Judgment of 28th May 2003, K 44/02

AMENDMENT TO THE DEFINITION OF "CO-OPERATION" WITHIN THE LUSTRATION ACT

Type of proceedings:	Composition of Tribunal:	Dissenting opinions:
Abstract review; Question of law referred by a court **Initiators:** Group of Deputies; Warsaw Court of Appeal	Plenary session	4

Legal provisions under review	Basis of review
Exclusion from the definition of "co-operation" with Communist security agencies (subject to lustration) the co-operation relating to matters of intelligence, counter-intelligence or border protection [Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Amendment Act 2002: Article 1 in the part concerning Article 4(3) of the amended Act]	Rule of law Principle of equality Right to public information [Constitution: Articles 2, 32(1), 61(1)]

The Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Act of 11th April 1997 (commonly known as the Lustration Act 1997) creates an obligation to undergo "lustration" by persons who, in the democratic Polish Republic hold, or aspire to hold, certain important public offices (e.g. the President of the Republic of Poland, Members of Parliament and government, judges, prosecutors and advocates). Such persons, if born before 11th May 1972, are obliged to declare, in a formal "lustration declaration", whether they were formerly an officer, employee or cooperative of the security agencies of the Communist State. Admission of any such association with the Communist security agencies is publicly announced but does not automatically preclude such a person from holding the aforementioned public offices. Where, however, a person having been involved in co-operation with the Communist security agencies has concealed this fact in his/her "lustration declaration", this amounts to a "lustration lie" which results in the automatic loss of any public office currently held by that person and a prohibition against holding such office for a subsequent period of 10 years. All "lustration declarations" are verified by the Public Interest Commissioner, who is nominated by the First President of the Supreme Court. If the Commissioner, in the course of verifying a "lustration declaration" forms a reasonably held suspicion as to the veracity of such declaration, he may initiate "lustration proceedings", acting as the public prosecutor. The judicial pronouncement of a "lustration lie" is the responsibility of the "lustration court" – a special court division within the Warsaw Court of Appeal.

The subject of "lustration" has been the subject of litigation, in addition to legal and political discourse, for many years and numerous provisions of the Lustration Act 1997, as amended, have been the subject of various Constitutional Tribunal judgments (cf. W 5/93, K 24/98, K 39/97, P 3/00, SK 10/99, SK 28/01, K 7/01 and K 11/02).

In the present case the Tribunal ruled on a question of law referred by the lustration court and an application of the group of Deputies. These applicants questioned the constitutionality of an Act of 13th

September 2002 which amended the Lustration Act 1997 so as to exclude from the definition of "co-operation" with Communist security agencies any co-operation relating to matters of intelligence, counter-intelligence or border protection. It should be noted that the amending Act excluded such matters only in relation to informal "co-operation" and did not preclude the lustration process from continuing to apply to those who performed such tasks in the course of employment or service.

The Tribunal's finding that the amending Act was incompatible with the Constitution resulted in a reversion to the law prior to the amending Act.

The judgment was delivered by the majority of votes. Four judges presented dissenting opinions concerning both the ruling and the principal reasons for the ruling.

RULING

The challenged amendment does not conform to Article 2, Article 32(1) and Article 61(1) of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The principle of continuity of the Polish State does not mean the continuity of the axiological foundations of statehood and the legal system in force before and after the political breakthrough of 1989. The constitutional expression of the lack of such continuity results from the Act of 29th December 1989, which amended the 1952 Constitution of the Polish People's Republic (*Polska Rzeczpospolita Ludowa*, i.e. the official name of Poland under the Communist regime), removing all references of the law in force to values on which the Polish constitutional system during the Communist regime of 1944-1989 was based.

2. The lustration procedure, provided for in the Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Act of 11th April 1997 (the Lustration Act 1997) is a mechanism for testing the veracity of "lustration declarations" about any co-operation between the security agencies of the Communist State and persons currently holding or seeking certain public offices involving special responsibilities. The 1997 Act does not deem reprehensible, nor impose sanctions for, the mere fact of such co-operation with State security agents during the years 1944-1990, but rather the concealment of any such co-operations or relationships in the lustration declaration. The Act aims to ensure that the most important public offices are held by persons who are truthful and therefore trustworthy.

3. From the rule of law principle (Article 2 of the Constitution) stems the requirement for legal provisions to be clear and precise so that the addressee of the legal norm knows which actions are of the legal significance and the reasons for such significance. This requirement is of particular importance in the context of the lustration process, since an erroneous understanding of the statutory meaning of the term "co-operation" may lead persons required by law to declare any involvement in Communist security agen-

cies to make inaccurate declarations. This could result in legal sanctions being imposed on the basis that a "lustration lie" has been committed.

4. The legal provision under consideration in the present case, having introduced an excusable type of "co-operation" within the meaning of the Lustration Act 1997, excluding from its scope any co-operation relating to matters of "intelligence, counter-intelligence or border protection", fails to meet the aforementioned criteria. This conclusion results from consideration of the *travaux preparatoires* which indicate that the aim of that legislation was, on the one hand, to ensure that those engaged in formal co-operation with the security agencies were required to undergo the lustration procedure whilst, on the other hand, allowing those who consider that they were involved in informal co-operation related to matters of intelligence, counter-intelligence or border protection to be exempted from this procedure. Such a construction creates a fundamental uncertainty as to the manner in which a person will assess their own actions when making a "lustration declaration" and, in consequence, creates the risk that their assessment will be challenged by the Public Interest Commissioner and the lustration court.

5. The essence of the principle of equality, enshrined in Article 32 of the Constitution, is that all those to whom legal provisions are addressed should be subject to those provisions without favouritism or discrimination. Although the principle of equality does not preclude the different treatment of legal subjects which may be objectively distinguished, such differential treatment must always be justified on the basis of established criteria. The rationale for having chosen a particular criterion for differentiating between legal subjects must be subject to scrutiny to assess, inter alia, conformity with the constitutional principle of social justice.

6. The principle of equality encompasses not only the equality of the addressees of a legal norm in relation to their rights and privileges, but also in relation to their obligations. Therefore it is not possible to conclude that the legislator has unlimited discretion in delimiting the categorisation of legal subjects required to undergo the lustration procedure.

7. The relevant characteristic to be taken into account when deciding on the applicability of the lustration procedure adopted by the 1997 Act is the fact of relations, of a person currently holding or seeking public office, with the widely construed definition of State security agencies. Article 2 of the Lustration Act 1997 contains a detailed and exhaustive list defining the institutions and agencies which are deemed to fall within the concept of "State security agencies". It may be assumed that the legislator, in creating this catalogue, was guided by detailed knowledge of the organisation, functioning and tasks of the security services. Included in this list were, inter alia, intelligence and counter-intelligence agencies and some agencies sharing responsibility for border defence. Of crucial relevance is the fact that a considerable number of activities described as relating to intelligence, counter-intelligence or border protection were subject to the political commands of Communist governors and so aimed at fulfilling the same tasks as those belonging to other structures of the security agencies, which are not excluded by the amendment in question. It would prove extremely difficult to draw the line between "intelligence" or "counter-intelligence" activities and suppression of opponents to the "people's government" (as the Communist regime called itself).

8. In addition to the imprecise nature of the aforementioned excusable kind of "co-operation" with Communist security agencies, the amending provision furthermore breaches the constitutional principle of equality. Firstly it creates an unjustifiable distinction between secret co-operatives according to the nature of the tasks carried out by such persons. Secondly, it also creates an unjustifiable distinction between, on the one hand, persons officially engaged in, or employed by, Communist security services (who remain subject to the lustration procedure) and, on the other hand, persons who undertook unofficial co-operation of the same kind (who are excluded from the lustration procedure by virtue of the amending excusable kind of co-operation).

9. The Lustration Act 1997 effectively aims to secure access to information, regarding the past activities of persons holding or seeking public office, to a certain degree necessary for realisation of the citizens' right enshrined in Article 61(1) of the Constitution. The limitations on this right created by the aforementioned excusable kind of co-operation are not justifiable in accordance with the grounds set out in Article 61(3).

MAIN ARGUMENTS OF THE DISSENTING OPINIONS

- judges Ewa Łętowska, Marian Grzybowski and Marek Mazurkiewicz

- A presumption of constitutionality stands behind every Act (including amending Acts) and any rebuttal of this presumption requires convincing justification. Such justification must be particularly convincing in relation to an amending Act which aims to provide more liberal regulations than the Act being amended, in accordance with the principle of *in dubio pro libertate* [i.e. if in doubt, rule in favour of liberty] which is inherent in a democratic State.

- The Lustration Act 1997 has a repressive nature, even though such repression is not of such a kind as to impose criminal responsibility. Regardless of whether the provision in question is to be regarded as *lex specialis* or, alternatively, as introducing a particular excusable kind of co-operation with Communist security agencies to the lustration procedure, the Act in question introduces a limitation or curtailment of prior legislation having a repressive character and, therefore, must be characterised as a liberalising Act.

- The argument relating to the imprecise nature of the definition of those persons excluded, by the amending Act, from the obligation to disclose their co-operation with State security agencies is unconvincing. The Lustration Act 1997 is itself imprecise in the scope of its definitions to at least an equal degree, which is evidenced by the history of the Act, the disputes in relation to it and the several Constitutional Tribunal's rulings which have ruled on its provisions. If the ambiguity and absence of clarity of this Act has not led the Constitutional Tribunal to declare the 1997 Act unconstitutional, similar ambiguity in a liberalising Act which amends the 1997 Act should not lead to the conclusion that the amending Act is unconstitutional.

- The argument relating to inequality, arising from challenged provisions, between those persons excluded from the lustration procedure and those to whom the procedure continues to apply, would result in the unconstitutionality of any exclusions which exempted any particular category of persons from the lustration procedure within the ambit of the Lustration Act 1997. This conclusion finds no support in the wording of Article 2 and Article 32 and, more importantly, the spirit of the Constitution.

- The argument relating to the infringement, by the challenged provisions, of Article 61(1) of the Constitution is based on an expansive interpretation of this constitutional provision. This is an interpretation of a constitutional provision in the light of the provisions of the Lustration Act 1997 prior to the challenged amendment.

- judge Bohdan Zdziennicki

- In assessing the period of the Polish People's Republic, the law and the administration of justice within the current democratic Polish State should remain impartial and neutral.

- Activities which were lawful within the Polish People's Republic at the time they were committed, and do not amount to war crimes or crimes against humanity under international law (cf. Article 43 of the Constitution) may not constitute grounds for justifying current discrimination.
- The principal controversies in this case are related to the assessment of the constitutionality of the Lustration Act 1997 itself. This is evidenced by the fact that this Act and its amendments – which have developed the law in different directions – have been scrutinised many times by the Constitutional Tribunal. On each occasion that the Tribunal ruled on the merits of such a case, it has been unable to deliver a unanimous decision and each of these cases has resulted in the delivery of dissenting opinions.
- Public disclosure of information regarding the relations of certain persons with the Communist State security services during 1944-1990 represents a kind of punishment by virtue of the fact that such relations are generally viewed in a negative way. To properly ascertain whether this may be treated as a punishment, the concurrent existence of two elements is of crucial importance: a certain detriment and public condemnation (i.e. negative opinions, consideration that such associations were wrong) of the activities, with which the detriment is associated. The public disclosure, published in an official journal, is without doubt a punishment resulting in lasting infamy.
- The Lustration Act 1997, as a repressive Act, contradicts the constitutional principles relating to criminal responsibility, the right to a fair and public hearing, the right to protection of private life, honour and good reputation and the right of protection of personal data. It would conform with the Constitution to repeal this Act altogether. The exclusion of certain activities from the scope of the 1997 Act, therefore, limits its unconstitutionality and means that the amending Act may not itself be regarded as unconstitutional.
- The challenged exclusion from the definition of "co-operation" in relation to intelligence, counter-intelligence or border protection builds on other exemptions which already exist within the Lustration Act 1997. This allows a degree of individual, and not merely collective, assessment of the activities of persons required to submit lustration declarations, which lessens the degree of unconstitutionality of the 1997 Act.
- The argument relating to the absence of precision within the definitions used by the legislator in relation to the challenged amending Act is incomprehensible. "Intelligence", "counter-intelligence" and "border protection" activities have a clear and defined meaning, both in everyday language and in specialist terminology related to the functioning of various State services.
- Intelligence, counter-intelligence and border protection activities such as those dealt with by the challenged amendment are conducted by all States. Their exclusion from the scope of lustration does not therefore constitute an infringement of the constitutional principle of equality. The argument related to the unjustified differentiation of co-operatives, employees and functionaries of the security services is also erroneous, since the Act clearly distinguishes between employment, service and co-operation.
- The allegation that the challenged amendment limits the right of citizens to information on persons holding public office, or eligible for such office (pursuant to Article 61(1) of the Constitution) is incomprehensible. The aforementioned constitutional right cannot deprive persons holding, or seeking, public office from the legal protection of their private life, honour and good reputation.

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 32. 1. Everyone shall have the right to equality before the law. Everyone shall have the right to be treated equally by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 43. There shall be no statute of limitation regarding war crimes and crimes against humanity.

Art. 61. 1. A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons holding public office. This right shall also include the right to receive information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.
[…]
3. Limitations upon the rights referred to in Paragraphs (1) and (2), may be imposed by statute solely in order to protect the freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.