because the Constitution of the Republic of Poland, just like a series of other basic laws, does not contain such a basic provision” (*Uzasadnienie projektu kodeksu karnego z 1932 r. – Komisja Kodyfikacyjna RP [Justification of the draft criminal code of 1932 – Qualifying Commission of the Republic of Poland]*, vol. V, book 3, p. 4).

In modern criminal doctrine, it is generally held that the „principle of *lex retro non agit* possesses the nature of a constitutional principle vis-à-vis criminal law, resulting from the principle of a democratic state ruled by law and expressed in detail in Article 42 paragraph 1 of the Constitution” (K. Buchała, A. Zoll, *Kodeks karny. Część ogólna [Criminal code. General part]*, Krakow 1998, p. 44). Apart from the principle of *lex retro non agit*, Article 42 paragraph 1 of the Constitution also expresses the principle *nullum crimen* and *nulla poena sine lege*. The principle of retroaction in criminal law expresses the directive whereby a deed can only be a crime if it was banned by a law that was in force when it was committed. Therefore, an act which provides the basis for criminal responsibility must come into force before an offence has been committed (K. Buchała, A. Zoll, *op.cit.* p. 43).

Referring to this issue, the Constitutional Tribunal, in a judgement of 10 July 2000, case Ref. No. SK 21/99, said the following on the subject of an interpretation of this principle: „The general principle of *lex retro no agit* possesses particular importance in criminal law. The connection between this principle and criminal law is expressed in Article 42 paragraph 1 of the Constitution (the principle of *nullum crimen sine lege*). This principle means that there is no crime if there was no act in force when the crime was committed, there is no punishment if no punishment is envisaged in the act, and that the law is not retroactive, therefore judgement can be made only on the basis of the law that was in force at the moment when the crime was committed. The principle of *lex retro non agit* guarantees that a deed which is not a crime will not become a crime later, and that if the deed is punishable, it is subject to a precisely determined punishment” (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No. 5/2000, item 144, p. 620). Reaching this ruling, the Tribunal cited the argumentation contained in the judgement in the case Ref. No. P. 2/99, namely that „ Article 42 paragraph 1 of the Constitution contains the principle

of *lex retro non agit*, but only to an extent to which this coincides with the principle of *nullum crimen sine lege*. The principle of *nullum crimen sine lege* is a particular concept of the principle *lex retro non agit*, because at its roots also lies the civic guarantee that regulations that lay down a person's criminal responsibility at the moment when a crime was committed will not change later. Strictly speaking, the point is to guarantee to the citizen that his deed is either not punishable, or it is subject to a precisely established punishment" (Official Collection of Constitutional Tribunal's Decisions – OTK ZU No 5/1999, item 103, p. 564).

Returning to a constitutional assessment of Article 51 of the Act, the Tribunal states that the Act introduces, independently of the other aforementioned legal instruments, extra-statutory particular norms of normative criminal law laid down in Chapter 5. In this Chapter, the legislators lay down four new types of offences subject to a fine, restriction of freedom or deprivation of freedom amounting to 2 (Article 44 and 46 paragraph 1 and 2) and 3 (Article 45) years. Without even examining in detail the type of conduct penalised by the Act, one can generally say that the Act introduces new, acute restrictions to the sphere of constitutional freedom of the individual. In such a situation, the legislators were obliged to adhere to the current rules of formulating law.

The legislators' intention of introducing these provisions with retroactive force is a violation of the ban, stemming from Article 2 of the Constitution, on giving a legal provision retroactive validity and, in particular, is a violation of Article 42 paragraph 1 and the resultant principle of *nullum crimen sine lege penali anteriori* and *nulla poena sine lege penali anteriori*.

Summing up this part of its considerations, the Tribunal states that the applicant has shown that the challenged Article 51 of the Act of 6 July 2001 on Detective Services does not fulfil the requirements set for the concluding provision which lays down the date of the coming into force of the new Act, because when violating the aforementioned principles, the Act retroactively introduces provisions which lay down particular provisions of normative criminal law, and thus violates Article 2 and 42 paragraph 1 first sentence of the Constitution.

4. The question of the unconstitutional nature of the concluding provision also involves the problem, set forth in Article 122 paragraph 4 of the Constitution, of the inseparable connection of this provision with the entire Act, in other words even if the Act does not specify the date on which it comes into force, it may assume the force of Act after it has been signed by the President and promulgated in the Journal of Laws.

Article 88 paragraph 1 Constitution says that the condition precedent for the coming into force of a generally applicable normative act is its promulgation. In its judgement of 20 December 1999, case Ref. No. K. 4/99, the Tribunal elaborated further regarding an interpretation of the conditions and forces of promulgating a normative act within the meaning of Article 88 paragraph 1 of the Constitution: „This provision makes the coming into force of an act dependent upon its promulgation. In any case, this provision does not only apply to acts, but also to other generally applicable normative statutes, namely directives and enactments of local law, as well as international agreements (Article 88 paragraph 3). Introducing this regulation, the constitution-makers referred to the traditional principle already expressed in the Gratianus doctrine: *leges instituuntur cum promulgantur*. This principle is dictated both by an axiological postulate based on the moral-political principles inherent in the concept of a <state ruled by law>, and by the pragmatic postulate of making legal regulations an forceful instrument with which to influence the behaviour of those to whom they are addressed. Promulgation means reporting the contents of a normative

act to its addressees. According to Article 88 paragraph 2 of the Constitution, the principles and procedures of promulgating acts of parliament and other normative acts specified therein are specified by statute. Further provisions of the Constitution (Article 122 paragraph 2 and 5 and Article 144 paragraph 3 subparagraph 7) say that an act is promulgated when its text is published in the Journal of Laws, therefore any other way of communicating the text of a law to the public is insufficient. On account of the above-mentioned function of the requirement set forth in Article 88 paragraph 1 of the Constitution, it should be assumed that in order to fulfil this requirement, it is necessary not only to publish a given issue of the Journal of Laws, but also make it available, in other words at least consign it to distribution. But from the point of view of Article 88 of the Constitution, it does not matter if those to whom a normative act is addressed availed themselves of the opportunity of acquainting themselves with its text, promulgated in the proper manner ” (Constitutional Tribunal’s Decisions – OTK 1999, part II, item 51, p. 34).

The rules for promulgating normative acts and some other legal instruments is set forth in the Act of 20 July 2000 on Promulgation of Normative Acts (Journal of Laws – Dz.U. No. 62 item 718). Article 4 paragraph 1 of this Act recognises the constitutional principle of introducing normative acts after a suitable *vacatio legis*, establishing a ban on separating the date of the coming into force of a normative act from the date of its promulgation. As was said above, the challenged final provision does not fulfil these requirements. If, on the strength of its own judgement, the Tribunal prevents the wrongly constructed wording of Article 512 from assuming the force of law, the Act remains deprived of a provision stating the date when it comes into force, this provision being eliminated from its text. In such a case, Article 4 paragraph 1 first sentence of the aforementioned Act on Promulgation of Normative Acts, saying that normative acts containing generally applicable provisions and promulgated in journals of laws come into force 14 days after their promulgation, shall automatically apply.

The above issue leads to another question: Is the period of *vacatio legis* set forth in Article 4 paragraph 1 of the Act on Promulgation of Normative Acts sufficient to bring into force the subject matter of the Act on Detective Services? The Tribunal says that it would be good to introduce normative acts with sufficiently long periods of *vacatio legis* because that would give their addressees sufficient time to adapt to their provisions. Obviously, unless there are exceptional circumstances, the period of *vacatio legis* should be sufficiently long in the case of regulations concerning new legal matter, and especially in the case of the introduction of various bans and directives connected with criminal responsibility.

According to the Tribunal, a 14-day period for the coming into force of the Act on Detective Services is not the best timeframe, but it is permissible in such a situation. The signing and consignment to promulgation of a law which regulates a very important sphere of social problems, important for the protection of the legal order and the fundamental rights of the individual, will not negate the legislative effort that went into the legislative work on the Act.

In such a situation, the Constitutional Tribunal passes the judgement that was stated in the introduction.