

**10/2/A/2011**

**JUDGMENT**  
of 16 March 2011  
**Ref. No. K 35/08\***

**In the Name of the Republic of Poland**

**The Constitutional Tribunal, in a bench composed of:**

Andrzej Rzepliński – Presiding Judge  
Stanisław Biernat  
Zbigniew Cieślak  
Maria Gintowt-Jankowicz  
Mirosław Granat – Judge Rapporteur  
Wojciech Hermeliński  
Adam Jamróz  
Marek Kotlinowski  
Teresa Liszcz  
Małgorzata Pyziak-Szafnicka  
Stanisław Rymar  
Piotr Tuleja  
Sławomira Wronkowska-Jaśkiewicz,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearings on 23 February and 16 March 2011, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the Polish Ombudsman (hereinafter: the Ombudsman) to determine the conformity of:

- 1) the Decree of 12 December 1981 on Martial Law (Journal of Laws - Dz. U. No. 29, item 154) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland of 22 July 1952 (Journal of Laws - Dz. U. of 1976 No. 7, item 36, as amended),
- 2) the Decree of 12 December 1981 on special proceedings in the cases concerning offences and misdemeanours during the period of martial law (Journal of Laws - Dz. U. No. 29, item 156) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland,
- 3) the Decree of 12 December 1981 on including cases concerning certain offences in the scope of jurisdiction of military courts as well as on changing the organisation

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\* The operative part of the judgment was published on 28 March 2011 in the Journal of Laws - Dz. U. No. 64, item 342.

of military courts and military organisational units in the Public Prosecutor's Office of the People's Republic of Poland during the period of martial law (Journal of Laws - Dz. U. No. 29, item 157) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland,

- 4) the Act of 25 January 1982 on special legal regulation during the period of martial law (Journal of Laws - Dz. U. No. 3, item 18) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland,
- 5) the Resolution of the Council of the State of 12 December 1981 on the introduction of martial law for reasons of the state's security (Journal of Laws - Dz. U. No. 29, item 155) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 8(2) and (3) as well as Article 31(1) of the Constitution of the People's Republic of Poland,

adjudicates as follows:

**1. The Decree of 12 December 1981 on Martial Law** (Journal of Laws - Dz. U. No. 29, item 154) **is inconsistent with Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) of the Constitution of the People's Republic of Poland, which was enacted by the Legislative Sejm on 22 July 1952** (Journal of Laws - Dz. U. of 1976 No. 7, item 36, as amended) **as well as with Article 15(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966** (Journal of Laws - Dz. U. of 1977 No. 38, item 167).

**2. The Decree of 12 December 1981 on special proceedings in the cases concerning offences and misdemeanours during the period of martial law** (Journal of Laws - Dz. U. No. 29, item 156) **is inconsistent with Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) of the Constitution of the People's Republic of Poland as well as with Article 15(1) of the International Covenant on Civil and Political Rights.**

Moreover, the Tribunal decides:

**1) pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997** (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375 as

well as of 2010 No. 182, item 1228 and No. 197, item 1307), **to discontinue the proceedings as regards examining the conformity of the Resolution of the Council of the State of 12 December 1981 on the introduction of martial law for reasons of the state's security (Journal of Laws - Dz. U. No. 29, item 155) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 8(2) and (3) as well as Article 31(1) of the Constitution of the People's Republic of Poland on the grounds that issuing a judgment is inadmissible,**

**2) pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, to discontinue the proceedings as regards examining the conformity of the Decree of 12 December 1981 on including cases concerning certain offences in the scope of jurisdiction of military courts as well as on changing the organisation of military courts and military organisational units in the Public Prosecutor's Office of the People's Republic of Poland during the period of martial law (Journal of Laws - Dz. U. No. 29, item 157) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 8(2) and (3) as well as Article 31(1) of the Constitution of the People's Republic of Poland on the grounds that issuing a judgment is useless,**

**3) pursuant to Article 39(1)(3) of the Constitutional Tribunal Act, to discontinue the proceedings as regards examining the conformity of the Act of 25 January 1982 on special legal regulation during the period of martial law (Journal of Laws - Dz. U. No 3, item 18) to Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland on the grounds that the provisions have ceased to have effect.**

## **Summary of the statement of reasons for the judgement of the Constitutional Tribunal of 16 March 2011, Ref. No. K 35/08 (the Decrees on Martial Law)**

### **1. Introduction**

At the hearings on 23 February and 16 March 2011, the Constitutional Tribunal considered an application by the Polish Ombudsman (hereinafter: the Ombudsman) to carry out a review of five legal acts concerning the martial law legislation of 1981 and 1982. The following were challenged: 1) the Decree of 12 December 1981 on Martial Law (Journal of Laws - Dz. U. No. 29, item 154, as amended; hereinafter: the Decree on Martial Law), 2) the Decree of 12 December 1981 on special proceedings in the cases concerning offences and misdemeanours during the period of martial law (Journal of Laws - Dz. U. No. 29, item 156; hereinafter: the Decree on Special Proceedings), 3) the Decree of 12 December 1981 on including cases concerning certain offences in the

scope of jurisdiction of military courts as well as on changing the organisation of military courts and military organisational units in the Public Prosecutor's Office of the People's Republic of Poland during the period of martial law (Journal of Laws - Dz. U. No. 29, item 157; hereinafter: the Decree on the Jurisdiction of Military Courts), 4) the Act of 25 January 1982 on special legal regulation during the period of martial law (Journal of Laws - Dz. U. No 3, item 18, as amended; hereinafter: the Act on special legal regulation during the period of martial law) as well as 5) the Resolution of the Council of the State of 12 December 1981 on the introduction of martial law for reasons of the state's security (Journal of Laws - Dz. U. No 29, item 155; hereinafter: the Resolution on the Introduction of Martial Law). The main allegation against those legal acts was that they had been issued without a legal basis. The legislator had no power to issue normative acts, which was against the principle of legalism. Moreover, the Ombudsman put forward an allegation that the Decrees of 12 December 1981 had been issued in violation of the standards concerning the prohibition against retroactivity of law.

## **2. The question of jurisdiction of the Constitutional Tribunal**

In the first place, the Constitutional Tribunal considered whether the challenged legal acts fell within the scope of its jurisdiction, within the meaning of Article 188 of the Constitution. Indeed, the applicant had challenged the Decrees of the Council of the State equivalent to statutes and the Resolution of the Council of the State, which did not exist in the current system of sources of Polish law. Moreover, all the challenged regulations had been repealed. Therefore, the Constitutional Tribunal determined its jurisdiction in the said case.

### **2.1. The possibility of examining decrees equivalent to statutes by the Constitutional Tribunal**

Article 188 of the Constitution specifying the scope of jurisdiction of the Constitutional Tribunal does not enumerate *expressis verbis* decrees equivalent to statutes. However, in accordance with Article 91 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), whenever in the provisions of the Act there is reference to the "statute" it shall be understood as statutes or other legislative acts issued on the basis of the provisions obligatory prior to the day on which the Constitution of the Republic of Poland, enacted on 2 April 1997, takes effect. Since the Decrees of the Council of the State were legal acts equivalent to statutes, the Tribunal could examine their conformity to the Constitution.

## **2.2. The possibility of examining the Resolution on the Introduction of Martial Law by the Constitutional Tribunal**

There were particular doubts as to the jurisdiction of the Constitutional Tribunal with regard to the Resolution on the Introduction of Martial Law. In the opinion of the Tribunal, the introduction of martial law (§ 1 of the Resolution) should be classified as an act of applying the law. The act introducing the martial law did not establish new legal norms, but it was an event determining that the legal norms provided for in case of such an occurrence would be applied.

The Constitutional Tribunal concluded that the Resolution on the Introduction of Martial Law did not fall within the scope of the constitutional concept of “legal provisions enacted by central State organs”. The Tribunal stated that issuing a ruling with regard to that Resolution was inadmissible and discontinued the proceedings within that scope.

## **2.3. The question of validity of the Decrees of 12 December 1981 and of the Act on special legal regulation during the period of martial law, and the jurisdiction of the Constitutional Tribunal**

The Constitutional Tribunal stated that the challenged Decrees of 12 December 1981 and the Act on special legal regulation during the period of martial law fell within the scope of Article 188 of the Constitution. However, the Tribunal took into account that, in accordance with Article 38 of the Act of 29 August 2002 on martial law and the powers of the Supreme Commander of the Armed Forces as well as the Commander’s subordination to the constitutional organs of the Republic of Poland (Journal of Laws - Dz. U. No. 156, item 1301, as amended; hereinafter: the Act of 2002 on Martial Law), the following had ceased to have effect: the Decree on Martial Law, the Act on special regulation during the period of martial law, the Act of 18 December 1982 on special legal regulation during the suspension of martial law (Journal of Laws - Dz. U. No. 41, item 273, as amended).

It followed from Article 2 of the Act on special legal regulation during the period of martial law that the Decrees enumerated in that Act (i.e.: the Decree on Martial Law, the Decree on Special Proceedings, the Decree on the Jurisdiction of Military Courts, the Decree of 12 December 1981 on forgiving and forgetting certain offences and misdemeanours (Journal of Laws - Dz. U. No. 29, item 158) were binding until the promulgation of the Act on Martial Law. They ceased to have effect on the day of entry into force of the Act of 2002 on Martial Law.

Also, the Constitutional Tribunal observed that on 1 January 1998, on the basis of Article 3 of the Act of 6 June 1997 – the Provisions implementing the Penal Code (Journal of Laws - Dz. U. No. 88, item 554), the provisions of the Decree on Martial Law providing for criminal liability for

committed offences had been derogated. Article 3 of the Act - the Provisions implementing the Penal Code stipulated that, as of the day of entry into force of the Penal Code, the provisions concerning matters regulated by the Code would cease to have effect, unless the provisions of the said Act provided otherwise.

Therefore, the Constitutional Tribunal stated that all the challenged normative acts had ceased to have effect, within the meaning of Article 39(1)(3) the Constitutional Tribunal Act, as they might no longer specify obligations related to particular conduct. Consequently, a review of those acts would be possible only if it were assumed that issuing a ruling by the Constitutional Tribunal was necessary in that regard for the protection of constitutional rights and freedoms (Article 39(3) of the Constitutional Tribunal Act).

#### **2.4. The analysis of the necessity of adjudicating on the Decrees of 12 December and on the Act on special legal regulation during the period of martial law**

2.4.1. The Constitutional Tribunal carried out an analysis whether it was necessary to adjudicate on the challenged Decrees of 12 December 1981 and the Act on special legal regulation during the period of martial law in order to protect constitutional rights and freedoms. Pursuant to Article 39(3) of the Constitutional Tribunal Act, the Tribunal shall not discontinue proceedings if issuing a ruling, with regard to a normative act which has lost its validity before the ruling is issued, is necessary for protecting constitutional rights and freedoms.

In the judgment, the Constitutional Tribunal analysed the content of Article 39(3) of the Constitutional Tribunal Act. The Tribunal presented the genesis of the introduction of the provision in the Act as well as the interpretation of the provision in the light of the jurisprudence of the Constitutional Tribunal and the views of the representatives of the doctrine of law.

2.4.2. Adding to the previous jurisprudence, the Constitutional Tribunal pointed out that it was necessary for the Tribunal to issue a ruling for the protection of constitutional rights and freedoms, where *de lege lata* it was impossible – in the case of the legislator’s inactivity - to ensure the effective protection of these rights without issuing such a ruling. What is meant here is every situation where constitutional rights and freedoms were infringed, as a result of issuing or applying a given normative act under examination, and where at the moment of issuing a ruling they are not sufficiently protected; and in particular when the legislator did not eliminate the consequences of the infringements, whereas issuing a ruling by the Constitutional Tribunal will ensure the protection of those rights and freedoms. The “necessity” referred to in Article 39(3) of the Constitutional

Tribunal Act is explained in the argumentative discourse, i.e. after the examination of the circumstances weighing in favour of the protection of human rights.

The Constitutional Tribunal drew attention to the fact that Article 39(3) of the Constitutional Tribunal Act, which provided for adjudicating on a normative act which is no longer valid, might be applied to both a review initiated before the Tribunal in relation to a specific case as well as an abstract review. In the case of a question of law or a constitutional complaint (a review initiated in relation to a specific case), there is a presumption that issuing a ruling is necessary for ensuring the constitutional protection of rights and freedoms. Challenging a given provision as part of such a review leads to the assessment of the legal consequences of past events. In the case of abstract review, the applicant is obliged to present appropriate arguments which justify the indispensability of issuing a ruling about an invalid provision in order to protect constitutional rights and freedoms. If such evidence and arguments are not put forward, the Tribunal will discontinue the proceedings on the grounds that there is no necessity for protecting constitutional rights and freedoms.

2.4.3. When analysing the necessity for protecting constitutional rights and freedoms, the Tribunal made reference to the principle of the dignity of the person (Article 30 of the Constitution).

The Constitutional Tribunal explained that the significance of the constitutional norm expressing the principle of the dignity of the person, as regards the needs for examining the constitutionality of legislation from the martial law period, consists in the fact that it implies the most effective and the broadest protection of constitutional rights and freedom, as much as possible, and the elimination of any infringements of those rights. This refers not only to the infringement of rights which occurred after the enactment of the present Constitution, but also to the infringements of constitutional rights which took place before its entry into force.

The Constitutional Tribunal pointed out that the obligation to respect and protect the dignity of the person is related to the implementation of the principles of a democratic state ruled by law, including the principle that public authorities shall function on the basis of, and within the limits of, the law. The prerequisite of respect and protection of the dignity of the person by the organs of public authority is the observance of binding legal norms enacted in a proper way.

2.4.4. The Constitutional Tribunal stressed that there was a direct link between the infringement of requirements concerning powers when enacting the law and the infringement of human rights. The Constitution of the People's Republic of Poland guaranteed, and the Constitution of 1997 guarantees, rights which ensure that the individual and other private entities are protected against interference from the organs of public authority, undertaken without having relevant powers.

Issuing a normative act which introduces restrictions on constitutional rights, without having relevant powers, constitutes an example of an infringement of those rights. Indeed, such an act leads to issuing decisions which apply the law and which further interfere with constitutional rights, thus triggering a series of actions undertaken without a proper legal basis. From the point of view of the individual, legal interference undertaken despite the breach of provisions specifying the powers of the organs of public authority, as regards enacting the law, is no less burdensome than interference infringing on the substantive requirements set out in the Constitution.

The protective role of human rights is of particular significance in the case of the right guaranteed by the principle of *nullum crimen, nulla poena sine lege*. The principle of *nullum crimen, nulla poena sine lege* implies a number of requirements addressed to the legislator and the entities which are responsible for applying the law. The most important requirement related to the principle of *nullum crimen, nulla poena sine lege* is the prohibition against retroactivity of a criminal law statute (*lex retro non agit*). It is of key significance among the principles of criminal liability. The said principle rules out criminal liability on the basis of normative acts, even if they are equivalent to statutes, when they have been enacted by the organs of public authority without relevant powers to do so or have been enacted in violation of procedural provisions.

Constitutional protection against arbitrary interference by the organs of public authority means not only prohibition against such interference but also a requirement to eliminate the effects of such interference. In a state which meets the fundamental criteria of formal rule of law, an individual or entity - whose constitutional rights have been infringed - has the right to demand that a normative act infringing on those rights be repealed and that the effects of such interference be eliminated. This concerns the infringements of rights caused by the non-conformity of the content of a normative act to the content of constitutional norms, and by the enactment of a normative act without relevant law-making powers or in violation of provisions regulating the procedure for enacting a given legal act.

Therefore, the Tribunal stated that the question whether the interference with the individual's rights infringed on formal or substantive requirements set out in the Constitution was not vital, from the point of view of determining the necessity for issuing a ruling to protect constitutional rights and freedoms. It is necessary to ensure the protection of constitutional rights and freedoms, regardless of the fact whether the infringement thereof resulted from enacting a normative act the content of which was unconstitutional, or from enacting a normative act by an organ of public authority which did not have relevant law-making powers.

2.4.5. The Tribunal also made reference to the standards in accordance with which the



necessity for issuing a ruling to protect constitutional rights and freedoms was to be analysed. The challenged normative acts were enacted on 12 December 1981, when the Constitution of the People's Republic of Poland was in force. They were applied as normative acts which regulated proper conduct from 12 December 1981 until 21 July 1983. Since their enactment, multiple changes have been made to constitutional provisions concerning the individual's rights and freedoms. At present, the said rights and freedoms are guaranteed by the Constitution of the Republic of Poland of 2 April 1997.

After 1989, with the rejection of the primacy of the Communist Party and the introduction of the principle of a democratic state ruled by law, changes were made to the constitutional regulation of human and civil rights and freedoms, as well as to the approach to safeguarding them. The constitution-maker assigned key significance to formal means of protecting the rights and freedoms. The rights guaranteed in constitutional regulations which were binding before the entry into force of the present Constitution are also guaranteed in the present Constitution: in their essence, they are the same rights, but they are more strictly protected and are subject to more effective formal safeguards. Moreover, the Constitution of the Republic of Poland of 2 April 1997 guarantees rights which were not *expressis verbis* guaranteed at the constitutional level prior to 17 October 1997. A majority of those rights were, however, recognised in the Polish legal system. They arose from the International Covenant on Civil and Political Rights, which was opened for signature in New York on 19 December 1966 (Journal of Laws - Dz. U. of 1977, No. 38, item 167; hereinafter: the International Covenant on Civil and Political Rights) and which was binding for the Polish legislator.

The Tribunal explained that, in the case under examination, it was not vital whether the necessity for issuing a ruling, pursuant to Article 39(3) of the Constitutional Tribunal Act, was subject to assessment in the light of the regulations, safeguarding rights and freedoms, which were binding at the moment of adjudication or which were binding during the period when the rights and freedoms were infringed. The binding Constitution of the Republic of Poland has expanded the scope of protection of constitutional rights, in comparison to the legal provisions prior to its entry into force. Each instance of interference with the rights guaranteed in the regulations which were binding prior to 17 October 1997 simultaneously constitutes interference with the same rights being subject to constitutional guarantees which have been binding since that day. Therefore, issuing a ruling, in the case under examination is necessary, both from the point of view of the rights guaranteed in the Constitution which was binding at the time of the enactment of the said Decrees as well as from the point of view of the rights guaranteed in the Constitution at the time of adjudication.

2.4.6. The Tribunal discussed the nature of the infringement of constitutional rights and freedoms in the case of the Decrees of 12 December 1981.

The Tribunal indicated that the Decree on Martial Law contained substantive provisions introducing restrictions on the individual's constitutional rights and freedoms. Article 4(1) of the Decree on Martial Law suspended or restricted fundamental civil rights set out in the Constitution of the People's Republic of Poland and other statutes as well as international agreements to which the People's Republic of Poland was a signatory. In particular, the following were revoked or restricted: personal inviolability (Article 87(1) of the Constitution of the People's Republic of Poland); the inviolability of the home and the privacy of correspondence (Article 87(2) of the said Constitution); the right of association (Article 84(1) of the said Constitution); the freedoms of speech, publication and assembly as well as the freedom to organise marches, rallies and demonstrations (Article 83(1) of the said Constitution). Thus, by means of a legal act equivalent to a statute, the legislator restricted the constitutional civil rights. The regulations of the Decree on Martial Law were contrary to the obligations, accepted by Poland, which arose from the International Covenant on Civil and Political Rights.

The repressive character of the Decree on Martial Law manifested itself in the fact that the Decree penalised acts which had not been regarded as criminal before 13 December 1981, and also it introduced harsher penalties for acts which were prohibited under the law at that time, as well as it categorised numerous previous misdemeanours as offences. Repressive provisions were aimed at suppressing the freedoms of speech, association, publication and assembly, as well as other freedoms and rights which had been enjoyed by the citizens, pursuant to the Constitution of the People's Republic of Poland and the binding international law.

Analysing the Decree on Special Proceedings, the Tribunal noted that the said legal act contained procedural and substantive provisions which introduced harsher penalties in those proceedings. The Decree concerned the individual's personal liberty, guaranteed by both the Constitution of the People's Republic of Poland and the Constitution of the Republic of Poland. In the light of the Decree on Special Proceedings, the court obligatorily had to order detention pending trial (cf. Article 8(1) of the Decree), and there was no possibility of appealing a judgment issued in provisional proceedings (Article 13(3)).

The Decree on the Jurisdiction of Military Courts assigned cases concerning certain offences to military courts, and at the same time it introduced some changes in the organisation of those courts, *inter alia*, as regards the appointment of judges in those courts as well as the participation of lay judges in court proceedings in criminal cases. The changes introduced affected the functioning of courts and the appointment of judges, as well as the way criminal cases were examined and

procedural and substantive provisions were applied. The provisions under consideration were of significance for the protection of the constitutional rights and freedoms guaranteed by the Constitution of the People's Republic of Poland and the Constitution of the Republic of Poland, in particular the individual's personal liberty and right to ownership.

Repression imposed on the basis of the Decrees of 12 December 1981, including convictions, concerned citizens who committed acts which fell within the scope of "activity for the sake of independence of the Polish State" as well as those who committed acts which were prohibited by decree but which did not qualify as related to such activity. The examination of the constitutionality of the Decrees and the issue of a ruling were in the interest of all those entitled to constitutional rights and freedoms, and not merely in the interest of the persons regarded by authorities as "the participants of illegal anti-socialist activity".

The Constitutional Tribunal stated that the challenged Decrees of 12 December 1981 concerned constitutional rights and freedoms. The Tribunal proved that issuing a judgment concerning the Decree on Martial Law and the Decree on Special Proceedings was necessary.

2.4.7. The Tribunal drew attention to the fact that the legislator issued regulations which mitigated the negative consequences of normative acts enacted during the period of martial law.

However, the Tribunal stated that normative acts enacted in order to redress the harm and damage caused until 1989 had a selective character. They did not include some of the infringements of human rights and freedoms. What remained outside their scope was the following: certain forms of political repression, and instances of infringements of constitutional rights and freedoms, which were not the cases of repression for political activity, but which involved constitutionally illegitimate interference with the most important rights and freedoms of citizens in general. In particular, this pertains to criminal law interference which affected not only persons engaged in political activity, but also those who were not politically active but, for various reasons, breached criminal law provisions which were binding during the period of martial law.

The Constitutional Tribunal concluded that current legal measures did not allow to challenge the rulings made in certain cases in the proceedings conducted on the basis of the Decree on Martial Law and the Decree on Special Proceedings. Therefore, only issuing a ruling by the Constitutional Tribunal could be an effective measure to protect the constitutional rights and freedoms of all those in relation to whom special proceedings had been carried out, and not only with regard to those who had acted for the sake of independence of the Polish State.

2.4.8. The Tribunal established that the period when the Decrees of 12 December 1981 had

been applied could be divided into two periods. The first one – from the introduction of martial law until the last day the martial law was in force, i.e. until 21 July 1983. During that period, the martial law was in force and the organs of public authority applied the Decrees as normative acts specifying the proper conduct of its addressees. The second period began on the day the martial law was lifted, i.e. on 22 July 1983 and lasted until the formal abrogation of the Decrees, i.e. until 25 October 2002 inclusive. During that period the said Decrees were not applied, but they constituted an integral part of the legal system and, for that reason, they posed a potential threat to constitutional rights.

The fact that direct interference with constitutional rights occurred during the period of martial law is neither relevant for the assessment whether there is necessity to issue such a judgment, nor does it affect the assessment of constitutionality of a given decree. In fact, the necessity to issue a ruling does not depend on the length of the period during which a normative act under examination was actually applied, but is contingent upon occurrence of at least a single instance of interference with constitutional rights; in the case of such interference, issuing a ruling on the unconstitutionality of the normative act under examination may facilitate the elimination of effects of such interference.

2.4.9. The Decrees of 12 December 1981 were challenged in their entirety, and the presented allegations refer together to the entire legal acts. Therefore, the Constitutional Tribunal did not consider for each provision separately whether the constitutional review of a particular provision was indispensable for protecting constitutional rights and freedoms.

2.4.10. The Constitutional Tribunal stated that issuing a ruling which concerned the constitutionality of the Decree on Martial Law and the Decree on Special Proceedings was necessary to protect constitutional rights and freedoms. Those two Decrees exhausted the issue of protection of constitutional rights and freedoms. Therefore, the Constitutional Tribunal concluded that issuing a ruling on the Decree on the Jurisdiction of Military Courts was useless, and discontinued the proceedings within that scope.

The Ombudsman presented no arguments justifying the necessity for issuing a ruling on the provisions contained in the Act on special legal regulation during the period of martial law. The Constitutional Tribunal therefore concluded that issuing a ruling with regard to the Act on special legal regulation during the period of martial law was not indispensable for ensuring the protection of constitutional rights and freedoms, and discontinued the proceedings within that scope.

### **3. A period which is appropriate for specifying the object of review**

The substantive considerations of the Constitutional Tribunal concerned the Decree on Martial Law and the Decree on Special Proceedings. The Tribunal resolved the problem of an appropriate higher-level norm for review.

The Constitutional Tribunal considered the fact that, with regard to the Decree on Martial Law and the Decree on Special Proceedings, the Ombudsman indicated higher-level norms for review by requesting the Tribunal to examine the normative acts in the light of Article 7 of the Constitution of the Republic of Poland in conjunction with Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland. At the hearing on 16 March 2011, the representatives of the applicant specified the higher-level norms for review more precisely, explaining that they requested that the Decrees of 12 December 1981 were also reviewed from the point of view of Article 15(1) of the International Covenant on Civil and Political Rights, as it contained the prohibition against retroactivity of law.

The Tribunal clarified which constitutional provisions constituted the basis for review in the case under examination. For that reason, it cited the view from its jurisprudence that, when assessing the constitutionality of the content of a legal norm, the reliable constitutional provisions are those which are binding on the day of adjudication; whereas when assessing law-making powers to enact a given provision and a procedure for its enactment – the constitutional provisions which were binding on the day the said provision was issued. This thesis was established in the jurisprudence of the Constitutional Tribunal, and has been reflected in its subsequent judgments (cf. e.g. the judgments of: 29 October 2002, Ref. No. P 19/01, OTK ZU No. 5/A/2002, item 67, and 12 July 2005, Ref. No. P 11/03, OTK ZU No. 7/A/2005, item 80). The Ombudsman presented the allegation of infringement of provisions governing powers, and indicated that the constitutionality of the normative act under review in the present case was subject to assessment from the point of view of constitutional provisions which were binding at the time when it was enacted, and thus from the point of view of Article 31(1) and Article 8(2) and (3) of the Constitution of the People's Republic of Poland. At the same time, the Tribunal took into account the fact that the higher-level norms for review indicated by the Ombudsman included the principle of legalism. The said principle was included in the Constitution of the People's Republic of Poland, as well as it is present in the Constitution of the Republic of Poland. This was noted in the *petitum* of the Ombudsman's application.

The Tribunal discussed the essence of the principle of legalism from Article 7 of the Constitution. The principle states that the organs of public authority shall function on the basis of, and within the limits of, the law. It also refers to enacting normative acts.

At the same time, the Constitutional Tribunal stressed that an action taken without law-making powers or an infringement of a law-making procedure does not have to, in itself, result in infringing particular rights and freedoms. However, as an illegal action, it is an inadmissible form of interference with the rights and freedoms. The guarantee of rights and freedoms entails that they may only be interfered with in the cases provided for in the Constitution, as well as within the scope provided therein, and also that they may be regulated only in a certain legal form. Both the way the legislative organs are appointed as well as the procedure for their actions are to legitimise those actions. This is particularly significant in the case of criminal law, which allows for far-reaching interference with the most valuable goods of the individual, and thus is based on the fundamental principles of *nullum crimen, nulla poena sine lege*. And it was the norms of criminal law that the challenged decrees contained. The organs which have been entrusted with ensuring the legality of actions undertaken by the organs of public authority, including the legislative branch, are obliged – in accordance with the principle of legalism – to eliminate any infringements of the law caused by those organs.

Indicated as one of the higher-level norms for review in the present case, Article 7 of the Constitution was applied by the Constitutional Tribunal by way of exception. Article 7 is justified axiologically by the principles of transitional justice, which do not defend the illegal actions of former authorities and which require – as much as it is possible – that illegal infringements on rights and freedoms be eliminated.

There was no need to refer to the principle of legalism contained in Article 8(2) and (3) of the Constitution of the People's Republic of Poland, as that principle had been specified in the provisions on the power of the Council of the State to issue decrees (Article 31 of the Constitution of the People's Republic of Poland).

The Constitutional Tribunal made reference to the higher-level norm from Article 15(1) of the International Covenant on Civil and Political Rights, which concerned the prohibition against retroactivity in criminal law. The Constitutional Tribunal indicated that the said provision expressed the fundamental principles of criminal law, which were both addressed to the organs enacting the law as well as to the law-enforcement organs. The Constitutional Tribunal emphasised that the principles contained in the said provision of the Covenant were absolute in character and permitted no exceptions. In particular, the Covenant does not provide for suspending the application of provisions of Article 15 in the case of threats to the state.

The principles of *nullum crimen, nulla poena sine lege* and the prohibition against retroactivity of law were expressed in Article 42(1) of the Constitution of the Republic of Poland. Pursuant to their content, the organs of public authority enacting the law should shape legal

provisions in such a way so as to eliminate their retroactivity. By contrast, the organs of public authority which are responsible for applying the law should ensure that binding legal regulations are applied in such a manner that they will not be retroactive. Article 15(1) of the International Covenant on Civil and Political Rights constituted an adequate higher-level norm for review.

At the same time, the Constitutional Tribunal stated that the law-making principles under the previous constitutions had differed from the current ones. In order to fulfil the requirements of legalism, each regulation has to be a regulation enacted, by a competent authority, in accordance with an appropriate procedure specified by the norms of the law which is binding at the time of the enactment of the regulation. The Constitution of the People's Republic of Poland contained law-making rules, including the regulation of Article 31(1). The regulation concerned issuing decrees by the Council of the State in the periods between the sessions of the Sejm. The assessment of the power to issue the Decree on Martial Law and the Decree on Special Proceedings, and the relevant procedure for the enactment thereof, from the point of view of the principle of legalism, had to take into account the provisions on issuing a decree equivalent to a statute, set out in Article 31(1) of that Constitution. The provisions constitute a necessary criterion for the assessment whether a given decree was issued by a competent organ of public authority and in accordance with a relevant procedure, and therefore they may not be overlooked in the process of constitutional review of the legal act under examination.

Indicated by the Ombudsman as one of the higher-level norms for review, Article 7 of the Constitution of the Republic of Poland is the basis of a democratic state ruled by law. However, the principle of legalism fulfils the function of a guarantee in every legal system. What arises from that principle is the guideline that – in case of doubt – when conducting a constitutional review of normative acts which have ceased to have effect, a higher-level norm for review should be the legal act which is not binding but which proclaimed the principle of legalism. In the case under examination, such a legal act is the Constitution of the People's Republic of Poland. Compelling axiological justification for the above conclusion is found in the principles of transitional justice, which do not defend the illegal actions of former authorities.

The legal acts challenged by the Ombudsman were enacted at the time when the Constitution of the People's Republic of Poland was in force (in the wording which was binding on 12 December 1981) and were binding during the periods when subsequent constitutional regulations were in force, including the present Constitution of the Republic of Poland. The question of formal constitutionality of a normative act issued in the context of one constitutional regulation affects the assessment of its constitutionality in the context of every subsequent constitutional regulation being in force; this is so due to the fact that a normative act which is binding and applied (despite having

been enacted by an organ of public authority (without relevant powers) infringes on the principle of legalism, formulated in the subsequent constitutional regulations which are binding at the time when the unconstitutional normative act is in force.

#### **4. The Analysis of the power to enact the Decree on Martial Law and the Decree on Special Proceedings**

4.1. While assessing the constitutionality of the enactment of the Decree on Martial Law and the Decree on Special Proceedings, the Constitutional Tribunal stated that the Council of the State had summoned the third session of the 8<sup>th</sup> term of the Sejm on 30 March 1981, by the Resolution of the Council of the State of 24 March 1981 on summoning the session of the Sejm of the People's Republic of Poland (Official Gazette – *Monitor Polski* (M. P.) No. 8, item 62). The said Resolution was issued on the basis of Article 30(1)(2) of the Constitution of the People's Republic of Poland. The session was adjourned on 26 March 1982, in accordance with the Resolution of the Sejm of the People's Republic of Poland, dated 26 March 1982, on adjourning the session of the Sejm of People's Republic of Poland (Official Gazette – M. P. No. 10, item 68).

Consequently, the session of the Sejm lasted from 30 March 1981 to 26 March 1982. Within the meaning of Article 31(1) of the Constitution of the People's Republic of Poland, the Council of the State was competent to issue decrees which were equivalent to statutes only during the periods between the sessions of the Sejm. At the same time, the Council of the State was obliged to submit those decrees to the Sejm for approval at the Sejm's nearest session. It clearly followed from the constitutional regulation that, during the session of the Sejm, the Council of the State had no power to issue decrees equivalent to statutes.

There is no doubt that the Council of the State issued the Decrees contrary to Article 31(1) of the Constitution of the People's Republic of Poland. Both the Decree on Martial Law and the Decree on Special Proceedings were issued on 12 December 1981. At that time, the third session of the 8<sup>th</sup> term of the Sejm was in progress. Such legislative action on the part of the Council should be regarded as illegal - since it was carried out without a legal basis - i.e. breaching particular constitutional provisions concerning the legislative process and infringing on the principles regarding the functioning of the organs of public authority.

4.2. Also, the Tribunal pointed out that the Decree on Martial Law and the Resolution on the Introduction of Martial Law were separate legal acts. They differed in character. They were issued on different bases.

Pursuant to Article 33(2) of the Constitution of the People's Republic of Poland, the Council of the State could introduce martial law in the part of or in the entire territory of the People's



Republic of Poland, provided this was required for the defence or security of the state. For the same reasons, the Council of the State could order partial or general mobilisation.

In the Decree on Martial Law, the Council of the State specified the premisses of the introduction of martial law. Apart from the reasons of the state's security and a threat to sovereignty (an external threat), the Council of the State determined that martial law might be introduced in the case of serious threat to or violation of peace and public order in the country, within the borders of one or several voivodeships (an internal threat).

In the view of the Tribunal, the Council of the State had no right to specify the premisses of the introduction of martial law, as well as to establish the premisses which were not indicated in Article 33(2) of the Constitution of the People's Republic of Poland.

The said organ of public authority should not have regulated the fundamental issues of the state's system of government, including the rights of citizens. Within that scope, the competent organ was the supreme organ i.e. the Sejm. Matters concerning martial law should have been regulated solely by statute, due to the scope of interference with [the rights] guaranteed in the Constitution of the People's Republic of Poland at that time (the scope which ensued from the nature of that extraordinary measure), as well as due to the catalogue of fundamental rights set out in the International Covenant on Civil and Political Rights, which was ratified by Poland. This would have required, in each case, the implementation of the Sejm legislative procedure.

The Council of the State had no power to issue the Decree on Martial Law as a legal act infringing the Constitution of the People's Republic of Poland. The premisses of Article 1 of the Decree on Martial Law, to a large extent, concern a state of emergency, and such a measure was not provided for in the Constitution of the People's Republic of Poland. Naturally, a state of emergency allows for a more restricted scope of interference with human rights and freedoms than this is the case during the period of martial law. Therefore, in accordance with *argumentum a maiori ad minus*, where there are no acts of armed aggression towards the organs of public authority in the country, and there are no premisses of occurrence of such acts, then an admissible extraordinary measure would be a state of emergency, also always specified by statute. Taking into consideration both the understanding of the Constitution as a fundamental statute in the official doctrine of that time, and the fact that Poland was bound by the principles set out in the Universal Declaration of Human Rights of 1948, by ratified international agreements outlining the catalogue of human rights as well as by the values cherished by social partners, the Tribunal stressed that the Council of the State had had no power to adopt provisions on a state of emergency by decree after 1977, even during a period when the Sejm was not in session, due to the fact that the said provisions regulated restrictions on rights and freedoms.

The members of the Council of the State not only should have, but actually must have, been aware of those constitutional restrictions. Pursuant to Article 30(1)(3) of the Constitution of the People's Republic of Poland, the Council of the State was an organ of public authority obliged to "ensure conformity of the law to the Constitution".

### **5. The analysis of the allegation that the prohibition against retroactivity of law was infringed**

The Tribunal discussed the meaning of the principle of *lex retro non agit*, emphasising that the principle prohibited the legislator from enacting retroactive norms, apart from extraordinary situations where exceptions to that rule were admissible. As regards the organs of public authority, in case of any doubts as to the meaning of interpreted provisions, the principle requires them to reject any interpretations according to which these provisions would be retroactive.

The principle of *lex retro non agit*, insofar as it overlaps with the principle of *nullum crimen, nulla poena sine lege*, is expressed in all acts of international law which concern human rights.

The Constitutional Tribunal made reference to its jurisprudence regarding that principle (cf. the ruling of 22 August 1990, Ref. No. K 7/90, OTK in 1990, item 5; the rulings of the Constitutional Tribunal of: 25 February 1992, Ref. No. K 3/91, OTK of 1992, Part 1, item 1, p. 9; 19 October 1993, Part 2, item 35; 30 November 1993, Ref. No. K 18/92, OTK in 1993, Part 2, item 41; 7 December 1993, Ref. No. K 7/93, OTK in 1993, Part 2, item 42 as well as the judgment of 17 December 1997, Ref. No. K 22/96, OTK ZU No. 5-6/1997, item 71).

The Tribunal did not regard the prohibition against retroactivity of law as absolute, and allowed for exceptions thereto, provided that there were circumstances which justified such an exception. However, the Tribunal assumed that the said prohibition was absolute in the context of criminal law (cf. the judgment of 3 October 2001, Ref. No. K 27/01, OTK ZU No. 7/2001, item 209).

In the view of the Tribunal, both Decrees under examination contained provisions in which the legislator separated the date of their entry into force from the moment when conduct or an event occurred to which the norms of the Decrees could apply. And so Article 61 of the Decree on Martial Law stipulated that: "The Decree shall enter into force on the day of its promulgation, but shall be binding from the day it is passed". Similar wording was included in Article 25 of the Decree on Special Proceedings, which stipulated that: "The Decree shall enter into force on the day of its promulgation, but shall be binding from the day of the introduction of martial law".

The Decree on Martial Law was passed on 12 December 1981 and from then on it was

applicable to the conduct and events specified therein.

Pursuant to § 1 of the Resolution of the Council of the State on the Introduction of Martial Law, the martial law was imposed on 13 December 1981; thus, the Decree on Special Proceedings was applicable to the conduct and events from 13 December 1981.

The challenged Decrees were promulgated on 18 December 1981 and only on that day, in accordance with their final provisions, they entered into force, despite the fact that the issue of the Journal of Laws where they were published was dated 14 December.

The Tribunal indicated that, during the period from 13 December 1981 until the day of actual promulgation, the Decrees under examination were not part of the Polish legal system, since – as acts which had not been promulgated – they were not binding. Therefore, it was justified for the citizens to expect that criminal law statutes which had been binding until then would be applied to the acts committed during the said period. The Decrees became retroactive on the day of their promulgation.

Due to the retroactivity of both Decrees, the perpetrators of the acts indicated therein were held criminally liable, during the period from 13 to 17 December 1981, although the said acts were not prohibited at the moment of commission thereof, or they were held criminally liable in accordance with the provisions set out in the Decrees, i.e. the provisions which were more stringent than those that were binding at the moment of commission of the acts. The norms of the Decrees were applied to both the perpetrators of the acts which, in the light of the former provisions, were not at all criminal as well as the perpetrators of the acts which, in the light of the former provisions, were punished with milder penalties. Both Decrees provided for imposing harsher penalties than those which were applicable at the moment of commission of the acts.

The Constitutional Tribunal concluded that there was no doubt that the Decree on Martial Law and the Decree on Special Proceedings infringed on the principle of non-retroactivity of law, expressed in Article 15(1) of the International Covenant on Civil and Political Rights.

#### **6. The application of the Decree on Martial Law and the Decree on Special Proceedings, and the issue of their proper promulgation**

The Ombudsman also drew attention to the fact that the Decree on Martial Law and the Decree on Special Proceedings, both dated 12 December 1981, were promulgated in the Journal of Laws of 14 December 1981. In fact, the said Journal was submitted for publication and was published no earlier than on 17 December 1981. The Ombudsman also stated that, as a result, during the first few days of martial law courts applied an unofficial text of a normative act, which – in the opinion of the Tribunal – was tantamount to applying the norms of an act which was no binding.

The Constitutional Tribunal stated that, in the case under examination, the legislator's infringement of the principle of non-retroactivity of law overlapped with the infringements of that principle caused by the organs of public authority which were responsible for applying the law. The antedating of the Journal of Laws and the way its copies were distributed, as well as the application of a normative act which was not binding by courts, as actions falling within the scope of the application of the law exceed the scope of jurisdiction of the Constitutional Tribunal.

### **7. The effects of the ruling**

The Constitutional Tribunal declared that the Decree on Martial Law and the Decree on Special Proceedings were unconstitutional, for they had been enacted by the Council of the State, which had not had the relevant powers in that regard.

7.1. The constitution-maker does not distinguish among the effects of rulings declaring the unconstitutionality of a normative act, depending on whether this unconstitutionality is substantive or formal. Within the meaning of Article 190(4) of the Constitution, every ruling of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective ruling of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

A normative act issued by an authority without relevant powers, or by infringing on provisions regulating the legislative procedure, is binding until the announcement of a ruling which declares its unconstitutionality or ceases to be binding at a later date specified by the Constitutional Tribunal. By contrast, a ruling which declares unconstitutionality of an act which is not binding does not undermine its validity during the period when a given normative act was binding, but opens up the possibility of re-opening proceedings on the basis of Article 190(4) of the Constitution.

The Decree on Martial Law and the Decree on Special Proceedings were regarded by the organs of public authority as binding normative acts and were applied by them. The judgment of the Constitutional Tribunal declaring the unconstitutionality of the Decrees does not retroactively undermine their validity during the period when they were binding and applied. But it opens up the possibility of applying Article 190(4) of the Constitution and of re-opening the proceedings where these acts were applied.

7.2. The ruling of the Constitutional Tribunal is of direct significance in the context of criminal law. Upon request of those concerned, it makes it possible to re-open criminal proceedings

where the provisions of repressive law, contained in the challenged Decrees, were applied.

On the basis of Article 39(3) of the Constitutional Tribunal Act, the Constitutional Tribunal resolved the question whether it was admissible to issue a ruling in the case under examination. The said provision has a unique character and delineates the boundaries within which the declaration of unconstitutionality of normative acts indicated in the operative part of the judgment may then constitute the basis for re-opening the proceedings which ended with a legally effective ruling. In particular, this may solely occur insofar as it is indispensable, in a given case, for protecting constitutional rights and freedoms. Thus, when considering the admissibility of re-opening proceedings in criminal cases, the organs of public authority which are responsible for applying the law should, in each case, determine the nature of the infringement of constitutional rights or freedoms in given proceedings (taking into account the constitutional standard which was binding at that time), as well as whether, in a given case, the said re-opening will constitute an adequate and necessary measure to remedy the said infringement; moreover, they should specify an appropriate scope and character of the re-opening, narrowing it down particularly to those elements of the proceedings or rulings ensuing therefrom which did not meet the above-mentioned constitutional standard.

7.3. The Constitutional Tribunal established that adjudicating on the decrees concerning martial law was necessary for protecting constitutional freedom and rights. At the same time, the Tribunal acknowledged that many of the rights and freedoms could not be restored, and the infringement thereof – compensated. However, the Tribunal stated that the ruling in the case under examination was significant for enhancing the rule of law and – regardless of its limited direct impact – for preserving the principle of protection of citizens' trust in the state and its institutions. The ruling manifests the function of the state as a guarantor and confirms the supreme role of constitutional provisions, in the case where actions are taken by the organs of public authority without a legal basis and in violation of the fundamental principles for enacting the law.