49/4/A/2009

JUDGMENT
of 16 April 2009
Ref. No. P 11/08*

In the name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Mirosław Granat – Presiding Judge
Marian Grzybowski
Wojciech Hermeliński – Judge Rapporteur
Marek Kotlinowski
Mirosław Wyrzykowski,

Krzysztof Zalecki – Recording Clerk,

having considered - at the hearings on 15 December 2008, 20 January 2009 and 16 April 2009, in the presence of the court referring the question of law, the Sejm and the Public Prosecutor-General - the following question of law referred by the Court of Appeal in Kraków:

whether Article 148(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, with amendments), as amended by Article 1(15) of the Act of 27 July 2005 amending the Penal Code, the Code of Criminal Procedure and the Executive Penal Code (Journal of Laws - Dz. U. No. 163, item 1363), is consistent with:
– Article 10 in conjunction with Article 175(1) of the Constitution;
– Article 45(1) in conjunction with Article 178(1) and Article 31(3) of the Constitution;
– Article 118(1) as well as Article 119(1) and (2) of the Constitution,

adjudicates as follows:

Article 1(15) of the Act of 27 July 2005 amending the Penal Code, the Code of Criminal Procedure and the Executive Penal Code (Journal of Laws - Dz. U. No. 163, item 1363) **is inconsistent with Article 118(1) and Article 119(1) and (2) of the Constitution of the Republic of Poland, due to the fact that it was passed by the Sejm without observance of procedure required for enacting the said Article.**

Moreover, the Tribunal decides:

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 as well as of 2005 No. 169, item 1417), **to discontinue the proceedings as to the remainder, on the grounds that the pronouncement of a judgment is useless.**

* The operative part of the judgment was published on 23 April 2009 in the Journal of Laws - Dz. U. No. 63, item 533.

STATEMENT OF REASONS

I

1. The Court of Appeal in Kraków, 2nd Criminal Division, (hereinafter: the court referring the question) has referred the following question of law to the Constitutional Tribunal: whether Article 148(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, with amendments; hereinafter: the Penal Code), as amended by Article 1(15) of the Act of 27 July 2005 amending the Penal Code, the Code of Criminal Procedure and the Executive Penal Code (Journal of Laws - Dz. U. No. 163, item 1363; hereinafter: the amending Act), is consistent with Article 10 in conjunction with Article 175(1) of the Constitution, with Article 45(1) in conjunction with Article 178(1) and Article 31(3) of the Constitution, and also with Article 118(1) as well as Article 119(1) and (2) of the Constitution.

The question of law has been raised in relation to the following facts:

Proceedings are pending before the court referring the question, as regards criminal liability of two persons co-accused, *inter alia*, of an offence under Article 13(1) in conjunction with Article 148(2) of the Penal Code, which consisted in assaulting a person with a knife and injuring him/her in the neck, doing so together and under mutual agreement, with the intention to kill that person in order to steal his/her, although they did not achieve their goal as the injured person defended him/herself. Pursuant to Article 14(1) in conjunction with Article 148(2) of the Penal Code, the said offence is subject to the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life, with the reservation that, in accordance with Article 54(2) of the Penal Code, the penalty of deprivation of liberty for life shall not be imposed on the perpetrator who was under 18 at the time of the commission of the offence.

By the judgment of the Circuit Court in Kraków, dated 20 September 2007, the accused were sentenced to 25 years of deprivation of liberty for that crime.

In the course of the proceedings initiated by appeals filed against the above judgment by the defence counsels of the accused, the Court of Appeal in Kraków raised doubts which it expressed in the question of law, presently under examination.

The court referring the question underlined that it was the legislator's obligation to specify a prohibited act subject to penalty and set out other determinants of punishability, including a criminal sanction. The legislator's freedom in that regard is merely restricted by the systemic assumptions specified in the Constitution and the relevant provisions of international law. Therefore, the legislator's freedom to create law may not override constitutional principles, and in particular it may not eliminate the independence of courts and judges.

The court referring the question stated that the administration of justice in criminal matters involved determining the commission of a given prohibited act, its punishability, and a penalty for the perpetrator of the act. Prohibited acts which are classified in a similar way vary, as regards the extent to which they bring about detrimental social consequences. The perpetrators of such acts are not equally guilty, display different personal qualities, and differ as regards their conduct following the commission of their acts, all of which affect the kind of penalty that is imposed (Article 53(1) and (2) of the Penal Code). Determining a penalty for an offence entails more than simple application of a sanction provided for in a criminal law provision, as it constitutes an outcome of an analysis carried out by a judge, who rationally considers all the circumstances. A fair judgment for a perpetrator is contingent not only upon the proper determination of facts and the accuracy

of legal subsumption, but also upon fair determination of penalty, its aptness and usefulness for attaining the intended results of the proceedings.

Further on in the substantiation of the presented question of law, the court referring the question stated that if a given judge had no freedom to determine a penalty, his/her role in administering justice would be limited to stating facts and carrying out legal subsumption, whereas he/she would be deprived of the possibility of determining a penalty. In such circumstances, contrary to Article 10 and Article 175(1) of the Constitution, justice would be administered by the legislator, and not by the judiciary. The measure of fairness of particular judicial decisions would be the adequacy of a criminal sanction, provided for in abstract terms by the legislator for all criminal acts which have not yet been committed, rather than the particular circumstances surrounding a given penalty. In the view of the court referring the question, this would be inconsistent with the individual's right to a fair and public hearing of his/her case (Article 45(1) of the Constitution), which is guaranteed, *inter alia*, by judicial independence, which in such circumstances would be non-existent in the context of adjudicating on a penalty.

Granting judges the freedom of decision as regards determining the type and severity of a penalty (Article 53(1) and (2) as well as Article 54(1) of the Penal Code), the legislator prescribed that a penalty should be individualised within the limits of a given criminal sanction, taking into account the circumstances of a particular offence and the circumstances of a given perpetrator (Article 55 of the Penal Code), and he introduced a ban on imposing a penalty, the harshness of which exceeded the degree of guilt (Article 53(1) of the Penal Code). In this context, the court referring the question emphasised that the assessment regarding the guilt of a perpetrator, the circumstances affecting the severity of a penalty, the individualisation of the penalty and its proportionality to the offence committed fell exclusively within the remit of an independent judicial decision; and judges might not be replaced by the legislator in that respect, for the legislator naturally made *a priori* and general decisions.

The court referring the question pointed out that the Polish criminal law applied the system of sanctions which were defined in relative terms, and thus enabled judges to determine penalties adequately to particular circumstances of each case. This way courts are assigned the role to administer justice, and each person is guaranteed a fair hearing of his/her case. Sanctions defined in absolute terms are virtually non-existent in the Polish legal system. Such a sanction (death penalty) was provided for in Article 1 of the Decree of 31 August 1944 on the exercising of punishment for Nazi-Fascist criminals guilty of the murder and torment of the civilian population and prisoners, and for traitors to the Polish Nation. As the court referring the question stressed, that legal act had a unique character, due to the historical circumstances. Another sanction defined in absolute terms is the interdiction on driving motorised vehicles imposed for an indefinite period (for life), in the case where a person is again convicted of driving such a vehicle in the circumstances set out in Article 42 of the Penal Code. In the opinion of the court referring the question, unlike the penalty of deprivation of liberty, this criminal measure has more of a preventive, rather than repressive, character.

The court referring the question underlined that the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life were regarded in the legal practice as unique, due to their eliminating effects.

Further on in the substantiation, the said court drew attention to the fact that the previously binding penal codes had not provided for aggravated homicide. Initially, as regards aggravated homicide, the binding Penal Code provided for the penalty of deprivation of liberty for a period ranging from 12 to 15 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life. The amending Act

has narrowed down the selection to the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life, thus restricting judicial freedom. In this context, the court referring the question stressed that, where proceedings concerned the liability of the accused who had committed the offence he/she was accused of before reaching the age of 18, Article 54 of the Penal Code excluded the possibility of imposing the penalty of deprivation of liberty for life, which meant that the accused person might only face the penalty of 25 years of deprivation of liberty. The court also pointed out that in such a case it was not possible to impose a different penalty, by applying the legal mechanism of extraordinary mitigation of a penalty, not only where that was optional, but even where extraordinary mitigation of a penalty was obligatory.

The provision which has raised the constitutional doubts in the court referring the question entails that courts are only to determine whether an accused person has committed the alleged act, carry out legal classification, and then impose a penalty: in the case of an underage perpetrator – without any possibility of choosing a penalty, and in other cases - with the choice limited to the harshest penalties.

In the view of the court referring the question, the above regulation raises doubts as to its conformity to Article 45(1) and Article 178(1) of the Constitution. Indeed, no matter what has been established by a court, and regarded as vital for determining the severity of a penalty, it may not be taken into account. This clashes with the principle of judicial independence. As a consequence of the challenged regulation, the application of the sanctions set out in Article 148(2) of the Penal Code may result in imposing excessively harsh penalties, which would be contrary to the principle of proportionality (Article 31(3) of the Constitution). This raises doubts as to the conformity of the challenged regulation to the principle of separation of powers (Article 10 of the Constitution) and the principle that the administration of justice is vested in courts (Article 175(1) of the Constitution).

Moreover, the court referring the question drew attention to the reservations concerning the conformity of the legislative process which had resulted in the enactment of the challenged provision to Article 118(1) as well as Article 119(1) and (2) of the Constitution.

2. In a letter of 30 June 2008, the Public Prosecutor-General presented his stance on this case. He stated that Article 1(15) of the amending Act was inconsistent with Article 118(1) as well as Article 119(1) and (2) of the Constitution. As to the remainder, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), the proceedings should be discontinued, on the grounds that the pronouncement of a judicial decision is useless.

Making reference to the way the amending Act was enacted as well as the jurisprudence of the Constitutional Tribunal regarding the enactment of statutes, the Public Prosecutor-General stated that the amendment which led to the adoption of Article 1(15) of the amending Act by the Sejm went beyond the admissible scope ratione materiae of amendments which might be proposed during the analysis of a bill by the Sejm.

The Public Prosecutor-General stressed, in particular, that the initiative aimed at narrowing down the range of penalties for aggravated homicide - only to the penalty of 25 years of deprivation of liberty or the penalty of deprivation of liberty for life - appeared in 2002 in the Deputies' bill amending the Penal Code and the Executive Penal Code; the said bill contained a proposal to raise the minimum statutory sentence for the most serious offences, introduced a definition of a functionary responsible for the public order, and introduced a new type of offence – the homicide of such a functionary at the time when he/she is on duty or in relation to his/her duties, as well as modified the premisses of the

extraordinary mitigation of a penalty and of the conditional earlier release (see the Sejm Paper No. 702/ 4th term of the Sejm). At the same time, the authors of the bill saw the need for an appropriate modification of the provision on the rules of applying the extraordinary mitigation of a penalty, and proposed that point 1^1 should be added to Article 60(6), after point 1, with the following wording: if a prohibited act constitutes an offence which is subject to the penalty of 25 years of deprivation of liberty or the deprivation of liberty for life, the court imposes the penalty of deprivation of liberty for a period ranging from 8 to 15 years", which mitigated the effect of the restriction on the principle of judicial imposition of a penalty. Shifting only the proposal for the change of the sanction specified in Article 148(2) of the Penal Code to the amending Act has resulted in discrepancies in the jurisprudence of courts, with regard to the issue of extraordinary mitigation of penalties provided for in Article 1(15) of the amending Act.

In the view of the Public Prosecutor-General, the comparison of the scope ratione materiae of the amending Act, in its previous wording, with the amendment which has raised the constitutional doubts in the court referring the question, leads to the conclusion that the amendment considerably exceeds the scope of the Act. Indeed, the amendment concerns the sanctions referring not only to the sanctions resulting from sexual motives, but to all cases of aggravated homicide. In order to achieve the goal set in the amending Act, a legislative measure was used which went far beyond the assumptions of the initial amendment.

In the opinion of the Public Prosecutor-General, in the case under examination, due to exceeding the scope ratione materiae of the admissible amendments at the second stage of reading the bill in the Sejm, the principle that the Sejm shall consider bills in the course of three readings (Article 119(1) of the Constitution) has been infringed and the provisions on legislative initiative (Article 118(1) of the Constitution) have been evaded.

The Public Prosecutor-General stressed that since declaring the unconstitutionality of the legislative process resulted in deeming the amendment ineffective, then it became unnecessary to examine the challenged provision from the point of view of the other higher-level norms for review.

3. In a letter of 8 October 2008, the Marshal of the Sejm presented the stance of the Sejm in the present case.

In the view of the Sejm, the challenged provision is inconsistent with Article 10 in conjunction with Article 175(1), with Article 45(1) in conjunction with Article 178(1) as well as with Article 31(3) of the Constitution, and it is consistent with Article 118(1) and Article 119(1) and (2) of the Constitution.

Making reference to the constitutional problem rendered in the question of law referred by the Court of Appeal in Kraków, 2nd Criminal Division, the Sejm emphasised that there were four kinds of sanctions in the doctrine of criminal law: absolutely undefined, defined in absolute terms, relatively undefined and defined in relative terms. What is currently dominant is the model of sanctions which are defined in relative terms. The said model entails specifying the limits of a sanction for a particular type of an offence which are subject to specification in the process of applying the law.

The letter of the Sejm underlined that until 26 September 2005 there had only been two instances of sanctions which were defined in absolute terms. Such a sanction defined in absolute terms is provided for in Article 1 of the Decree of 31 August 1944 on the exercising of punishment for Nazi-Fascist criminals guilty of the murder and torment of the civilian population and prisoners, and for traitors to the Polish Nation. The above provision provides solely for death penalty for the conduct specified therein, but pursuant to Article 13(1) of the Act of 6 June 1997 – the Provisions introducing the Penal Code

(Journal of Laws - Dz. U. No. 88, item 554, with amendments), instead of that penalty, the penalty of deprivation of liberty for life is adjudicated. Another instance of a sanction defined in absolute terms is specified in Article 42(4) of the Penal Code. This is the interdiction on driving motorised vehicles for an indefinite period, imposed obligatorily, in the case of a perpetrator who is again convicted of driving such a vehicle in the circumstances set out in Article 42(3) of the Penal Code.

The sanction provided for an offence specified in Article 148(2) of the Penal Code is, in fact, closer to the sanction defined in absolute terms, especially that in particular cases the difference between the penalty of 25 years of deprivation of penalty and the penalty of deprivation of liberty for life may prove to be insignificant.

The letter of the Sejm stressed that by means of the amending Act which had changed Article 148(2) of the Penal Code, in the way which had raised the constitutional doubts in the court referring the question, the following new criminal measures had been introduced into the Penal Code: obligatory interdiction on taking any or specific posts, on taking up any or specific professions, or activity related to providing education and medical treatment to minors or having custody of them, imposed in the case where a perpetrator is once again sentenced to deprivation of liberty for an offence against sexual freedom and morality to the detriment of a minor (Article 41(1b) of the Penal Code) as well as an obligatory order to stay away from certain circles or places, an interdiction on contacting certain persons or on leaving one's place of residence without permission granted by the court, imposed where a person is sentenced to deprivation of liberty without conditional suspension of the execution thereof, for an offence against sexual freedom or morality to the detriment of a minor (Article 41a(2) of the Penal Code).

With reference to the content of Article 10 of the Constitution, the letter of the Sejm stated that on numerous occasions it had been indicated in the jurisprudence of the Constitutional Tribunal that the principle of separation and balance of powers (regarding the legislative, executive and judicial branches of government), expressed therein, did not have purely organisational implications, but constituted the protection of human rights against potential abuse of power by whichever organ of public authority that exercised the power.

In that context, the Sejm stressed that the place of the judiciary in a democratic state ruled by law was vital, but it was only when the judiciary was independent from other branches within the system of government that it could fulfil its duties. The other organs of public authority may neither interfere in the functioning of courts, nor may they participate in the administration of justice. At all stages of proceedings, criminal liability falls within the remit of the judiciary. Although the legislative branch decides which acts are prohibited and specifies the severity of sanctions, the legislative process may not infringe on the judicial "minimum of exclusive competence". The judiciary would otherwise become "a hostage" of the legislative branch, and would mechanically carry out the will of the legislator. Such a state of affairs would be inconsistent with Article 175(1) of the Constitution, as then courts could not - on the basis of a legal act of another branch of government – freely, though within the scope of a statute, determine a criminal sanction for a specific offence, adjusting a given penalty to a particular perpetrator, the circumstances of an act and the degree of guilt.

The Sejm emphasised that the excessive and arbitrary interference of the legislative branch with the realm of functioning of courts or the administration of justice might be regarded as an infringement on the principle of balance of powers.

In the view of the Sejm, incorporating a sanction which is defined almost in absolute terms into the Penal Code is not without impact on the right to a fair trial, which is guaranteed in Article 45(1) of the Constitution. With reference to the components of that

principle, the letter of the Sejm stressed that eliminating the "minimum of exclusive competence" resulted in interference with the judicial independence of courts. That also affects the element of the right to a fair trial which implies that it is necessary to properly devise the court procedure.

Making reference to Article 148(2) of the Penal Code, the Sejm stated that the amendment of that provision had led to the situation where courts were deprived of the possibility of imposing penalties which would be adequate to the nature and circumstances of a prohibited act as well as to the personal qualities of a perpetrator. As a result, that has eliminated the "minimum of exclusive competence" of the judiciary, which is tantamount to the non-conformity of the challenged provision to Article 10 and Article 175(1) of the Constitution.

Further on, it was pointed out in the substantiation of the said letter from the Sejm that by limiting the possibility of selecting a sanction, in the case of an offence under Article 148(2) of the Penal Code, the legislator had assigned general primacy of prevention to a penalty, in a negative sense, allowing for the possibility of imposing a penalty, the harshness of which might exceed the degree of guilt and the resocialisation needs of a given perpetrator.

Depriving courts of any chance of flexibility, when selecting a penalty, may be inconsistent with Article 30 of the Constitution, as the requirement to preserve the "minimum of exclusive competence" of the judiciary - with regard to the individualised application of procedures for assessment of a prohibited act and for administration of justice in a given context - stems from the protection of human dignity.

The Sejm noted that the sanction specified in Article 148(2) of the Penal Code made it difficult for courts to implement the principle of adequate criminal law's response, and thus the principle of a fair trial, within the meaning of Article 45(1) of the Constitution. When implementing the principle of adequate criminal law's response, courts should rely on the provisions of Chapter 6 of the Penal Code, primarily including Article 53(1) of the Penal Code, pursuant to which a given court imposes a penalty according to its own discretion, within the limits prescribed by a statute, which does not exceed the degree of guilt, considering the level of social consequences of the act committed, and taking into account the preventive and educational objectives which the penalty has to attain with regard to the sentenced person, as well as the need to raise the awareness of law among the public. At the same time, the Sejm underlined that the obligation of a court to "impose a penalty according to its own discretion, within the limits prescribed by a statute" arose from the constitutional principle that the administration of justice was vested in courts (Article 175(1) of the Constitution). The said obligation is also closely related to the principles that: courts and tribunals shall be independent of other branches of power (Article 173 of the Constitution) and judges shall be independent and subject only to the Constitution and statutes (Article 178 of the Constitution). The actual exercise of the courts' power to freely determine the severity of a penalty in a given case is only possible when an independent court adjudicating in that case has the freedom to decide in that respect.

Article 178 of the Constitution is closely connected with Article 45(1) of the Constitution. The obligation ensuing from that provision, which is addressed both to the legislative branch as well as to the judiciary, constitutes a measure which is aimed at exercising the right to a fair trial, guaranteed in Article 45(1) of the Constitution.

With reference to Article 31(3) of the Constitution, the Sejm stated that the concept of penalty as *ultima ratio* arose from that provision. The implementation of that idea is not possible when a criminal sanction is defined in absolute terms.

As regards the allegations concerning the legislative process of enacting Article 1(15) of the amending Act, which has assigned Article 148(2) of the Penal Code its current wording, the Sejm concluded that, by introducing the requirement that the Sejm was to consider bills in the course of three readings, in Article 119(1) of the Constitution, the legislator ordered that the basic content which was included in a statute should be subject to the complete legislative procedure. The formal character of the legislative process is to guarantee that the solutions adopted in statutes will be thoroughly analysed. What contradicts this is the incorporation of new normative content into a bill at the final stages of legislative process in the Sejm.

In the view of the Sejm, in the case under examination, there was no infringement of the legislative procedure, in accordance with which the Act amending Article 148(2) of the Penal Code was enacted. Due to shortening the 4th term of the Sejm, a number of solutions which were being developed by the Sejm Committee on Codification Changes, which, *inter alia*, deals with amendments to the Penal Code, were incorporated in the bill included in the Sejm Paper No. 2693/4th term of the Sejm. The proposal for amending Article 148(2) of the Penal Code was in the bills included in the Sejm papers with the following numbers: 181, 387, 702 and 775. After the first reading at the plenary session of the Sejm, all those bills were referred to the Special Committee, which examined them with the assistance of numerous scholars and experts from the field of criminal law. The subject matter of the session of the subcommittee created within the Special Committee was, *inter alia*, the Deputies' bill which included, among others, the proposal to amend Article 148(2) of the Penal Code (the Sejm Paper No. 702/4th term of the Sejm).

II

At the hearing on 15 December 2008, the participants in the proceedings maintained their stances presented in writing.

With reference to the query of the Constitutional Tribunal, the representative of the court referring the question and the Public Prosecutor-General unanimously stated that, in their view, the declaration of unconstitutionality of the challenged provision by the Constitutional Tribunal, on the grounds of formal irregularities during the legislative process, should result in "reviving" the challenged provision in its wording prior to the amendment.

At the hearing on 20 January 2009, the participants in the proceedings maintained their previous stances.

As regards the hearing on 16 April 2009, the representative of the Sejm failed to attend, despite having been properly notified. Pursuant to Article 60(3) in conjunction with Article 41(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), the Constitutional Tribunal decided to continue the proceedings.

The representative of the court referring the question corrected his previous stance, with regard to the consequences of a potential judgment which would declare the unconstitutionality of the challenged provision. He stated that, in his opinion, such a judgment would result in depenalisation of aggravated homicide. Article 148(2) of the Penal Code has been challenged merely with regard to the sanction specified therein, but if the Constitutional Tribunal deemed the sanction unconstitutional, this would have impact on the act specified in that provision, as according to the principle of *nullum crimen sine lege poenali*, there may be no offence without a sanction. Consequently, this would mean the necessity to classify conduct which exhausts the characteristics set out in Article 148(2) of the Penal Code as offences under Article 148(1) of the said Code, and to apply the

penalties specified in that provision. In the opinion of the representative of the court referring the question, the judgment of the Constitutional Tribunal declaring the unconstitutionality of the challenged provision, within the challenged scope, would not result in "reviving" Article 148(2) of the Penal Code in its wording prior to the amendment which has limited the range of sanctions. As a result of such a judgment by the Constitutional Tribunal, only paragraphs 1 and 4 (homicide and homicide with mitigating circumstances) would remain in Article 148 of the Penal Code, which would mean returning to the state of affairs prior to 1997. This would imply "regress" in relation to the current legal order, since – before the introduction of the category of aggravated homicide, in the jurisprudence of courts there was a negative phenomenon of "decreasing" penalties to the possible minimum and there were considerable discrepancies as regards the severity of penalties imposed in the cases displaying similar actual circumstances.

In closing remarks, the representative of the court referring the question stated that he maintained the allegations concerning the challenged provision. He emphasised that the judgment declaring the unconstitutionality of the challenged provision would result in re-instigating a few hundred proceedings, but the consequences of leaving the challenged provision in the legal system would be far more serious.

By contrast, the representative of the Public Prosecutor-General stated that the negative consequences of the judgment declaring the unconstitutionality of the provision under examination could be minimised by derogating the amending provision and "reviving" Article 148(2) of the Penal Code in its wording prior to the amendment. In conclusion, he requested the Tribunal to determine the unconstitutionality of Article 1(15) of the amending Act, due to the infringements of the legislative process, and to discontinue the proceedings as to the remainder.

III

The Constitutional Tribunal has considered as follows:

1. The court referring the question raises doubts as to Article 148(2) of the Act of 6 June 1997 – the Penal Code (Journal of Laws - Dz. U. No. 88, item 553, with amendments; hereinafter: the Penal Code), as amended by Article 1(15) of the Act of 27 July 2005 amending the Penal Code, the Code of Criminal Procedure and the Executive Penal Code (Journal of Laws - Dz. U. No. 163, item 1363; hereinafter: the amending Act.)

Penalising aggravated homicide, the challenged provision which stipulates that: "Whoever kills a human being: 1) with particular cruelty, 2) in connection with hostage taking, rape or robbery, 3) for motives deserving particular reprobation, 4) with the use of firearms or explosives, shall be subject to the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life".

It follows from the substantiation of the question of law that the constitutional doubts of the court referring the question concern neither the admissibility of existence of the category of aggravated homicide as such, nor the situations which the legislator links with that category. They solely regard the sanction for the offence described in that provision. The court referring the question has determined the scope of the allegations neither in the *petitum* of the question of law, nor in the substantiation thereof. However, what resolves this is the indication in the *petitum* that the constitutional doubts of the court referring the question concern Article 148(2) of the Penal Code, as amended by Article 1(15) of the amending Act, since the amendment introduced by the amending Act solely referred to the sanction. Also, such a conclusion as to the scope of allegations in the case under examination can undeniably be drawn from the argumentation which the court

referring the question has put forward, in order to justify its doubts as to the constitutionality of the challenged provision.

2. The court referring the question has formulated two kinds of allegations concerning the type of a prohibited act which falls under the category of aggravated homicide.

It seems to follow from the substantiation of the question of law that the allegations regarding substantive law are of primary significance.

Regardless of that, the court referring the question has raised allegations concerning procedural issues, which included reservations as to the legislative process of enacting Article 1(15) of the amending Act, which has assigned Article 148(2) of the Penal Code its current wording.

The amendment to the challenged provision, introduced by the above-mentioned amending Act, aimed at specifying the sanctions for the conduct described therein. In the initial wording, there was a choice between the penalty of deprivation of liberty for a period ranging from 12 to 15 years, the penalty of 25 years of deprivation of liberty or the penalty of deprivation of liberty for life. After the amendment, the following have remained as possible penalties: the penalty of 25 years of deprivation of liberty or the penalty of deprivation of liberty for life.

The amendment introduced by the said amending Act has brought about a considerable change in the system of penalties for the perpetrators who were under 18 at the time of the commission of the offence. Indicating that one of the two co-accused persons in the proceedings - in relation to whom the court referring the question has raised doubts - was under 18 at the time of the commission of the offence, the court pointed out that, with regard to the perpetrators of aggravated homicides who belonged to that group, the amending Act had completely departed from the concept of a penalty defined in relative terms. The amending Act, pursuant to which Article 148(2) of the Penal Code has been amended, has not changed Article 54(2) of the Penal Code, in accordance with which the penalty of deprivation of liberty for life is not adjudicated with regard to the perpetrators who were under 18 at the time of committing the offence. Therefore, as regards that group of perpetrators, the penalty specified in Article 148(2) of the Penal Code is rendered in absolute terms in an extreme way. In such a case, it is only possible to impose the penalty of 25 years of deprivation of liberty.

In the period prior to the amendment to Article 148(2) of the Penal Code, introduced by Article 1(15) of the amending Act, it was possible to punish the perpetrators who had committed the offence specified in that provision before turning 18 with the penalty of deprivation of liberty for a period ranging from 12 to 15 years or the penalty of 25 years of deprivation of liberty. By contrast, with regard to adult perpetrators, the following were applicable: the penalty of deprivation of liberty for a period ranging from 12 to 15 years, the penalty of 25 years of deprivation of liberty or the penalty of deprivation of liberty for life.

The court referring the question has stressed that, in particular in the case of the perpetrators who were under 18 at the time of the commission of the offence, the challenged regulation assigns an absolute character to the sanction which may possible to be imposed under Article 148(2) of the Penal Code. It follows from the substantiation of the presented question of law that Article 148(2) of the Penal Code raises doubts in the court referring the question as to the rendering of sanctions with regard to both the perpetrators who were under 18 at the time of the commission of the offence and adult perpetrators. In both cases, courts have no possibility of taking into account the factors which individualise a penalty. What depends on dispelling doubts as to the

constitutionality of the challenged provision, with regard to the two aforementioned groups of perpetrators, is the resolution of the case pending before the court which has referred the question (Article 193 of the Constitution), since in that case one of the co-accused persons committed the prohibited act before turning 18, whereas the other one did so – as an adult perpetrator.

Juxtaposing the above remarks with the realities of the case, in the light of which the court referring the question has raised doubts as to the constitutionality of Article 148(2) of the Penal Code, it should be stated that with regard to the perpetrators of aggravated homicides who were under 18 at the time of the commission of the offence, the court loses any possibility of taking into account the circumstances of the prohibited act as well as the personal circumstances of the perpetrator, when determining the penalty. As regards the perpetrators who belong to that group, it is only possible to impose the penalty of 25 years of deprivation of liberty.

It needs to be emphasised that such sanctions defined in absolute terms, which result from the amendment to Article 148(2) of the Penal Code, with the unchanged wording of Article 54(2) of the Penal Code, seem to be the unintended effect of the amending Act. There is no mention of that issue in the documents recording the course of the legislative process aimed at enacting the said Act. Nevertheless, Article 148(2) of the Penal Code, within the challenged scope, clearly remains contrary to the assumption adopted in Article 54(2) of the Penal Code. Excluding the possibility of imposing the penalty of deprivation of liberty for life, in the case of perpetrators who were under 18 at the time of the commission of the offence, indicates that the principle of adequate criminal law's response is of particular significance here. However, due to the absolute character of the wording of Article 148(2) of the Penal Code, with regard to that group of convicted persons, courts are obliged to impose a penalty determined in advance.

In the context of limiting the scope of courts' competence, done by means of the amending Act, what should be borne in mind is the broad and general rendering of aggravated homicide specified in Article 148(2) of the Penal Code.

In the case under examination, the allegations concerning the irregularities that occurred in the course of the legislative process regarded the exercise of the right to introduce amendments as a substitute for a legislative initiative.

The constitutional allegations concerning Article 148(2) of the Penal Code, concurrent with those indicated by the court referring the question, have also been put forward in the literature on the subject (cf. A. Zoll, "Znaczenie konstytucyjnej zasady podziału władzy dla prawa karnego materialnego", *Ruch Prawniczy, Ekonomiczny i Socjologiczny* Vol. 2/2006, p. 334 and subsequent pages; E. Łętowska, "Kara za zabójstwo kwalifikowane – problematyka konstytucyjna", *Państwo i Prawo* Vol. 10/2006, pp. 5-6; A. Sakowicz, "Sankcja bezwzględnie oznaczona (uwagi krytyczne na tle art. 148 § 2 k.k.)", *Państwo i Prawo* Vol. 5/2006, p. 18 and subsequent pages).

3. The bill intended to become the amending Act was the initiative of a group of Sejm Deputies, submitted on 5 March 2004 (the Sejm Paper No. 2693/4th term of the Sejm). The proposed amendments were justified by the need for protection against the repetitiveness of criminal activity in the case of the persons who committed serious offences for sexual reasons. The bill provided for the possibility of imposing an indefinite interdiction on holding a particular post, doing a particular job or conducting particular business activity, in the event an offence is committed for sexual reasons. Moreover, in a number of specific cases, it provided for an obligatory court order to provide compulsory treatment for the perpetrator, and – in some cases – an order to confine him/her to a maximum-security mental asylum after the end of the sentence. The bill also provided for changes in the execution of

rulings concerning such offences. However, it did not contain any proposals on amending Article 148(2) of the Penal Code.

The first reading of the bill in the form presented above took place at the 76th session of the Sejm on 25 May 2004. Then the bill was referred to the Special Sejm Committee on Codification Changes (hereinafter: the Special Committee). It follows from chapter 4, section 2, of the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – the Rules of Procedure of the Sejm of the Republic of Poland (Official Gazette – *Monitor Polski*, M. P. of 2002 No. 23, item 398, as amended; hereinafter: the Rules of Procedure of the Sejm) that such a procedure is applied for amending statutes which have the legal status of codes.

The above bill was considered at the sessions of the Special Committee on 1 July 2004 and 14 April 2005, as well as by the special subcommittee created to consider that bill (Bulletin of Sejm Committees No. 3359/4th term of the Sejm; the session of the Special Committee of 1 July 2004).

After the first reading of the bill, during the work of the Special Committee, no proposal for amending Article 148(2) of the Penal Code was put forward. An amendment regarding Article 148(2) of the Penal Code was proposed no earlier than during the second reading on 6 May 2005. Its content was not the object of a separate discussion at a session of the Sejm.

Due to the amendments put forward during the second reading, the bill was again referred to the Special Committee. The reservations that were raised at that time as to the constitutionality of the amendment to Article 148(2) of the Penal Code were related to the fact that the bill did not include that issue and that the amendment was introduced as late as during the second reading. Eventually, after considering the amendments at the sessions on 19 May 2005 and 1 June 2005, the Special Committee requested the Sejm to reject the said amendment (cf. the Sejm Paper No. 3912-A/4th term of the Sejm)

The third reading of the bill took place at the 104th session of the Sejm (4th term) on 3 June 2005. The amendment to Article 148(2) of the Penal Code was then adopted, despite the fact that, during the debate, reservations as to its constitutionality were again voiced by the Committee.

During the work in the Senate with regard to the bill passed by the Sejm, there was a proposal to delete the provision amending Article 148(2) of the Penal Code (cf. the Senate Paper No. 974Z, 974A, a verbatim record of the 84th session of the Senate on 29 June and 1 July 2005).

During the 108th session of the Sejm (4th term), on 27 July 2005, the Sejm rejected the Senate's amendment, despite the fact that, after examining the resolution of the Senate, the Special Committee requested that the amendment put forward by the Senate be adopted (the Sejm Paper No. 2454/4th term of the Sejm; for more information on the legislative process aimed at enacting the amending Act, see E. Łętowska, *op.cit*., pp. 7-9).

The problem of sanctions for aggravated homicide emerged in the course of work on other bills intended to amend the Penal Code, which were submitted earlier than the bill to become the amending Act. What is meant here, in particular, are the bills included in the Sejm Papers No. 387 and 702/4th term. The amendment to Article 148(2) of the Penal Code, by limiting the range of sanctions for the offence under that provision, solely to the penalty of 25 years of deprivation of liberty or the penalty of deprivation of liberty for life, was provided for, in particular, in the Deputies' bill amending the Penal Code and the Executive Penal Code, included in the Sejm Paper No. 702. The said bill proposed, *inter alia*, raising the minimum statutory sentence for the most serious offences against life, as well as a number of other comprehensive changes in the Penal Code and the Executive Penal Code. The fragment concerning Article 148(2) of the Penal Code was singled out

and moved to the bill intended to become the amending Act, pursuant to which Article 148(2) of the Penal Code was assigned the wording which has raised constitutional doubts in the court referring the question.

It should be emphasised that, although the bill intended to become the amending Act did not contain any proposals for provisions to be included in the part of the Penal Code which enumerated the types of offences, it did mention conviction for homicide, including aggravated homicide, as one which justified the application of special criminal and preventive measures (the Sejm Paper No. 2693/4th term). Hence, the said bill also referred, within its scope, to the crime of homicide, including aggravated homicide.

After the first reading, the Special Committee submitted a comprehensive bill intended to become the Act amending the Penal Code (the Sejm Paper No. 3912/4th term of the Sejm). It follows form the Sejm verbatim records that, in this case, exceeding the scope ratione materiae of the said bill by the very author thereof stemmed from the intention to implement, as much as possible, the assumptions of the amendment and to take into account the proposals from the government and experts (cf. the minutes from the 102th session of the Sejm (4th term) of 6 May 2005 – the speech by the reporter of the Special Committee – Cezary Grabarczyk).

4. In its jurisprudence, the Constitutional Tribunal has already drawn attention to the fact that the criteria determining the constitutionality of an amendment must be based on the premisses pertaining to the content of a regulation, and not merely to the genetic equivalence of a legal act (cf. the judgment of the Constitutional Tribunal of 24 March 2004, Ref. No. K 37/03, OTK ZU No. 3/A/2004, item 21).

As regards the legislative process, the provisions of the Constitution distinguish three legal institutions: a legislative initiative, amendments to a bill introduced during debates over the bill conducted in the Sejm and amendments introduced by the Senate to the bill passed by the Sejm. They all aim at introducing amendments to the binding legal order.

The institution which is of fundamental significance for the legislative process is undoubtedly a legislative initiative, which initiates legislative proceedings, the final stage of which should be the entrance into force of a new statute. Introducing amendments – both by the Sejm and the Senate – is possible only when the right to initiate legislation has been exercised by a competent authority or group of persons and, moreover, only at certain stages of the legislative process (in the Sejm and the Senate). Hence, not only are these institutions separate from the institution of legislative initiative, but they also play a secondary and subsidiary role in relation thereto. For the above reasons, the interpretation of the provisions regulating amendments of the Sejm and the Senate must be carried out in such a way that it would not lead to blurring the differences between a legislative initiative and amendments and, as a result, to evading requirements which the Constitution provides for in the case of legislative initiative (cf. the judgment of the Constitutional Tribunal of 23 November 1993, Ref. No. K. 5/93, OTK in 1993, Part II, item 39, as well as the judgments of: 22 September 1997, Ref. No. K. 25/97, OTK ZU No. 3-4/1997, item 35 and 24 March 2004, Ref. No. K 37/03).

In Article 118(1) and (2), the Constitution exhaustively sets out who is competent to exercise the right to initiate legislation, moreover requiring - in paragraph 3 - that each of those authorities or groups of persons, when introducing a bill to the Sejm, should indicate the financial consequences of the implementation of the future statute. The exercise of the right to initiate legislation consists in submitting the text of a bill in such a form that it can be enacted without any need for amendments thereto. Submitted to the Sejm by a competent authority or group of persons, a given bill should primarily meet the

requirements for drafting legislation which arise from the tradition adopted in Poland (cf. the judgment of the Constitutional Tribunal of 24 March 2004, Ref. No. K 37/03).

The above statement that the exercise of the right to initiate legislation consists in submitting a bill eligible for enacting to the Sejm should not be misunderstood. Particularly, it does not follow therefrom that its modification is ruled out at the stage of considering the bill by the two houses of the Polish Parliament. The Constitution does not prohibit introducing changes to the content of the submitted bill. On the contrary, the right to introduce amendments to the bill is enshrined in the Constitution.

What is of significance for the reconstruction of the constitutional concept of an amendment to a bill is Article 119(2) of the Constitution. According to that provision, the right to introduce amendments to a bill in the course of its consideration by the Sejm is granted to the author of the bill, Deputies and the Council of Ministers. The right to introduce amendments means *prima facie* the right to submit motions to delete, add or replace certain words or passages of a bill with others. Although the Constitution and binding normative acts do not contain a legal definition of an amendment to a bill, this does not entail that the concept of an amendment may not be reconstructed in the course of interpreting the provisions of the Constitution. The Constitutional Tribunal has already indicated in its jurisprudence that, in a technical sense, an amendment has a form of a proposal for deleting a certain excerpt of a bill, supplementing it by adding new elements or replacing some parts of the text of the bill, especially certain words with others (cf. the judgment of the Constitutional Tribunal, Ref. No. K 37/03).

This purely technical rendering does not indicate what may be the scope ratione materiae of an amendment proposed by a competent authority or person, and more precisely: are there any – and if so, what – limits of supplementing the content of a given bill by means of amendments which consist in supplementing it with new words, sentences or additional sections of a normative act. In the jurisprudence of the Constitutional Tribunal, there is an emphasis on the connection between an amendment and a certain "basic element" – the element the amendment refers to, i.e. a given bill, with the indication that Article 119(2) of the Constitution stresses this connection, when mentioning amendments to a bill, i.e. to a specific bill intended to become a particular statute, which is the object of consideration by the Sejm (cf. the judgment of the Constitutional Tribunal in the case K 37/03).

The amendments which inherently consist in supplementing the text of a bill with new elements should be connected with the bill, submitted in the Sejm by its author, and this connection should not only have a formal, but also a substantive character, which entails that certain amendments referring to the bill should be related to its content, leading to the modification of the original content of the bill, rather than to the creation of a new bill.

5. The fact that the Constitution distinguishes between the right to submit a bill in the Sejm (Article 118 of the Constitution) and the right to introduce amendments to the bill (Article 119(2) of the Constitution) must lead to the conclusion that these rights are distinct and differ in their scope ratione materiae.

Article 119(1) of the Constitution introduces the principle that the Sejm shall consider bills in the course of three readings. It follows from the jurisprudence of the Constitutional Tribunal that this principle should not be interpreted in a purely formal way, i.e. as a requirement that a bill marked in exactly the same way should be considered three times. The goal behind the principle of three readings is to examine a bill as diligently and thoroughly as possible and, consequently, to eliminate the risk of adopting faulty or arbitrary solutions in the course of legislative work (cf. the judgment of the Constitutional Tribunal in the case K 37/03).

The principle of three readings implies the necessity to consider the same bill three times by the Sejm, not only with regard to its technicalities, but also as regards its substance. Therefore, there must be "equivalence of scope" in the case of the considered bill. What is important for the interpretation of Article 119(2) is the conclusion arising from the interpretation of Article 119(1) of the Constitution, which states that the right to introduce amendments to a bill should be seen as a basis for modifying the bill in the course of legislative work in the Sejm.

The principle of three readings also implies the admissible scope (depth) of amendments. Amendments may even completely change the directions adopted by the authority or group of persons exercising the right to initiate legislation. However, in principle, they must fall within the scope of the bill, proposed by a competent authority or group of persons, and submitted to the first reading. Indeed, any normative content exceeding the scope of an amendment should undergo all the stages of legislative process, which is to eliminate the risk of faulty or arbitrary solutions. Going beyond the scope ratione materiae which has been specified by the very author of a given bill may occur only when the content of an amendment is closely related to the object of a given bill, and in particular when its introduction is necessary to fully achieve the goal set by the author of the bill. A different stance would mean bypassing constitutional requirements concerning a legislative initiative and the three readings of the bill (cf. the judgments of the Constitutional Tribunal of: 24 March 2004, Ref. No. K 37/03; 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129; 19 September 2008, Ref. No. K 5/07, OTK ZU No. 7/A/2008, item 124).

The Constitution does not require that bills be considered by Sejm committees; however, Article 119(3) of the Constitution explicitly suggests that an analysis of proposed amendments should primarily take place in the course of work carried out by a committee.

The Constitutional Tribunal states that the amendment changing Article 148(2) of the Penal Code, which refers not only to the cases of homicide committed for sexual motives, but to any types of aggravated homicide, exceeds the scope of the original content of the bill which solely refers to offences committed for sexual motives. Therefore, the introduced change may be regarded as substantively connected with the assumptions of the amendment, only to the extent it has led to harsher measures for offences committed for sexual motives which at the same time have the character of aggravated homicide (cf. E. Łętowska, *op. cit*., p. 11). As it has been indicated above, the consequences of the introduced change are much greater, as they refer to all types of aggravated homicide. In the view of the Constitutional Tribunal, although the introduction of the change in Article 148(2) of the Penal Code, which raises the doubts of the court referring the question, is to some extent substantively connected with the object of the original content of the bill, it still exceeds the scope of its assumptions. The consequences of the amendment in the enacted form go far beyond the object of the original content of the bill, at the same time the far-reaching amendment to Article 148(2) of the Penal Code was not necessary for achieving the goal which consisted in tightening the sanction for paedophilia and for other serious offences committed for sexual motives. For that reason, it was sufficient to change the penalties applicable for those very offences (E. Łętowska, *op.cit*., p. 12).

The Constitutional Tribunal states that the Act amending Article 148(2) of the Penal Code was enacted by infringing on the principle of proportionality, since the far-reaching interference by the legislator, which caused unintended results, was not necessary for achieving the set goal. The amended statute ensuing from the amendment under examination, due to the scope of its results and the fact that it is not necessary for the achievement of the set goal, exceeds the constitutional restrictions.

Constitutional reservations may also be raised by the moment of supplementing the bill intended to become the amending Act with the amendment.

As it has been indicated above, the analysed amendment was proposed during the second reading of the said bill. Its content was shifted from another bill aimed at amending the Penal Code and the Executive Penal Code.

Arising from Article 119 of the Constitution, the principle of three readings implies the necessity to consider the same bill three times by the Sejm, not only with regard to its technicalities, but also as regards its substance. It constitutes a guarantee of accuracy of legislative work so that the result of a regulation enacted will be accurate as well as internally and externally cohesive.

In the case of work on the bills which provide for amendments of codes, the principle of three readings is of special significance. As it has already been mentioned, what constitutes a crucial guarantee of preparing a cohesive bill is the stage where the work is conducted by committees.

With reference to codes, the Rules of Procedure of the Sejm provide for additional guarantees which are to result in achieving the goal. What should be regarded as such a guarantee is the work conducted by the Sejm Committee on Codification Changes, with the assistance of experts. What is also of significance here is a set of strict requirements for conducting the second reading of the bill intended to become the amending Act, which follow from Article 94 of the Rules of Procedure of the Sejm.

The Constitutional Tribunal states that, in the case under examination, there is no incorporation of a regulation which has not at all been subjected to the first reading. From the formal point of view, there is no irregularity here which consists in amending the code by bypassing the stage of consideration by the Special Committee. However, both the first reading as well as the deliberations by the Special Committee concerning that regulation were conducted in a different context. The constitutional reservations raised by the court referring the question do not pertain solely to the circumstance that the provision which has led to the challenged amendment to Article 148(2) of the Penal Code initially constituted a fragment of a different bill amending the Penal Code, with regard to which separate legislative proceedings were instigated.

Also, what is problematic is the context of the enacted amendment which has impact on the scope and consequences thereof. Taking a fragment of comprehensive regulation (included in the Sejm Paper No. 702/4th term of the Sejm), aimed at amending the Penal Code, out of context has changed the object of the amendment.

Such a legislative solution has led to the situation that the amendment to Article 148(2) of the Penal Code not only does not remain in appropriate proportion to the bill intended to become the amending Act, but also causes the above side effects by interfering with the subject matter which does not fall within the scope of the amending Act (cf. E. Łętowska, *op.cit*., p. 14).

Article 119(3) of the Constitution does not rule out the possibility of introducing amendments only during the second reading. However, the Constitutional Tribunal has already indicated in its jurisprudence that this does not mean that the possibility of introducing amendments in the course of legislative process is unrestricted constitutionally. The amendments concerning a bill must be formally and substantively connected therewith. Amendments may even completely change the direction of the solutions adopted by the authority or group of persons exercising the right to initiate legislation. However, in principle, the solutions must fall within the scope of the bill proposed by a competent authority or group of persons after its first reading (cf. the judgments of the Constitutional Tribunal of: 24 March 2004, Ref. No. K 37/03; 28 November 2007, Ref. No. K 39/07; 19 September 2008, Ref. No. K 5/07).

As it has been indicated above, in the case under examination, the solutions contained in the bill submitted in the Sejm, in the case of which the first reading has not taken place, has been shifted to the amending Act by means of the amendments introduced at the stage of the second reading.

The changes concerning legal codes are surrounded with procedural guarantees. They are manifested, *inter alia*, by the necessity to carry out an assessment of the proposed change by the Special Committee, appointed in particular to introduce changes in legal codes, and arising from the Rules of Procedure of the Sejm.

As it has been illustrated above, at further stages of legislative work, going beyond the scope ratione materiae set by the author of a bill is admissible where the content of the amendment is closely connected with the object of the bill. This is particularly so when the introduction of the amendment is indispensable for the full achievement of the legislator's objectives.

The amendment - assigning Article 148(2) of the Penal Code with the wording which the court referring the question has raised doubts about - was subject to the assessment of the Committee after the first reading, although not as part of the work on the amending Act where it has eventually been placed.

The Constitutional Tribunal does not question the admissibility of simply shifting an amendment included in one bill to a different bill which originally did not concern the subject matter regulated therein, as long as all formal requirements of legislative process are met. The amendment supplementing the original content of the bill must correspond to the original goal of the drafted regulation. Otherwise, the introduction of the amendment may result in a fragmentary change, which will bring about ill-considered and arbitrary results. By contrast, this clashes with the constitutional principles which set the right manner of proceeding with Sejm amendments.

The amendment previously included in the Act intended to amend the Penal Code, by making the sanction for paedophilia and other serious offences committed for sexual motives harsher, as well as by shifting it to the amending Act, has exceeded the scope of the goal of the original regulation applying the harsher sanction to any behaviour which exhausts the characteristics of aggravated homicide.

Bearing the above in mind, the Constitutional Tribunal states that in the situation under examination, the legislative process which aims at passing the provision assigning Article 148(2) of the Penal Code with its present meaning was affected by the irregularities clashing with the requirements arising from Article 118(1) and Article 119(1) and (2) of the Constitution, with regard to the requirements concerning admissible amendments which arise therefrom.

6. As it has been indicated above, the constitutional doubts raised by the court in the referred question of law concern not only formal issues, but also the substantive law conformity of the challenged provision to the indicated higher-level norms for review.

In accordance with Article 42 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), the Tribunal shall, while adjudicating on the conformity of a normative act or ratified international agreement to the Constitution, examine both the contents of the said act or agreement as well as the power and observance of the procedure required by provisions of the law to promulgate the act or to conclude and ratify the agreement. Substantive law allegations must always arise from the content of an application, whereas the Constitutional Tribunal examines *ex officio* allegations about unconstitutionality in respect of procedural and competence criteria, regardless of the content of a given application, question of law or complaint (cf. *inter alia* the judgments of: 24 June 1998,

Ref. No. K 3/98, OTK ZU No. 4/1998, item 52; 28 November 2007, Ref. No. K 39/07; 19 September 2008, Ref. No. K 5/07).

The allegations put forward in the present case concern the review carried out by means of substantive law criteria and the procedure for enacting the challenged provisions.

In the jurisprudence of the Constitutional Tribunal, there is no uniform line of jurisprudence which refers to the legitimacy of examining substantive allegations in the case of declaring the unconstitutionality of procedural provisions.

On the one hand, the Constitutional Tribunal has assumed that determining an infringement of a procedure is a sufficient premiss of unconstitutionality of a challenged provision, and that in such a situation there is no need to examine substantive allegations (cf. the judgment of: 23 February 1999, Ref No. K. 25/98, OTK ZU No. 2/1999, item 23 and 19 June 2002, Ref. No. K 11/02, OTK ZU No. 4/A/2002, item 43).

On the other hand, the Tribunal has also stated that declaring unconstitutionality for procedural reasons does not rule out the admissibility of examining substantive allegations (see the judgment of 22 September 1997, Ref. No. K. 25/97). The content of Article 42 of the Constitutional Tribunal Act confirms that the criteria of constitutionality indicated therein may be applied together. Therefore, the examination of a given legal act (provision) may consist in the simultaneous assessment of its substantive, competence and procedural accuracy.

In accordance with the jurisprudence of the Tribunal, the unconstitutionality of the manner of enactment of the challenged provisions always needs to be taken into consideration (even if this has not been indicated in an application). However, the declaration of unconstitutionality of enactment does not always lead to redundancy of the analysis of the challenged provision, from the point of view of the substantive law allegations. That issue should be determined by the Tribunal in the context of purposefulness, taking into account the circumstance that a given legal act (provision) is challenged in the course of *a priori* or *a posteriori* review (cf. the judgment of the Constitutional Tribunal of 28 November 2007, Ref. No. K 39/07). In this judgment, the Tribunal has deemed it justified to limit the examination to procedural issues, if they accompany substantive law issues and are sufficient for potential adjudication of unconstitutionality.

In the judgment of 19 September 2008 (Ref. No. K 5/07), examining - as part of *a posteriori* review – the criminal law provision which penalises slander of the Polish Nation, the Constitutional Tribunal states that possible declaration of unconstitutionality of the legislative procedure which has brought about the enactment of challenged provisions leads to eliminating them from legal transactions, makes a substative review of the legitimacy of the allegations formulated therein objectless, and thus deems further proceedings useless.

The Constitutional Tribunal, adjudicating in that bench, shares this stance with regard to the case under examination.

7. The unconstitutionality in the present case has been declared due to formal irregularities which occurred in the course of the legislative process aimed at enacting the amending Act, to the extent it assigned Article 148(2) of the Penal Code with the challenged wording.

Acting within the scope of its powers, the Constitutional Tribunal has declared the unconstitutionality of the provision affected by legislative irregularities which occurred during the process of enacting the provision.

The consequence of this judgment is that the scope of a judge’s discretion with regard to adjudicating sanctions for aggravated homicide has been extended, in comparison

to the previous legal order. As a result of this judgment by the Constitutional Tribunal, Article 148(1) of the Penal Code remains in force, which enables a judge to impose not only the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life, but also – where this is justified – the penalty of deprivation of liberty for a period ranging from 8 to 15 years. Also, it should be underlined that Article 148(1) of the Penal Code, as a more appropriate provision for the perpetrator (Article 4(1) of the Penal Code) shall be applicable for the prohibited acts which were committed at the time when Article 148(2) of the Penal Code could not be applied.

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