Judgement of 11th May 2007, file Ref. No. K 2/07

LUSTRATION

(Fundamental arguments)

Type of proceedings: Abstract review Initiator: Group of Deputies	Composition of Tribunal: Plenary session	Dissenting opinions: 9

Legal Provisions under review	Basis of review
Provisions of the Act of 18th October 2006 on the disclosure of information concerning documents of State security agencies between the years 1944-1990, and the content of such documents (in the wording introduced by the Amending Act of 14th February 2007), as well as provisions of some acts amended by way of the above Act.	Provisions of the Constitution and the (European) Convention for the Protection of Human Rights and Fundamental Freedoms

I. General characteristics of the Judgement

A. Subject of the challenge

It is the Amended Act that has been challenged in the present case (the Act of 18th October 2006 on the disclosure of information concerning documents of State security agencies between the years 1944-1990, and the content of such documents; Journal of Laws – Dz. U. No. 218, item 1592, with amendments) [hereinafter referred to as: the Act of 18th October 2006, or the Lustration Act] in the wording introduced by the Amending Act (the Act of 14th February 2007 amending the Act on the disclosure of information concerning documents of State security agencies between the years 1944-1990, and the content of such documents, and the Act on the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation; Journal of Laws – Dz. U. No. 25, item 162) [hereinafter referred to as: the Amending Act, or the Amending Act of 14th February 2007].

Both the Amended Act and the Amending Act introduced (...) amendments to a dozen or so other acts (including, in particular, the Act of 18th December 1998 on the Institute of National Remembrance – the Commission for Prosecution of Crimes against the Polish Nation; Journal of Laws – Dz. U. No. 155, item 1016, with amendments) [hereinafter referred to as: the Act on the INR], in matters concerning the submission of lustration declarations and conducting lustration.

The subject of review of constitutionality (…) comprises both the Amended Act and the Amending Act, as well as (within the scope of the introduced amendments) other acts amended by way of the Act of 18th October 2006 and by way of the Amending Act of 14th February 2007.

B. Model of lustration in the Act of 1997, and in the Act of 2006

The lustration procedure, introduced by way of the Act of 11th April 1997 on the disclosure of work, service or collaboration with State security agencies between the years 1944-

1990 by persons discharging public functions (Journal of Laws of 1999 – Dz. U. No. 42, item 428, with amendments) [hereinafter referred to as: the Lustration Act 1997] prescribed unfavourable legal consequences for the lustrated persons who had submitted untrue lustration declarations.

[The Lustration Act of 18th October 2006] (...) in its original wording, departed from this procedure; the legislator abandoned the obligation to submit lustration declarations and introduced a specific obligation on persons aspiring to hold public offices to "produce a valid official confirmation of the existence of any State security agencies' documentation concerning the person in the archives of the Institute of National Remembrance". The second model of the lustration procedure (put forward in the Act on the INR, amended by way of the Act of 18th October 2006) envisaged the publication of the so-called "catalogues". The catalogues were supposed to separately include information identifying various categories of persons undertaking various forms of work, service or collaboration with State security agencies, according to categories based on various forms of such work, service or collaboration, as differentiated by and defined in the practice of State security agencies for their own use throughout the entire period of the Polish People's Republic (Polska Rzeczpospolita Ludowa, [i.e. the official name of the State during the communist era]). The obligation to prepare and publish the catalogues was imposed in the Institute of National Remembrance (…). A complete normative novelty, laid down in the Act of 2006 on the disclosure of information, consisted in the inclusion – in separate catalogues – of various types of data concerning persons that had worked for or served in State security agencies, persons collaborating therewith or even persons whose only registration data had been preserved, constituting a clue that a given person might have been considered by State security agencies as a secret collaborator, or an assistant in the process of gathering information. Still another, separate catalogue encompassed persons whose documentation confirmed that security organs purposefully gathered information against them – also in a secret manner. (…)

Another catalogue was to include persons holding managerial positions in the Polish Workers' Party (PPR), the Polish United Workers' Party (PZPR), the United People's Party (ZLS) and the Democratic Party (SD), as well as members of the Council of Ministers of the communist State and heads of central organs of government administration.

The intention of legislator in 2007 (the Amending Act of 14th February 2007) was to shift the focus in defining the notion of collaboration from formulas which were interpreted by the Constitutional Tribunal, and which had been developed against the background of Article 4 of the Lustration Act 1997 and encompassed not only objective, but also subjective elements of collaboration – to categories which were, in principle, solely objective in nature. This, in particular, refers to these categories of persons who "were considered" by security agencies as secret informers or assistants in operational gathering of information (...) as well as to persons whose only registration data have been preserved (...), since also these persons are subject to being disclosed by way of publication of their data in appropriate catalogues.

C. Amendments to the Act of 2006 introduced by way of the Amending Act of 2007

The amendment, introduced by way of the Amending Act of 14th February 2007, reinstated – as a matter of principle – the lustration procedure which had been in force for the previous ten years. This concerns the obligation, as envisaged in the Lustration Act 1997, to submit lustration declarations. Concomitantly, the legislator did not withdrew from publishing catalogues, and considerably extended the objective (the list of institutions recognised as security agencies) and – particularly – the subjective scope of lustration (new groups of persons subject to lustration). The Amending Act of 14th February 2007 did not, in fact, alter the principles, as envisaged in the Act on the disclosure of information, concerning the making of the archives of the Institute of National Remembrance public, yet considerably extended the cir-

cle of persons having access to the archives and introduced far-reaching diversification as regards the access, both in terms of the objective and the subjective scope.

The Amending Act of 14th February 2007 consisted in, *inter alia*, the reintroduction of the definition of collaboration that had previously been specified ten years earlier in the Act on the disclosure of work, service or collaboration (...) and the institution of the lustration declaration. It also introduced new principles of lustration procedure. In particular, instead of a certificate in the form of an official confirmation of the existence of documentation concerning a given person in the archives of the INR (...), a dual nature of lustration procedure was introduced. The duality is expressed in the content of Article 1 of the Act on the disclosure of information, in the wording introduced by way of the Amending Act of 14th February 2007. In consequence, the substance of the Act on the disclosure of information, in the wording introduced by way of the Amending Act of 14th February 2007 encompasses both the principles of lustration and the principles governing the disclosure of the INR archives, with effects for lustration proceedings *stricto sensu* (...).

D. Scope of competence of the Constitutional Tribunal

The Tribunal addressed all the well-founded (...) allegations, arranging them according to the systematics of the Act of 18th October 2006, subsequently amended by way of the Amending Act of 14th February 2007. The review encompassed the preamble to the Act, as well as several dozen particular provisions enumerated in the application and the supplement thereto, yet, not all of the challenged provisions have been found unconstitutional, either in whole or in part.

The Tribunal undertook the review of constitutionality only in respect of provisions (editorial units of the indicated normative acts) that had been expressly identified by the applicants for review, and only where the request to determine the unconstitutionality thereof had been well-founded by them. Adjudicating upon the remaining provisions of the Act on the disclosure of information in the form adopted in the Amending Act, and in particular, upon the provisions that had not been substantiated, would go beyond the scope of the application, and hence would be inadmissible. For this reason, proceedings within the scope not provided for in the challenge were discontinued by virtue of Article 39 paragraph 1 point 1 of the Constitutional Tribunal Act.

In some instances, certain norms (...) proved superfluous (...) in light of the Tribunal's decision. This resulted from the fact that the norms had been used for the operationalisation of other norms that were found unconstitutional (...). In such a case, the challenge alleging the infringement of some constitutional bases of review that had accurately been raised in the application did not require detailed justification in the reasoning part of the Judgement, as a result of the subsequent intensification of infringement of Article 2 of the Constitution.

The judgement declaring the unconstitutionality encompassed a considerable number of provisions referred for review, yet not to such an extent that one could allege the unconstitutionality of the entire Act.

Following the Judgement of the Constitutional Tribunal, the Act may still be applied. Concomitantly, it needs to be clearly pointed out that the model of lustration put forward therein, even when taking into account the effects of the present Judgement, is considerably wider than the one based on the former Lustration Act 1997. This concerns, in particular, the circle of persons subject to lustration, which has considerably been widened, while public access to documentation concerning persons holding particularly important offices has been confirmed, the latter being a normative novelty in the Polish model of lustration.

E. Summary of the sentencing part of the Judgement

Given the extensive nature of the sentencing part of the Judgement numbered K 2/07 as well as size limitations of this summary, only the most essential issues have been presented below:

1. *The definition of collaboration (Article 3a paragraph 1 of the Lustration Act) has been judged by the Tribunal as conforming to the indicated bases of review, provided that it is understood as the collaboration, for the confirmation of which the mere expression of a person's will to undertake one with security organs shall not suffice, and these shall be actual activities undertaken that materialise the collaboration (point 7 of the sentencing part). The transfer of the literal content of Article 4 paragraph 1 of the Lustration Act 1997 to Article 3a paragraph 1 of the Act on the disclosure of information of 18th October 2006 confirms the acknowledgement of the definition adopted in the jurisprudence of the Constitutional Tribunal.*
2. *The extension of the scope of collaboration by including one of the specific forms thereof (Article 3a paragraph 2), namely "intentional activities stemming from an obligation imposed by way of a statute operative at the time of undertaking such activities, and related to a function, office or work carried out, or fulfilled by the person if the information gathered by them had been provided to State security agencies with the intention to violate freedoms and rights of the person and the citizen", has been judged by the Constitutional Tribunal as conforming to the indicated bases of review, provided that the provision regulating this specific form of collaboration is interpreted in the manner laid down in the reasoning of this Judgement (point 8).*
3. *The supplementation of the catalogue of security agencies by including the Academy of Internal Affairs (point 3) has been judged by the Tribunal as conforming to the Constitution. On the other hand, the inclusion of the Office for Religious Affairs as well as the Main Office for the Control of the Press, Publications and Public Performances (point 4) has been found as non-conforming to the indicated bases of review on the grounds that the institutions did not possess either operations or investigative units and did not influence collaborators by means of methods characteristic of operative or investigative work.*
4. *The inclusion within the category of security agencies of both civil and military organs and institutions of foreign states performing "similar" tasks to those of the Polish security agencies, within the meaning of the Lustration Act (point 5), has been found to be unconstitutional. "Similarity" shall not constitute a notion that is precise enough and raises doubts as regards the specificity of provisions of penal law, as stemming from the principle of a democratic state ruled by law.*
5. *The inclusion within the catalogue of security agencies of the Office for the Control of the Publications and Public Performances, as well as the Office for Religious Affairs (point 4) has been judged as non-conforming to the indicated bases of review.*
6. *The part of the preamble to the Act referring to the "personal source of information" (point 1) has been judged as non-conforming to the Constitution.*
7. *The provisions envisaging the obligation to submit lustration declarations by advocates (point 59), legal counsellors (point 61), public prosecutors (point 64), notaries public (point 68), court enforcement officers (point 76) as well as persons standing for elections to commune councils, district councils or regional assemblies (point 77) have been judged by the Tribunal as conforming to the Constitution.*

8. *The provisions envisaging the obligation to submit lustration declarations by, inter alia, academics employed at institutions of higher education (point 13), persons discharging managerial functions at non-public schools (point 9, 14, 15), journalists (point 18) as well as expert auditors and tax advisors (point 17) have been judged by the Tribunal as non-conforming to the Constitution.*

9. *The provision providing for the deprivation of the lustrated person of the right to lodge a cassation, and vesting such right in the Commissioner for Citizen's Right as well as in the Public Prosecutor General, have been judged as non-conforming to the indicated bases of review (point 30).*

10. *The provision envisaging, in certain instances, the extension of the scope of the right to access to information contained in the documentation of State security agencies to include the so-called sensitive information has been found by the Tribunal to be unconstitutional (points 34 and 35).*

11. *The Constitutional Tribunal has not found the provisions establishing the structure of the lustration prosecutor's office unconstitutional (point 63).*

12. *Article 21a paragraph 2 sentence 2, insofar as it deprives a court of the right to specify the lower limit on the period of the loss of the right to stand as a candidate in elections, has been found unconstitutional, on the grounds that the provision envisages only one sanction for submitting an untrue lustration declaration (loss of the right to stand as a candidate in elections for 10 years) (point 28).*

13. *The sanction specifying a fixed period of the loss of the right to discharge public functions, i.e. for 10 years, which would take effect automatically, by virtue of the statute, in the event where lack of veracity of a lustration declaration was found, has been judged by the Tribunal as unconstitutional (point 32).*

14. *The obligation to submit lustration declarations be persons elected in universal elections which had taken place prior to the entry into force of the Act, has been found by the Tribunal as unconstitutional (point 38).*

15. *Article 36 paragraph 1 points 2 and 3 (concerning the permission of the President of the INR to access the archives) has been judged as non-conforming to the indicated bases of review, on the ground that the provisions do not specify the criteria underlying decisions of the President of the INR as to whether or not grant permission to access documentation for research or journalistic purposes, hence allowing for a possible allegation of "uncontrolled" discretion.*

II. Standards of lustration

The hitherto jurisprudence of the Constitutional Tribunal, also taking into consideration findings of other public institutions, national and international courts as well as provisions of international law binding upon the Republic of Poland, makes it possible to reconstruct rules and principles which the legislator shall take into account while regulating both the material-legal and procedural issues of lustration. These standards shall also be binding upon the Constitutional Tribunal.

1. **Conformity of lustration to constitutional and international standards**. The lustration procedure, understood as a legal mechanism to investigate connections and relations of persons holding or aspiring to hold important State offices, or already holding other pubic offices that entail a particularly high degree of responsibility, and in whom the public re-

pose confidence, must not, as a matter of principle, give rise to doubts both from the perspective of the conformity thereof to the Constitution, particularly to the principle of a democratic state ruled by law, as laid down in Article 2 thereof, and also in light of international standards (...).

2. **Counteracting the violation of human rights and the erosion of the democratisation process**. Measures to dismantle the heritage of the former communist totalitarian systems may remain in agreement with the ideas of a democratic state ruled by law, provided that the measures, while conforming to the principles of a democratic state ruled by law, will be directed against situations threatening the fundamental human rights or the process of democratisation.

3. **Lustration in the service of justice.** In eliminating the legacy of former communist totalitarian systems, a democratic state ruled by law must implement formal-legal measures that have been adopted by such a state. It must not apply any other measures, since this would resemble activities undertaken by the totalitarian regime, which is to be completely dismantled. A democratic state ruled by law possesses all necessary means to guarantee that the justice will be done and the guilty will be punished. It must not, and should not, satisfy the thirst for revenge, rather than serve the justice. It must respect such fundamental human rights and freedoms as the right to a fair trial, the right to be heard or the right to defence, and apply such rights also to persons who failed to apply them once they had been in power.

4. **Punishing perpetrators of offences in accordance with legal principles adopted by civilised nations.** A state ruled by law may (...) protect itself against the resurgence of communist totalitarian threats since it is in possession of appropriate means that do not infringe human rights nor the rule of law and that are based on the employment of both the administration of justice in penal cases and administrative measures. This signifies, *inter alia*, that it shall be inadmissible to adopt and apply provisions of penal law that would be given retroactive force. On the other hand, it shall be permissible to bring to court all persons responsible for any acts or negligence which at the time of the commitment thereof were not recognised as offences according to national law in force, but which were deemed such in light of general legal principles adopted by civilised nations. Furthermore, where actions of an individual clearly violated human rights, the contention that the person only carried out orders shall not preclude either the unlawful character of such acts, or the guilt of the individual. In consequence, the Lustration Act may only be applied towards the individual, rather than collectively.

5. **Removal of communist regime functionaries from power.** The goal of the legal regulation, in case of persons who did not perpetrate any offences subject to prosecution, but who held important offices in communist totalitarian regimes and supported the system, shall be to remove from power those persons who are not certain to exercise their office in accordance with the democratic principles, since they had shown no commitment thereto in the past nor are at present interested or motivated to adopt them. Such measures may remain in accordance with the principle of a democratic state ruled by law, provided that a certain number of criteria have been met. This signifies that the guilt, being individual, as opposed to collective, needs to be determined in each case separately, which clearly indicates that lustration acts must be applied to the individual, and not collectively. This also means that it shall be necessary to guarantee the right to defence, the right to the presumption of innocence until the guilt has been confirmed, as well as the right to appeal to a court.

6. **The goal of lustration shall be the protection of the newly-emerged democracy.** Lustration should focus on threats to the fundamental rights of the individual and to the proc-

ess of democratisation. It shall not be the goal of lustration to punish persons presumed guilty, as this task has been vested in public prosecutors applying penal law. The aim of applying lustration procedure shall not be revenge and one shall not allow for the abuse of the procedure for any political or social goals.

7. **Lustration Act, based on the principles of a state ruled by law, shall meet at least the following criteria:**

   a) Lustration shall only serve to eliminate or significantly diminish the threats to the establishment of lasting and free democracy, which the lustrated person poses by means of using the post they hold to engage in acts that could violate human rights or hinder the process of democratisation.

   b) Lustration shall not be used for the imposition of penalty and shall not be regarded as a form of revenge or expiation for guilt; a penalty may only be imposed for past criminal acts on the basis of the universally binding Penal Code, and in accordance with all procedures and guarantees specific to the prosecution.

   c) Lustration shall not apply to persons holding positions in private or semi-private organisations, since such organisations are characterised by too limited a structure of positions to enable the violation of fundamental human rights and the process of democratisation or pose a threat thereto.

   d) Time period of the prohibition on discharging functions shall be specified on rational basis, since one should not underestimate the possibility of positive changes in the attitude and conduct of a person. Lustration measures should cease to take effect as soon as the system of a democratic state has been consolidated. In this way the time scope of the Lustration Act's binding force and application shall be specified by a criterion that determines the attainment of minimum democratic standards by the State. This is significant both from the perspective of internal relations within the State and in light of the recognition of the State as a democratic one by the international community.

   e) Prohibition on discharging a function may be imposed against persons who gave commands to perform acts that constituted a grave violation of human rights, performed such acts themselves or overwhelmingly supported them; where a given organisation flagrantly violated human rights, it needs to be acknowledged that a member, employee or collaborator thereof took part in such acts if he/she was an important functionary therein, unless the persons can prove that they had not taken part in the planning of such policy, practice or acts, nor directed or implemented them.

   f) Precise definition of the collaborator. The lustration of "conscious collaborators" shall be admissible in respect of persons who "fulfil" the precise criteria of collaboration, as provided for in the statute and reviewed in the course of an appropriate procedure (...).

   g) Procedural guarantees. Subjecting a person to lustration procedure must be paralleled with ensuring the person full legal protection in accordance with the fair trial standards.

8. **Documents drawn by organs of the totalitarian system in a democratic state.** While seeking appropriate interpretation (including constitutional one) of provisions of lustration acts and regulations associated therewith, one has to keep in mind that all activities, without exception, performed by security agencies of the communist State between the years 1944 and 1989 aimed, above all, at ensuring that the power be exercised by the communist party apparatus in a monopolistic manner and that the methods of attaining this goal were characterised by a totalitarian, and subsequently at least an authoritarian manner of exer-

cising the power. The society was treated as an object, and political opposition was, at most, tolerated, yet only within the limits prescribed by authorities. Additionally, both the activities of operations and investigative units of the security apparatus, and the documentation drawn by the organs served to attain that goal. This fact should be taken into consideration by all organs applying the law that take into account the contents of resources archived in the INR, since the legislator has envisaged a different, new function, and hence different goals for such documentation within the constitutional order of a democratic state.

Based on the above principles and rules the Constitutional Tribunal has defined a detailed framework and limits relating to the regulation of lustration:

1. **Limitation upon the legislator's regulatory freedom.** (...) there are matters in which the Constitution prescribes for the legislator a much narrower scope of its political right to put forward a statutory regulation, and almost all statutory regulations require diligent assessment from the perspective of the admissibility of the contents and the adoption thereof. This shall primarily refer to regulating "classical" (personal and political) rights of the person and the citizen, since the Constitution envisages the broadest possible scope of freedom for the individual, and all regulations limiting such rights and freedoms must observe specific requirements, laid down particularly in Article 31 of the Constitution. Where the content of a statute were to introduce regulations that would encroach on matters specified in the Constitution as barely accessible to the legislator, then, such an infringement of procedure may and should be considered as one that brings about much more serious implications than any other infringement.
2. **Penal nature of lustration acts.** The above requirements are all the more important where a statutory regulation is penal in its nature (...). This stems from (...) the preamble to the Act (...), from standards emerging from the jurisprudence of the European Court of Human Rights (hereinafter referred to as: the ECHR) (...), from the adoption of penal procedure as appropriate for lustration proceedings, and (...) from the penal character of sanctions connected with the obligation to submit lustration declarations (...).
3. **Intensity of constitutional review shall be a consequence of the penal nature of the Act under review.** The subject of the constitutional review in case of lustration consists in examining whether the choice of values is not arbitrary, and – in particular – whether it adequately takes into account the protection of the constitutional freedoms and rights of the individual, and if the procedure specified in the Act satisfies the requirements of a democratic state ruled by law. The intensity of control by the Constitutional Tribunal shall be all the more greater when provisions (norms) relate to more fundamental, constitutionally safeguarded rights of the individual, and where the provisions may lead to the imposition of sanctions on the individual with greater intensity.
4. **Goal of the Act: the disclosure of work in the totalitarian apparatus or collaboration therewith.** The principal goal of the Act is the disclosure of facts concerning work or service with State security agencies or collaboration therewith during the years 1944-1990 or finding that a given person was not involved in any of such activities. The legislator intended that persons discharging public functions or aspiring to do so submit a declaration disclosing such facts. The goal of such a regulation is to guarantee transparency of public life, to eliminate specific "blackmail" that could consist in making use of facts from that past deemed compromising and to subject such facts to the public's judgement.
5. **The object of lustration procedure is the veracity of the lustration declaration.** One of the means to realise the object (and indirectly also the goal) of the procedure is a sanc-

tion, envisaged in the Act, consisting in the prohibition on discharging certain functions or offices for a specified period of time following a submission of an untrue lustration declaration. At issue is the need to disclose facts of service, work or collaboration by former functionaries, employees or collaborators of the State security agencies, for the reasons of transparency of public life as well as for the elimination of the risk connected, for example, with blackmail that could be used against persons who had failed to reveal such facts from their past. Hence, in consequence, it is important to establish the fact of service, work or collaboration of the person, and not the sole fact of their lie.

Collaboration by itself shall not prevent a citizen from discharging public functions. Therefore, the negative consequences for the persons concerned who already discharge or aspire to discharge public functions result from the fact of submitting untrue lustration declaration, and not the collaboration itself.

6. (...) it stems both from the nature of lustration procedure, which is similar to penal procedure, and from the obligation to apply provisions of the Code of Penal Procedure as appropriate, that a lustrated person shall enjoy all procedural guarantees, including the application of the *in dubio pro reo* principle, where unexplained doubts are determined in favour of the lustrated person, as well as the right to defence. Of particular significance among the procedural guarantees shall be the presumption of innocence principle (Article 5 § 1 of the Code of Penal Procedure), which – within the framework of the lustration procedure – shall be understood as a presumption of the veracity of lustration declarations at all stages of proceedings.

7. The Constitution envisages the right of access of everyone to official documents and data collections concerning himself (Article 51 paragraph 3) as well as the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute (Article 51 paragraph 4). The constitutional right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute (Article 51 paragraph 4 of the Constitution), which constitutes a reference to and elaboration of the right of privacy, as envisaged by Article 47 of the Constitution, shall not be effectively limited to any one category of persons by way of a statute. Owing to the guarantee function of the right to legal protection of one's honour and good reputation, such informational autonomy shall have unlimited scope of application. It may only be limited for reasons enumerated in Article 31 paragraph 3 of the Constitution.

8. The Constitutional Tribunal emphasises that no State interest shall legitimise or justify the saving in official documents and databases of information which is untrue, incomplete or gathered in a manner contrary to the one prescribed by a statute.

9. In case of statutory regulations which are supposed to be based on the above-mentioned principles, a particular significance shall be paid to the appropriate application of the constitutional principle of proportionality, understood not only as a constitutive part of constitutional principles that do not allow for the limitation of rights and freedoms of the individual, but also as a principle that constitutes an inherent component of the concept of a democratic state ruled by law. This principle outlines all significant components of a statutory regulation, *ergo* – for example – the subjective and objective scope of the regulation, the depth of interference by the State with personal or public affairs of individuals or the nature and severity of sanctions.

III. Hitherto jurisprudence of the Constitutional Tribunal concerning lustration

1. The *Decision of 19th June 1992 (file Ref. No. U 6/92)* was the first statement delivered by the Tribunal on lustration. (...) in the opinion of the Constitutional Tribunal it follows from the principle of a democratic state ruled by law that every legal regulation, even one that is of statutory nature, which grants a state organ the authorisation to encroach into the sphere of civil rights and freedoms must satisfy the requirement of sufficient specificity. The Tribunal understands this as the necessity to precisely define the permissible scope of interference as well as the manner in which the subject whose rights and freedoms are being limited may protect themselves against unjustifiable violation of their personal interests. (...) in a democratic state ruled by law every form of violation of personal interests must provide for the possibility of assessment of expediency of actions taken by a State organ (...).

2. In its *Resolution of 14th July 1993 (file Ref. No. W 5/93)* (...) the Tribunal states that the submission by a candidate for a Deputy of an untrue declaration, concerning their functions discharged in organs enumerated in the Electoral Law or secret collaboration with such organs, shall be both morally and politically reprehensible.

3. In the *Judgement of 21st October 1998 (file Ref. No. K 24/98)* (...) the Tribunal finds (...) that the lustration act does not concern the control of the past of persons aspiring to discharge or already discharging public functions, but rather that it solely concerns the veracity of declarations submitted by the persons. (...) Accordingly, at issue is not the punishment for the very fact of collaboration, but rather the observance of the principle of truthfulness and transparency of persons in whom the public repose confidence.

4. In its *Judgement of 10th November 1998 (file Ref. No. K 39/97)* the Tribunal formulates the definition of "collaboration". The Tribunal introduces five prerequisites that in aggregate characterise "collaboration" with operations and investigative units of State security agencies: first, such collaboration had to consist in maintaining contacts with State security agencies, thus providing the organs with information; second, the collaboration had to be conscious, that is, the persons undertaking such collaboration had to be aware of the fact that they had established contact with representatives of one of the agencies enumerated in Article 2 paragraph 1 of the act; third, the collaboration had to be secret, hence the person undertaking such collaboration had to be aware that both the fact of undertaking collaboration and the course thereof had to remain secret, and, in particular, should not be disclosed to the persons and circles that constituted the subjects of the information gathered; fourth, the collaboration had to involve operational gathering of information by agencies enumerated in Article 2 of the act; fifth, the collaboration could not only be limited to a declaration of will, but had to materialise in the conscious undertaking of particular activities in order to fulfil duties arising from the collaboration. Accordingly, the sole declaration of will concerning prospective collaboration and the scope thereof are deemed by the Tribunal unsatisfactory to be found a proof of collaboration, since these were concrete activities fulfilling the above-mentioned criteria that decide upon the real collaboration with security agencies. (...)

The Tribunal reminds that it is the will of the legislator that persons discharging public functions or aspiring to do so submitted declarations concerning their collaboration. The aim of such regulation is to guarantee transparency of public life, to eliminate blackmail by means of facts from the past that could be deemed compromising, and to subject such facts to public's judgement. The very fact of collaboration does not prevent any citizen from discharging public functions, and the lustration procedure merely reviews the truth-

fulness of persons already discharging or aspiring to discharge such functions. The negative consequences for the persons arise not from the fact of collaboration, but from the submission of an untrue declaration.

The Tribunal expresses the view that the submission of an untrue lustration declaration may constitute the basis for finding the infringement of principles of loyalty towards other citizens by a person being a candidate for an office that is filled by way of universal elections. This may result in a decision concerning the temporary loss of electoral rights of the person.

5. In the *Judgement of 5th March 2003 (file Ref. No. K 7/01)* (...) the Tribunal emphasises that lustration procedures do not seek accountability, but rather seek to protect the openness of public life. (...) the formal criterion concerning the affiliation to structures of State security agencies does not refer to the assessment of conduct, motives or the degree of guilt of individual functionaries and employees of such organs, but rather refers to the assessment of the role and functions of the organs in the past. The role, as has been laid down in the Preamble to the Constitution of 1997, consisted in the violation of fundamental freedoms and rights of the individual.

The Constitutional Tribunal finds that the failure to submit a declaration may be questioned by the person subject to lustration obligation, while a potential dispute concerning this matter giving rise to serious legal consequences for the person may be an object of a separate decision issued in different proceedings, in which the lustrated person will enjoy all procedural guarantees. The Constitutional Tribunal acknowledges that (...) there are no doubts that as the failure to submit a declaration constitutes an infringement of a statutory obligation, which might result in serious legal consequences for the person's employment relationship, function-based relationship, or holding of a function as a member of the respective professional association, then the assessment in this respect shall ultimately rest upon an appropriate common or administrative court owing to the fact that such assessment might influence the appropriateness of further decisions to terminate the person's employment contract or function-based relationship, or to exclude the person from membership in a professional association. The Tribunal states that in such a case the right to court shall fully be retained, except that it would be materialised within a separate procedure not directly linked to lustration. Moreover, the Tribunal acknowledges that lack of specific preliminary court procedure connected with the publication of lustration declarations does not infringe the lustrated person's right to court (...).

6. In its *Judgement of 28th May 2003 (file Ref. No. K 44/02)* the Tribunal states that (...) on the basis of the law in force one may not speak of "stigmatising" any persons or any former activities undertaken by them. Yet, another issue is the negative assessment of persons aspiring to discharge public functions or already discharging such functions who, being fully aware, violated the statutory obligation to reveal the truth concerning certain facts of their lives (...).

7. In the *Judgement of 26th October 2005 (file ref. No. K 31/04)* (...) the Tribunal acknowledges that there exists a necessity to grant full access (…) to all documents examined by the Institute of National Remembrance in proceedings to grant the status of the aggrieved person not only for the court supervising the proceedings, but also for persons initiating such proceedings. In the opinion of the Tribunal such resources at the moment of initiation of proceedings are inaccessible for the person concerned. (...) decisions concerning the legal status of an individual may not be based on any documents or information that would remain secret and therefore inaccessible both to the person concerned and the court supervising the decision-making procedure in the case, since it stems from the

mere essence of the right to court and the right to a fair trial that both the complainant and the court have access to documents constituting the basis for a decision (...).

The Tribunal also considers the goal of the lustration act (...). It finds that the goal does not consist in the assessment and subsequent finding of truthfulness of persons submitting lustration declaration. The primary goal thereof (...) is the disclosure of work or service with State security agencies, or collaboration therewith between the years 1944-1990, or finding that a given person was not involved in any of such activities.

In the opinion of the Tribunal the public right to information shall be realised by means of the activity of journalists. Accordingly, the scope of the right to information may not be different as regards journalists and other members of the society, since the journalists' access to documents consisting data concerning the aggrieved persons or third parties and gathered by the INR constitutes a form of realisation of the rights guaranteed to society as a whole. Therefore, if the legislator takes the view that not every person shall have free access to documents gathered in the INR archives, then granting such access to journalists, solely by virtue of their profession and without the need to indicate and substantiate the aim of research (...), has to be acknowledged as a constitutionally unjustified privilege granted to this occupational group.

IV. PRINCIPAL ARGUMENTS OF THE REASONING

A. Permanence of the Tribunal's jurisprudential lines

1. (...) The Tribunal's judgement (...) outlines the limits for regulatory freedom in matters that will be the object of ordinary legislation in the future, and which are concerned with the understanding of constitutional norms. This results in the creation of *acquis constitutionnel*, i.e. a set of standards governing the understanding of constitutional provisions.

2. (...) the principles and findings [concerning lustration] along with subsequent decisions examining the essence of the issue in greater detail constitute the well-established jurisprudential line of the Tribunal. A change thereto in the unchanged constitutional order would have to be dictated by compelling substantive arguments (see. the Judgement of the Constitutional Tribunal of 26th July 2006, file Ref. No. SK 21/04, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 7/A/2006 item 88, where it is stated that the permanence of the jurisprudential line of the Constitutional Tribunal shall be the value that constitutes a component of the constitutional principle of trust in the State and its laws).

3. All judgements issued hitherto by the Tribunal in cases concerning lustration shall retain their binding force, insofar as the object of adjudication thereof has referred to the definition of collaboration in the wording adopted in the Judgement numbered *K 39/97*, since this definition shall retain its value (...). Departure from thus defined [jurisprudential] line, outlined and confirmed in numerous decisions by the Tribunal, particularly in a situation where the understanding of secret collaboration specified in detail by the Tribunal has been the basis for judicial decisions issued throughout the years, would have to be dictated by very important reasons.

4. Where, however, the practice exercised by the INR against the background of such cases proved that the provision of Article 3a paragraph 2 is given a new meaning, other than the one adopted above, and, concomitantly, has led to activities violating constitutional rights and freedoms, then the norm of Article 3a paragraph 2 of the Act on the disclosure of in-

formation could again be subject to review of constitutionality. On such occasion the present view of the Tribunal concerning the understanding of the reviewed norm, guaranteeing the constitutionality of its meaning, will have to be subsequently verified in light of the fixed, consistent and common divergent practice concerning the interpretation thereof.

B. Goals of lustration

1. The Act of 18th October 2006 also reconstructed the goal of lustration. It was put forward in the preamble to the Act. The preamble expresses condemnation and social, moral and legal discredit of persons whose activities were "permanently connected with the violation of the rights of persons and citizens in the name of the communist totalitarian system". Continual violation of human rights (in various forms) (...) undeniably amounts to a criminal wrong. Accordingly, the preamble determines that the goal of the Act is of penal nature.

2. The preamble (...) specifies the goal and determines the nature of the Act, which influences the assessment of whether the Act meets the standards of constitutionality. The goal of the Act of 18th October 2006, as specified in the preamble thereto, is not the imposition of negative legal consequences arising from the submission of an untrue lustration declaration, but the "necessity to fill positions and jobs in which the public repose confidence with persons whose conduct has offered a guarantee of honesty, nobleness, accountability for one's own actions, civil courage and righteousness" as well as guaranteeing citizens the right, as stemming from constitutional safeguards, to "information on persons discharging such functions, holdings such positions or performing such jobs". Concomitantly, (...) the preamble indicates that the goal of the Act is the stigmatisation (in social life) and punishment (by way of sanctions envisaged by the Act itself) of persons collaborating with the totalitarian system in the manner specified therein.

3. Lustration aims to (...) disclose work or service with State security agencies or collaboration therewith, (...) as opposed to a wide range of information concerning persons subject to lustration.

4. The preamble in itself does not bring about legal consequences for the addressees of the Act. One may not claim, however, that the wording thereof is without significance to persons subject to lustration. The preamble sets directions for (...) both the interpretation of the challenged acts, including acts amended by way of this Act, and the manner of application thereof, which makes it necessary to deem the preamble a normative statement, significant for the review of constitutionality performed by the Constitutional Tribunal.

5. The dynamics of the extension of the circle of persons subject to lustration throughout the 10 years of lustration procedures in their statutory form has clearly indicated that the goal of the latest regulation evidently fails to comply with the goals of lustration in light of the documents of the Council of Europe and jurisprudence against the background of the European Convention. From the perspective of the latter documents the goal of lustration shall consist, above all, in the protection of democracy against reminiscences of totalitarianism, while the secondary goal thereof, subordinated to the realisation of the primary goal, shall be the individual penalisation of persons who undertook collaboration with the totalitarian regime (while it is at the same time necessary to maintain guarantees inherent to penal regulations). In light of the Act, however, one has to acknowledge that the issue of collaboration with security agencies of the totalitarian state has become stricter with time. Meanwhile, the lapse of time lessens the threat of blackmail and brings about the natural exchange of staff. Accordingly, based on the European standard (cf. Resolution No. 1096), the handling of the totalitarian system envisages, with the lapse of time, tem-

poral limitation and lessening of the force of arguments concerning the possibility of utilising operations materials prepared by the totalitarian apparatus to blackmail functionaries (on the part of third parties, pressure groups, foreign centres). This circumstance should be taken into consideration while seeking an answer to the question whether, based on substantive grounds, the catalogue of persons subject to lustration should be extended, or rather narrowed with the lapse of time.

6. The Act, as its very title suggests, concerns the disclosure of information "stored" in achieves which comprise documents of the security apparatus. One may not question the necessity to disclose the information (hence to undertake lustration) in order to protect the mechanisms of a democratic state against the threats emerging from the totalitarian past. Yet, it does not signify that for this very reason one may and should constitutionally approve of the disclosure of any kind of information stored in the archives, since full disclosure thereof infringes the constitutional principle of informational autonomy, whose mechanism has been specified in Article 47 and Article 51 of the Constitution.

7. The State may acquire, gather and, which is particularly significant for the matter being decided upon in the present proceedings, make accessible (since acquiring and, partially, also gathering [of the material] was accomplished several years before, under the rule of the totalitarian state) only this information on citizens that is necessary in a democratic state ruled by law. On the one hand, the individual has the right to legal protection of their private and family life as well as their honour and good reputation and to correct untrue, incomplete information, or information acquired by means contrary to statute. These two constitutional standards shall be binding upon any lustration procedure.

8. (...) the goal of lustration procedure must be proportional to the applied measures of information disclosure. Since the goal of lustration consists in the protection of democracy against threats arising from the totalitarian past, then the encroachment into the sphere of informational autonomy of the individual and the limitation of means serving thereto (Article 51 paragraph 4 of the Constitution) shall only be possible and admissible as long as it is necessary (and not only desirable or advantageous) for the realisation of the identified lustration goal.

C. Penal nature of the Act

1. The penal nature of the Act, as revealed in the preamble thereto, necessitates the assessment of the constitutionality thereof by means of standards characteristic of penal regulations. The ECHR's jurisprudence concerning lustration has offered an identical approach to this issue (...). Accordingly, the Act should fulfil legislative requirements based on standards inherent to penal acts. This concerns, in particular, the degree of precision and clarity (Article 2 of the Constitution), and also appropriateness of procedural requirements guaranteeing a reliable and effective court protection for the individual. Furthermore, where sanctions come into play, it shall be necessary to guarantee the observance of the presumption of innocence principle and to introduce individualised accountability.

2. (...) the intensity of constitutional review (i.e. the requirements set for the regulations under review) shall be all the more greater where the provisions (norms) under review deal with fundamental, constitutionally safeguarded rights of the individual, and where the provisions envisage the possibility of imposition of sanctions upon the individual with greater intensity. Undertaking lustration should, in the first place, ensure the protection of the mechanisms of democracy; the penal goal shall be secondary in nature; yet the presence thereof influences the necessity to take into account guarantee requirements related to such goal.

3. It shall be (...) impermissible to lower protective standards, characteristic of penal law, by means of purely formal alteration of nomenclature (...), since it shall be the substantive content behind such norms and institutions, and not a name given thereto, that is of significance, while standards constituting bases of constitutional assessment for norms under review must guarantee both real and effective protection.

4. The preamble shall be of decisive importance as regards the negative assessment by the society of persons found to be personal sources of information. This signifies that even in instances where the Act itself does not envisage any sanctions (...) the preamble creates favourable conditions for the development of opportunism in participants to legal transactions. (...) Hence, irrespective of whether or not the Act on the disclosure of information provides for legal sanctions connected with disqualification [from office] based on lustration, it does give rise to social stigmatisation of persons deemed personal sources of information (freezing effect of the Act).

5. Prohibition on undertaking specific occupations or jobs (political, legal, academic, journalist) for a relatively long period of time constitutes a severe sanction depriving the person concerned of the possibility to continue their professional lives. Such sanctions are, by their very nature, punishments; both the object and the contents thereof satisfy the description of what in the penal law is known as the "penal measure".

D. Definition of collaboration

1. The Constitutional Tribunal, while adjudicating upon the present case, upholds, with all firmness, its stance expressed in relation to the issue under consideration in the sentence of the Judgement numbered K 39/97 emphasising that the definition of secret collaboration formulated therein shall retain its validity. (...) the definition concerning the collaboration with security agencies shall be characterised by the following five features:

- first, the collaboration must consist in contacts with State security agencies, understood as providing the organs with information by the person collaborating therewith;
- second, the collaboration must be conscious, that is, the person undertaking such collaboration must be aware that he/she has established contact with representatives of one of the agencies enumerated in Article 2 paragraph 1 of the Act;
- third, the collaboration must be secret, thus the person undertaking such collaboration has to be aware that the fact of collaboration and the course thereof have to remain secret, in particular should not be disclosed to persons and circles that constituted the subjects of the information gathered;
- fourth, the collaboration must involve operational gathering of information by agencies enumerated in Article 2 of the Act;
- fifth, the collaboration may not be limited to a declaration of will; it has to materialise in the conscious undertaking of particular activities in order to fulfil duties arising from such collaboration. Accordingly, the sole declaration of will concerning future collaboration and scope thereof shall be deemed unsatisfactory to be found as a proof of collaboration since these are particular activities fulfilling the above-mentioned criteria that decide upon the real collaboration with security agencies.

2. (...) „collaboration" shall also comprise contacts arising from the fulfilment of provisions of a statute operative at the moment of such collaboration (Article 3a paragraph 2). More-

over, such collaboration shall require a satisfaction of the prerequisite of a conscious harming of other persons (...). (...) the existence of the subjective element renders it impossible to make use of the protective mechanism, as envisaged in Article 52d paragraph 4 of the Act on the INR, in the event where a person is deceased, yet whose name had been placed in the catalogue, and whose remembrance his/her relatives want to protect. It is all the more so, because it is impossible to prove innocence (which is also required by such protection) by means of demonstrating lack of "intention" on the part of the deceased person. This fact limits the feasibility of applying Article 3a paragraph 2 of the Act to undertake lustration of the deceased persons, on the grounds that it shall be inadmissible to create situations whereby a negative outcome of the lustration procedure (which entails both public and legal condemnation) is not accompanied by effective procedural guarantees, based on the principle of "equality of arms", providing for the protection of the individual who submitted a lustration declaration.

E. The notion of the State security agency

1. Distinguishing State security agencies from the body of organs and institutions making up the apparatus of the totalitarian state (and this was the apparatus that, as a whole, constituted a threat to and violated the fundamental rights and freedoms), shall not be entirely arbitrary in nature; it must consist in the indication of an essential feature that may be found in all units, and which could determine that State security agencies should be considered individually in light of the goal of the Act. Otherwise, such distinction would not be subject to constitutional review from the perspective of the principle of correct legislation and specificity, which, as a matter of principle, shall be applied to all editorial units of each normative act constituting the source of universally binding legal acts.

2. Within the meaning of the Act, also civil and military organs and institutions of foreign states performing "similar" tasks to those of the organs enumerated in Article 2 paragraph 1 of the Act, were included as State security agencies. By way of the clause contained in the provision the catalogue of State security agencies has been opened to additionally encompass organs and institutions of other states. „Similarity" shall not be (...) a notion that is precise enough. It, therefore, raises doubts as regards the conformity of the norm to Article 2 of the Constitution, which requires that a norm be specified in detail, and in accordance with rigorous criteria, appropriate given the penal nature of the Act.

3. While one may agree with a thesis that by means of the interpretation of the content of the preamble one could infer that in this particular instance [collaboration with security organs of foreign states performing tasks "similar" to those of Polish security agencies] consists in collaboration with organs of communist states, irrespective of the meaning attributed to the term at present. Yet, the argument that the Parliament would have difficulty in cataloguing such organs could and should be turned around to state that a person subject to the Act would find it all the more difficult to define their legal obligation in this respect.

F. Secret instructions of security agencies

1. (...) [secret instructions of the security apparatus of the totalitarian period] shall not serve to specify in detail the content of sources of law (statutes) in a democratic state ruled by law. Moreover, it stems from the principle of a democratic state ruled by law that these shall be statutory notions that determine the content of notions used in substatutory legal acts.

2. (...) it needs to be emphasised that materials [i.e. secret instructions by the security apparatus] which reveal the essence of activities of security organs of the totalitarian state, hence significantly broadening the knowledge of such state, and concomitantly ordering evidence in accordance with the factual background, which is being determined for the purpose of lustration proceedings, shall remain totally worthless as normative material constituting the building blocks of legal norms determining rights and obligations of the persons concerned.

3. (...) in a state ruled by law (Article 2 of the Constitution) secret normative or quasi-normative acts (...) shall not possess the nature of binding law. Accordingly, they shall not constitute the source of any rights or obligations granted or imposed by anyone upon citizens. The situation of citizens in a democratic state shall solely be determined by means of constitutional sources of law. Under no circumstances and in no sense shall these be normative acts of either direct or indirect secret character.

4. The content of secret instructions by security apparatus of the totalitarian state shall in no way be (...) helpful while defining statutory notions. Such "role-reversal" (...) necessitates an expression of particularly strong criticism.

5. Legal notions used by the legislator shall always have autonomous meaning, yet they need to be interpreted in light of the normative contents of the Constitution, as well as in light of norms binding upon the Republic of Poland by way of ratified international agreements. In no way shall legal norms refer to contents of secret acts or documents. Such archive resources should solely be the object of scientific research aiming at the explanation of the significance of mechanisms of organs in a totalitarian state, and they must not constitute the basis for any normative references in relations existing between the citizen and the State. Neither shall they shape (...) the situation of citizens.

6. Based on the Constitution of 1997, decoding the contents of statutory legal norms shall not be performed by way of a reference to (...) ambiguous instructions of the totalitarian state, which do not posses the status of sources of law. Such instructions did not provide legal bases for shaping the situations of persons concerned, not even when they were in force. Therefore, it is all the more blatant to attribute such a function thereto in the present lustration mechanism.

G. The notion of persons discharging public functions

1. (...) the notion of „persons discharging public functions" has been provided for in Article 61 paragraph 1 of the Constitution. While defining the constitutional notion of the "public function" one may also refer to Article 103 of the Constitution, which specifies the prohibition to jointly hold the mandate of a Deputy or a Senator with public functions (offices), as specified in the Constitution itself (paragraph 1 and 2), or in a statute, in particular in the Act of 9th May 1996 on the exercise of Deputies' and Senators' mandate (...). In light of the constitutional regulations referred to above there are no doubts that a person discharging a public function becomes one by way of performing tasks of public authority, managing communal assets or the property of the State Treasury (...).

2. The notion of a "public person" shall not be synonymous to the notion of a "person discharging public functions". (...), there are no doubts that [in the latter case] the persons concerned are connected by means of formal bonds with a public institution (organ of State authority).

3. (...) it is not (...) possible to determine precisely and unambiguously whether, and in what circumstances a person working for a public institution may be found to be discharging a

public function. Not every public person may be considered as one who discharges a public function. Discharging a public function shall entail the realisation of certain tasks in an office, within the institutional framework of a public authority, within other decision-making positions in the public administration, as well as within any other public institutions. Therefore, the determination as to whether a function is a public one should focus on a finding whether a given person performs, within a given institution and to a certain extent, the public task assigned to the institution. Hence, at issue are the subjects who have been vested with at least a narrow scope of decision-making competence within a given public institution.

4. While attempting to establish general features decisive in determining whether a given person is discharging a public function one may, without running too great a risk of making a mistake, acknowledge that at issue are the positions and functions discharging of which consists in making decisions that directly influence legal situations of other persons or ones that entail the drafting of decisions regarding other subjects. Accordingly, positions, even if discharged within public authority organs, yet being auxiliary or technical in their character, shall be excluded from the circle of public functions.

5. (...) the category of persons discharging public functions may not encompass functions, positions or jobs that are in no way connected with the sphere of public power (*imperium*) or with managing communal assets or the property of the State Treasury (*dominium*) (...). The relevant feature that makes it possible to distinguish the category of "persons discharging public functions" shall be the actual exercise of public power or management of communal assets or the property of the State Treasury.

6. The legislator, while making use of terms specified in the Constitution (...) may not ascribe, by way of a statute, any other meaning thereto than the one stemming directly from the content of constitutional norms. Such a legislative practice, reversing the constitutional order and blurring the meaning of the notions in use, by its very essence shall be inadmissible in a state ruled by law (...).

7. Being categorised into the group of persons subject to lustration on account of the job pursued or the function discharged may not be (...) dependent upon the attitude of a given circle. The necessity to subject persons discharging public functions to lustration has been specified in an objective and decisive manner by the goals of lustration.

8. (...) it is necessary to distinguish the legally defined type and scope of an activity, along with competencies connected therewith, as is the case with "persons discharging public functions", from actual acts of influencing other people's behaviour. From the perspective of the guarantee of proper functioning of a democratic system, the possibility and admissibility of ensuring informational autonomy shall be seen differently in the two instances (...). The requirement of radical transparency in case of persons discharging public functions *stricto sensu* shall not only be permissible, but also necessary (...).

H. Automatic nature of sanctions and the regulatory freedom of the legislator

1. One of the effects of finding lack of veracity of a lustration declaration is the loss of capacity to discharge a function (...), also in situations where persons who undertook collaboration with security agencies did so under compulsion or in fear of loss of their lives or health. A person acting under compulsion in fear of loss of their life or health or in fear of loss of lives or health of closest persons should be deemed (...) a prerequisite that excludes sanctions against such behaviours, since acting under compulsion gives rise to declaring invalidity of a declaration of will as such.

2. A provision that does not provide for the application of a diversified sanction for failure to fulfil a statutory obligation of a public character may not be acknowledged to satisfy the principles of correct legislation (Article 2 of the Constitution) or the requirements of the principle of proportionality. Hence, the mechanism of automatic imposition of sanctions for failure to submit a lustration declaration, irrespective of the underlying cause of the omission to observe the obligation, also had to be acknowledged as unconstitutional.

3. The severity of sanctions envisaged in the event of a submission of an untrue lustration declaration and, above all, for failure to submit one by a specified deadline (...) resulted in the encroachment of the regulation under review into the constitutionally protected rights to freedom of pursuing a profession or economic activity, undertaking scientific research or freedom of speech. [One may notice] (...) lack of proportionality as regards the legislator's encroachment by way of a measure lacking the feature of indispensability.

4. In case of regulating severe and irreversible sanctions operating *ex lege*, the regulatory freedom of the legislator shall be limited, in particular owing to the necessity of ensuring guarantee and protective mechanisms safeguarding against the irreversibility of the effect.

5. In a democratic state guarantee procedures safeguarding against consequences of legislative interference by way of penal measures (and such is the situation in case of lustration) should be complete, effective and available. Court-lustration proceedings utilised as a guarantee in the event of person's inclusion within the catalogue of subjects deemed personal sources of information shall not satisfy the above requirements.

6. The publication of catalogues shall be tantamount to the legitimisation of the perspective of agencies of the totalitarian state in order to stigmatise the dishonour of persons placed on such lists; After all, the preamble to the Act under review treats personal sources of information as persons who violate the law.

I. Right to stand as a candidate in elections

1. The principle of protection of trust in the State and its laws requires that in the event of imposing new obligations a certain period of adaptation to new regulations be specified. (...) this should encompass such important issues for citizens as the rights and freedoms of persons elected for their functions, thus also on account of voters' expectations. An appropriate adaptation period in such cases would be the term of office of persons elected in universal and direct elections.

2. The extension – in the middle of the term of office – of (...) the catalogue of persons subject to lustration to include persons elected for their functions in self-governments was a new and surprising situation for tens of thousands of persons connected with self-government. "Legal traps" of this kind set for persons who decide to take up public duties with trust in the legal regulations in force at the time of making the decision to stand as a candidate shall be inadmissible in light of the principle of protection of trust in the State and its laws (...).

3. Discharging a function based on a mandate obtained from voters in a universal ballot signifies subjecting the persons elected to the most rigorous vetting procedures existing in democratic systems. With respect to such persons there is no reason to support the view that there exists a necessity for the persons to submit their lustration declarations once again during their term of office. Imposing new obligations or limitations during the term of office shall not, as a matter of principle, be prohibited (...), [as with for example obligations] aiming at eliminating situations leading to corruption (...) [or] forfeiture of a mandate following a conviction for an intentional offence (...).

4. The operation (...) of the provision [envisaging the forfeiture, by virtue of the law, of the right to discharge a public function in the event of a failure to submit a lustration declaration, or a failure to submit the declaration in time] influences both the right to vote and the right to stand as a candidate in elections, hence the rights that are constitutionally guaranteed. It is because of this fact that the results of elections, which constitute the realisation of the principle of the sovereignty of the Polish People, shall be, in such a case, deemed illusory in the aspect of both the right to vote and the right to stand as a candidate.

5. Should one assume that there exists an obligation to submit lustration declarations once again by persons exercising their mandate, then one would have to acknowledge that the legislator in the course of a given term of office had changed the prerequisites deciding upon the deprivation of a function. This would contradict the principle of stability of the mandate.

6. Neither the right to vote, nor the right to stand as a candidate in elections shall be exhausted (...) in the act of voting itself. As for the right to stand as a candidate in elections, it shall not only encompass the right to be elected, but shall also involve the right to exercise the mandate obtained by way of elections conducted in a non-defective manner. The solution adopted in Article 57 of the Act under review is characterised by (...) the automatic nature of consequences and lack of guarantee procedures. In light of the above findings such a solution should be assessed as a disproportionate interference with the essence of democracy itself based on terms of office of representative bodies.

J. Disciplinary jurisdiction

1. Judges, public prosecutors, advocates, legal counsellors, notaries public and court enforcement officers (...) shall be subject to disciplinary jurisdiction, which – in an appropriate manner, and, above all, in a manner that takes into account all nuances significant for particular factual backgrounds – should assess reasons behind the failure to submit lustration declarations and apply disciplinary measures towards persons failing to fulfil the obligation, to the extent that they be deprived of the right to exercise a function or exclusion from a profession.

2. (...) Persons fulfilling the function of: the Commissioner for Citizens' Rights, a member of the National Council of Radio Broadcasting and Television, the President of the Supreme Chamber of Control, the President of the National Bank of Poland, (...) [i.e.] functions of particular importance to the State, shall be appointed and dismissed by State organs specified in the Constitution or statutes, and shall not – for understandable reasons – be subject to disciplinary jurisdiction.

3. Judges shall not constitute the only professional group subject to disciplinary jurisdiction, yet only in respect of judges there exists a constitutional guarantee, as laid down in Article 180 paragraph 2 of the Constitution, envisaging the competence of a court in cases concerning the recall of a judge from office. The existence of such competence vested in any disciplinary court presupposes a certain degree of discretion in decision-making of the adjudicating court. The construction adopted in the Act, introducing merely a pretence of competence of a disciplinary court, and thereby disguising the actual goal of the Act, may not be recognised as one that satisfies the requirements of (...) legislative diligence. Moreover, the construction infringes the principle of proportionality (...). In the case of judges, on account of the violation of the constitutional guarantee envisaging the competence of a court, the infringement is all the more apparent.

4. Since (...) in relation to the above-mentioned groups of persons the legislator at all decided to grant a certain degree of competence to disciplinary courts, then it must also grant at least a minimum degree of discretion in the courts' decision-making. (...).

5. (...) proceedings before disciplinary courts may not be ostensible in nature, as their objective shall be to determine the actual degree of guilt and to decide upon appropriate punishment.

6. Depriving a court of the right to individualise accountability by way of a rigid, statutory determination of a limit of the right to stand as a candidate, which has the nature of the constitutionally safeguarded right (...) amounts to a flagrantly disproportionate legislative interference (Article 31 paragraph 3 of the Constitution), limiting the protection by the courts (Article 45 of the Constitution), which in aggregate results in the infringement of the principle of diligent legislation.

7. (...) the automatic nature of sanctions for submitting untrue lustration declarations, operating by virtue of the law (...), without the possibility of specialised disciplinary courts, familiar with characteristics of a given profession, to diversify responsibility in the process of adjudicating (...) infringes both the principle of diligent legislation as specified in Article 2 of the Constitution, and the principle of proportionality (...).

K. Right to lodge a cassation

1. (...) vesting the right to lodge a cassation in the Commissioner for Citizens' Rights and the Public Prosecutor General, and refusing to grant the right to lodge a cassation against a legally valid decision to the person subject to lustration has to be acknowledged as disproportionally infringing, within the scope specified, the right to court (...). In this manner the parties to lustration proceedings have not been guaranteed the "equality of arms" principle, as stemming from the right to a fair trial.

2. The Polish legal system does not guarantee the subjective right to lodge a cassation, nor envisages any constitutional guarantees in this respect. Yet, since ordinary legislation in other cases, namely penal, civil or administrative, extends the possibility of protection of infringed rights or interests by way of cassation, then this higher standard needs to be observed by the ordinary legislator regulating this special instance within the penal procedure. Deprivation of persons subject to lustration of the right to lodge a cassation, and a return, in this respect, to solutions of a system of law envisaging an extraordinary review, should be considered as an arbitrary violation of the standard of a fair trial. Pragmatic arguments arising from concerns connected with the multitude of cassation proceedings related to lustration may not serve as the basis for lowering the constitutional standard of protection. This would amount to the acceptance of the view that factual circumstances may invalidate the operation of a constitutional norm under the pressure of organisational difficulties.

L. Lustration of journalists

1. (...) based on the Act on the disclosure of information, almost any person contacting editorial staff in relation to any press material shall be deemed a journalist. Such a broad definition, possibly justifiable by the former goals of the communist State, particularly interested in the control – at every stage – of publications as well as in persons involved in the production thereof, turns out entirely unproductive in the new democratic order of the State, and, in particular, for the purposes of appropriate application of lustration procedures, and, from this perspective, it shall not satisfy the requirement of specificity as de-

rived from Article 2 of the Constitution. The same obligations have been imposed on persons from such an ambiguously defined circle, as on persons discharging the most important State functions, which should, *per se*, be recognised as a regulation that flagrantly infringes the principle of proportionality.

2. By way of the media, including the electronic media, journalists have a great possibility of influencing people's behaviour. This influence does not, however, result from activities based on an expressly identified legal provision, as is the case with "persons discharging public functions" (by acting these persons realise their competence stemming from an expressly identified legal provision); the activity of journalists manifests itself in the public sphere by means of behaviours which are permissible, yet which do not constitute the realisation of any competence vested by virtue of the law, and which, at the most, may be subject to limitations or prohibitions. In the latter case the law prescribes the limits of activity, as opposed to the basis for, or obligation to perform such activity.

3. (...) failure to fulfil the lustration obligation, as imposed by way of the Act on the disclosure of information, by numerous persons merely cooperating with editorial staff would result in sanctions that would have to be rendered utterly illusory. An attempt to limit the activity of either this professional group as a whole, or particular persons concerned with any of the familiar forms of journalism, violates the principle of freedom to express opinions as well as to acquire and disseminate information (Article 54 of the Constitution), i.e. such freedom that, by its very nature, shall not be subject to subjective limitations.

4. (...) inclusion of journalists into the group of persons discharging public functions shall be deemed constitutionally defective, not only on account of lack of exercise of power characteristic of public functions (...), but also owing to the violation of proportionality whilst imposing limitations on activities that serve to fulfil the constitutional right to information.

M. Lustration declarations

1. The fundamental objective concerning the submission of the lustration declaration does not consist in the creation of an opportunity for assessment and then review of the truthfulness of the lustrated person. The principal goal of the Act is the disclosure of the fact of work or service with State security agencies, or collaboration therewith between the years 1944-1990, or finding that a given person was not involved in any of such activities. In order to acquire the maximum transparency of knowledge about persons discharging public functions or aspiring to do so the Act requires that such persons submit declarations disclosing such facts. Such declarations play an important role by ordering the entire lustration process at national level, if only on account of electoral procedures.

2. Submission of any declaration by a citizen at the request of authorities must be protected by the presumption of the veracity of facts, circumstances, etc. contained therein. This presumption may, obviously, be rebutted by way of an adopted procedure and upon the fulfilment of certain conditions. (...) lustration declarations may not take the form of (...) „a kind of inadmissible little game with the citizen", or a certain test of truthfulness. The declaration aims at acquiring certainty that a person did not undertake any service, work or collaboration with Sate security agencies in the past, which is admittedly conditional, yet which allows for a reasonably efficient realisation of lustration procedures in general.

N. Access to the archives of the INR

1. Access to the archives of the INR shall be possible primarily within the framework of: a) lustration proceedings, b) the right of everyone to access to documents concerning them-

selves, (...), c) carrying out statutory tasks by undefined subjects (...), d) pursuing scientific research upon a permission by the President of the INR (...), e) conducting journalistic activities upon a permission by the President of the INR (...). (...) both pursuing scientific research and enjoying the freedom of speech (which presupposes the possibility of its realisation by way of access to information as well as dissemination thereof) – shall be the constitutionally safeguarded freedoms (albeit not absolute in their nature).

2. Access to the archives of the INR for the purposes of scientific research and journalistic activities may not be greater and may not reduce the access thereto by the aggrieved persons; (...) such persons shall have the right to informational autonomy, as guaranteed by the Constitution.

3. The specification of prerequisites governing the access to the archives shall constitute (...) an instrument that must in an unambiguous and effective manner protect both values to an extent that guarantees an optimal balance. Accordingly, it shall be inadmissible to grant permission based on blanket, unclear or unverifiable expressions.

4. (...) a journalistic objective may not constitute a sufficient justification for granting access to the resources gathered in the INR.

5. Documents of the INR shall be archive resources, within the meaning of Article 1 of the Act of 14th July 1983 on national archive resources and on archives (...), constituting a part of national archive resources in the form of a separate archive. The organ of government administration competent in matters concerning the archive shall be the President of the INR (...). The general rule while making the archive resources available shall be the preservation of a 30-year-long limitation period following their drawing (...) and non-infringement of the legally protected interests of the State and citizens.

6. (...) archives of the INR comprise of materials and documents that had been by and large gathered without any legal bases, and on numerous occasions in an illegal manner. In particular, this concerns documents that were being drawn by persons who had been blackmailed. It is worth stressing at this point that such blackmail by utilising compromising materials or evidence of criminal activity was the means that in certain situations was even recommended in order to recruit new secret collaborators.

7. The extensive scope of journalists' right to obtain information, which is later compiled into a press material (...), indicates that the notion of "conducting journalistic activities" would have to be understood as an unrestricted kind of activity pursued by journalists, and, accordingly, an unrestricted access to the resources archived in the INR. Concomitantly, the legal system envisages (...) a prohibition on expressing opinions in the media concerning a ruling in court proceedings prior to issuing a decision at first instance. Such a situation gives rise to doubts as to whether the prohibition specified in Article 13 paragraph 1 of the press law also refers to lustration proceedings. Hence, also regulations concerning journalists' access to the archives of the INR result in a conflict between constitutional values (freedom of information – informational autonomy), which must be minimised by the legislator by way of drawing a line of demarcation, which could ensure protection of both values, without the excessive (disproportionate) detriment to either of the values for the benefit of the other. The appropriate instrument serving to achieve this goal shall be the specification – by way of a statute – of conditions for granting the permission by the President of the INR.

8. By envisaging a universal access to information relating to persons discharging public functions (Article 22 of the Act) the legislator, for reasons that are inexplicable in light of the Constitution, limited such access, yet by excluding only some of the so-called sensitive data. Among these were: racial or ethnic origin, religious convictions, religious af-

filiation as well as data on the state of health or sexual life (Article 22 paragraph 3 point 1 of the Act). This catalogue shall be to narrow (...). Omission of this kind shall not be justified by the necessity to perform lustration, since lustration aims at the disclosure of work or service with State security agencies or collaboration therewith (...), as opposed to the disclosure of detailed information about persons subject to lustration.

9. (...) a regulation protecting addresses and personal ID numbers (...) shall in every respect be desired, similarly to (...) [the protection of personal data of persons discharging] managerial functions in political parties ruling throughout the period of existence of the Polish People's Republic or occupying management positions in the government at that time (...). It is clear in light of the entirety of provisions of the Act on the disclosure of information that lustration procedure shall encompass all persons discharging more important public functions (...) from 24th August 1989 (a date marking the designation of Tadeusz Mazowiecki as the Prime Minister).

10. It is understandable that for the purpose of pending lustration proceedings materials, within an appropriate scope, must be made available immediately. This does not, however, signify that, except for cases expressly provided for in a statute, such documents may readily be made available, also to researchers or journalists. At issue are reliable research results and reliable press materials. Accordingly, it would be desired, or even recommended to guarantee that the persons whom the archive resources concern be guaranteed conditions for the earlier realisation of their rights provided for in Article 51 paragraph 3 and 4 of the Constitution. Otherwise, not only the persons' legally protected interests (Article 17 paragraph 1 of the Act on archives), but also the quality of scientific research based on materials not previously confronted with the knowledge of the persons directly concerned would suffer detriment. The same should equally be related to activities undertaken by journalists.

11. (...) in case of organs of public authority as well as other institutions, organisations or persons the access [to the archives of the INR] shall be conditional upon the exercise of statutory tasks (...). In each such instance there must exist an express statutory legal basis allowing for making such documents available. As regards researchers and journalists, by virtue of the very essence of their activity, the solution to the problem may not be analogous.

O. Procedural issues

1. The formula "is not inconsistent with", as used in 1997 [while undertaking the review of constitutionality of the Lustration Act 1997] for the description of relations between the norm under review and the constitutional basis of review [formerly the double negation as in the expression "is not inconsistent" often resulted in the confirmation of constitutionality, based on the rules of logic] – has (...) at present a different, unambiguous and consolidated meaning, established alongside the evolution of the jurisprudence. Currently, the formula "is not inconsistent with" is used exclusively in relation to instances where an inadequate basis of constitutional review has been put forward in an application: the situation exists where the application incorrectly identifies a basis of review, whereby the Tribunal, while essentially not assessing the appropriateness of the basis of review, does not express its opinion as regards the constitutionality, and hence the provision under review remains constitutional based on the presumption of constitutionality thereof, which had not been invalidated.

2. A review by the Constitutional Tribunal is not identical (as regards the object and effects of its adjudication) to an assessment concerning the violation of rights of the individual undertaken by the European Court of Human Rights. Still, certain rights and freedoms laid

down in the Convention may be utilised to support the reconstruction of the content of a constitutional basis of review, as undertaken by the Tribunal.

3. (...) the *soft-law* acts [e.g. Resolution No. 1096] shall not constitute the legally binding bases of constitutional review. Yet, such acts have been put forward to set guidelines for the interpretation of law, as regards both the object and the reconstruction of a basis of review. Within this scope, the Constitutional Tribunal, while undertaking a review of constitutionality, should take these into account.

4. (...) adoption of even faulty solutions shall remain within the scope of the legislator's discretion in decision-making, unless it is possible by way of the evidently defective construction thereof to presume, in advance, the complete uselessness of the solution in fulfilling the goals for the realisation of which they had been created.

5. (...) where an applicant associates the challenged normative content with a certain editorial unit of an act, and where for the reconstruction of the content thereof it is necessary to take into consideration also a different (not directly identified by the applicant) part of the same act, then there shall be no restrictions for the Tribunal to review all those provisions of the act which [in aggregate] contain the challenged normative content.

6. (...) "the possibility to familiarise oneself with the content of a statute" shall be encompassed within a wider issue of trust in law, and legal certainty (Article 2 of the Constitution).

7. (...) in order to fulfil the condition of "promulgation of a statute" it shall not only be necessary to publish the next issue of the Journal of Laws (Dziennik Ustaw), but also make the issue available, hence at least forward the issue for further distribution. From the perspective of Article 88 of the Constitution it shall be of no significance whether the addressees of a normative act have taken the opportunity to acquaint themselves with the content of a normative act which had been promulgated in accordance with the required procedures. This principle is dictated by both the axiological postulate based on moral-political principles inherent in the concept of a "state ruled by law", and by a pragmatic postulate of making legal regulations an effective instrument to influence the behaviours of those to whom they are addressed.

8. (...) a consolidated text, as opposed to a unified text, shall retain the feature of authenticity, similarly to the original text of a statute. This is the consolidated text that shall be encompassed by a presumption that the shape in which it has been promulgated is the original shape given thereto by the legislator. At this point one needs to take into account the fact that pursuant to Article 16 paragraph 1 of the Act of 20th July 2000 on the promulgation of normative acts and certain other legal acts (...) a consolidated act shall be promulgated where the number of amendments to an act has been significant or where the act has been previously amended on numerous occasions, which could significantly hinder the use of the text thereof.

9. (...) particularly worthy of criticism is the determination of so remote a date of promulgation of the consolidated text of the Lustration Act, all the more so because it raises serious concerns regarding intertemporal issues (doubts relating to the date and period of time outlining the remaining in force of individual norms). In such a situation lack of a consolidated text constitutes a "trap" for the addressees of such legal norms, especially as the norms impose obligations, whose failure to fulfil within the specified time period (expiring prior to the date of promulgation of the consolidated text) gives rise to far-reaching consequences in the sphere of rights and freedoms concerning considerable number of persons obliged to submit declarations. The necessity for the immediate entry into force of the amended norms may not constitute a justification in such case.

10. No (...) negative legal consequences may arise for the person filling in an official form, where the normative content of an appendix does not match the instructional form of the specimen.

V. Implications of the Judgement

A. Effects of the Judgement for the legal system

1. (...) failure to take legislative steps following the issue of decisions by the Constitutional Tribunal leads to exceptionally unfavourable consequences for the functioning of the current legal system.

2. The effects of the decision [of the Constitutional Tribunal] may take different forms, depending on the influence thereof on the legal system (...). At times the very judgement of the Tribunal shall be sufficient for the restoration of the state of constitutionality; in such an instance the legislator's intervention shall not be necessary. Yet, more frequently, particularly in cases where the finding of unconstitutionality refers to parts of mechanisms established by the norms under review, it shall be indispensable – following the decision by the Tribunal – to undertake "repair" activities on the part of the legislator.

3. (...) where the Tribunal – while not questioning the mechanism itself (...) – finds only part of the legal regime of the mechanism unconstitutional (...) [then] (...) following the issuing of a judgement by the Tribunal (...), until the intervention by the legislator, a temporary suspension of the mechanisms occurs, part of which has been affected by the finding of unconstitutionality. It shall be dependent on the legislator, and not the Constitutional Tribunal, when the suspended mechanism could become operative again.

4. The subject of review of constitutionality in the present case are norms that were shaped as a result of an influence exerted by amending provisions on the amended ones. In such a case the temporal effects of the Tribunal's decision manifest themselves in the loss of binding force of the unconstitutional norms as of the date of promulgation of this Judgement in the Journal of Laws (...). A judgement of the Constitutional Tribunal shall result in the loss of binding force of a norm found unconstitutional following the date of promulgation of the Tribunal's decision in the promulgation organ. (...) It shall not, however, be decisive as regards the temporal scope of the applicability of the legal state arising from the Tribunal's judgement.

5. Despite the fact that the loss of binding force of norms declared unconstitutional (derogation, amendment of the law as regards the scope of binding force) takes place as of the date of the promulgation of a judgement by the Constitutional Tribunal in the Journal of Laws, the mere pronouncement of the judgement by the Tribunal, upon completion of review procedures, shall not be without legal significance. As of the date of public delivery of a judgement (which always occurs prior to the derogation of the unconstitutional provision by way of a promulgation of the judgement in the Journal of Laws) the provision under review shall lose its presumption of constitutionality. This signifies that organs applying provisions declared unconstitutional or when applying them in the delay period which outlines the postponement of the entry info force of a judgement by the Tribunal (...) should take into account the fact that they deal with provisions that had lost their presumption of constitutionality.

6. All organs operating in the State shall be obligated to observe the Constitution. Accordingly, if it is known that some norms have already been found unconstitutional by virtue

of a decision issued by the Constitutional Tribunal, then even during the period preceding the official promulgation thereof all organs competent as regards the application of the act containing the unconstitutional norms should, within the limits of the scope of their administrative discretion, decision-making discretion, and by utilising instruments at their disposal and within the competence vested therein, act in such a manner as to minimise the consequences arising from the application of provisions known to be unconstitutional.

7. Consequently, there are no grounds to claim that only the formal promulgation of a judgement brings about such an effect. On the contrary, all organs applying the law should – within the scope of their competence and with regard to the wording of Article 7 and Article 8 of the Constitution – counteract the consolidation of the unconstitutional state, instead of passively seeking definitive and formal removal of the act whose unconstitutionality had already been found.

8. Pursuant to Article 190 paragraph 2 of the Constitution, this is the promulgation of judgements of the Constitutional Tribunal that shall exclusively be encompassed by the constitutionally guaranteed obligation of "immediate publication" (in other cases such an obligation is regulated by way of ordinary legislation). Such differentiation is justified when one takes into account the fact that in the case of a decision issued by the Tribunal at issue is the elimination from the legal system of norms deemed unconstitutional as quickly as possible, whereas in case of promulgation of statutes one deals with the introduction of norms encompassed by the presumption of constitutionality. Accordingly, as a matter of principle, it shall be necessary to minimise the occurrence of situations where norms already deemed unconstitutional, yet formally being part of the legal system, would actually be applied.

B. Effects of the Judgement for persons not subject (in light of the Judgement) to lustration

Lustration declarations submitted by persons who are not, in light of the present Judgement, subject to lustration shall be rendered useless, or without significance from the perspective of lustration procedures. Declarations that have already been submitted to appropriate organs or persons specified by the Act shall be returned. This obligation shall not necessitate the issuing of any additional normative regulations.

C. Effects of the Judgement for persons subject (in light of the Judgement) to lustration

In respect of persons who remain subject to lustration there shall exist no obligation to return the submitted lustration declarations. These declarations have been submitted as a result of the application of the Act still remaining in force, and in good faith, yet in accordance with the specimen which required, in the instructional part thereof, to exclusively address issues of secret collaboration. Accordingly, all lustration declarations in this part shall retain their value. Yet, they shall not constitute the basis for any negative consequences against persons submitting them as regards any potential collaboration, as referred to in Article 3a paragraph 2 of the Act on the disclosure of information.

MAIN ARGUMENTS OF THE DISSENTING OPINIONS

Judge Jerzy Ciemniewski

The dissenting opinion was submitted in relation to point 7 of the sentencing part of the Judgement, insofar as it refers to Article 3a paragraph 1 (the definition of collaboration) of the Lustration Act.

- Lack of clarification (...) of conditions [governing lustration proceedings, as formulated in *the Judgement of 10th November 1998 (Ref. No. K 39/97) as well as the Judgement of 26th October 2005 (Ref. No. K 31/04)*], may give rise to concerns regarding the observance thereof by the legislator. Moreover, this may give raise to doubts in relation to the effects of the Act for persons acquitted by way of judgements issued in cases considered under the rule of the Act of 11th April 1997.

Judge Zbigniew Cieślak

The dissenting opinion was submitted in relation to the Judgement of the Constitutional Tribunal, insofar as it found the non-conformity to the Constitution of the Republic of Poland of the following provisions: Article 2, Article 4, Article 10, Article 11, Article 21b and Article 57 of the challenged Lustration Act, as well as Article 52a of the Act on the INR.

- In a sovereign and democratic state the legislator is obliged to both face the troubled history in the name of the common good of society and create appropriate conditions for the state's functioning in the future. This proper functioning for the common good and in the interest of individual citizens should be ensured by filling functions, positions, offices and professions with worthy persons.
- The reason behind the abstract review of constitutionality of legal norms, as performed by the Constitutional Tribunal, lies in the concern of the law and order of the State, including the safeguarding of the superiority of the Constitution, being the supreme law of the Republic of Poland. (...) The realisation of this primary goal is, in particular, dependent upon the observance of the principle of the objective truth (...). It is therefore the obligation of the Constitutional Tribunal to consider a case in such a manner which guarantees optimum conditions for the correct and objective resolution thereof (...). The significance of this obligation is all the more greater on account of the single-instance system of proceedings before the Tribunal, which precludes any control of the organ as regards the observance of the obligation to examine all circumstances necessary to consider a case thoroughly. Accordingly, there exists a particular obligation incumbent upon the Constitutional Tribunal to utilise all available means to recreate the true background to a given case, constituting the basis for the appropriate application of constitutional provisions.
- (…) the procedure of the review of norms by the Constitutional Tribunal is based on the accusatorial principle (...). Closely related thereto is the principle consisting in the free exercise by the parties of their rights as regards the disposition of the subject of a challenge, and the applicant's right derived therefrom to change the scope of the challenge, understood as a formulation of a new challenge producing legally binding effects outlining the Constitutional Tribunal's scope of jurisdiction (...). [In the jurisprudence of the Tribunal] (...) the prevailing view is that the "limits of a challenge may only be specified by the organ authorised to submit an application to the Constitutional Tribunal to initiate proceedings". Extension of the scope of the application by a group of Deputies of 8th January 2007 by way of a correspondence of 28th March 2007 signed only by an authorised representative of the applicant, should have been rendered ineffective and disregarded by the Tribunal while considering the present case, since, in relation to the provisions of the Amended Lustration Act, referred to in the correspondence of 28th March 2007, the Constitutional Tribunal had not received any application from an authorised subject, i.e. a group of at least 50 Deputies. Within this scope the proceedings regarding the constitutionality of the Lustration Act had not at all been initiated.
- A preamble, being an integral part of a normative act, helps both organs applying the law and citizens to specify and systematise the content of the safeguarded values. It constitutes an extremely important source (tool) for the teleological interpretation of an act.
- The catalogue of subjects regarded as State security agencies (...) remains within the autonomous decision of the legislator who – in this respect – takes into account the criterion based on the determination of whether the activity of a given subject involved combating democratic opposition, trade unions, associations, churches and religious unions, or consisted in violating the right to the freedom of speech and assembly, as well as the right to life, freedom, property and security of citizens. Accordingly, it is not justified to apply solely the criterion of 'performing operative and investigative activity' for the determination of the catalogue of State security agencies, since activities of the repressive apparatus were performed systematically and in a manner mutually supportive and interdependent.

- The essence of notions which do not possess precisely defined meanings lies within their intrinsic feature leaving freedom of assessment of the factual background from the perspective of a given value. Thus, the legislator vests in the organ applying the law a specific authorisation to directly realise – in a particular situation – a certain value, with the aim to show legal effects in a given context.
- The legislator has the constitutionally guaranteed discretion to autonomously legislate the universally binding law. The discretion allows – within the so-called legislator's autonomy of will – for its autonomous determination of the subjective scope of, *inter alia*, the Lustration Act.
- One consequence of regarding documents as a historical value [on the grounds of Article 52a point 5 of the Act on the INR] is the acknowledgement that one should not connect any presumption of veracity therewith. Such documents should be subject to free assessment, since they merely confirm the fact that a given person had submitted a declaration, the content of which is contained in the document. An argument supporting the view of the attribution of historical value to the documents is the obligation to supplement, and not remove them once finding that they lack veracity (…).
- The Lustration Act does not aim to punish persons who had undertaken collaboration with State security agencies, but rather those who committed the so-called "lustration lie". The goal of lustration is the disclosure of the fact of collaboration or absence of such collaboration, and consequently ensuring the transparency of public life. The object of lustration proceedings is the veracity of lustration declarations, and the means for the realisation of the goal is a sanction consisting in the prohibition on discharging certain functions or filling certain positions. Collaboration by itself does not prevent a citizen from discharging public functions, since negative consequences arise not from the fact of collaboration, but from the submission of an untrue lustration declaration.
- The obligation to submit a veracious lustration declaration should be assessed in terms of an obligation connected with respect we owe the victims of the totalitarian system, and with concern about the right of our descendants to live and shape their own attitudes amongst righteous persons.
- The application of provisions of penal procedure to lustration procedure (...) may not be decisive as regards the "penal nature" of the entire Lustration Act, as the applied procedure serves solely to extend the procedural rights (and, generally, extending the legal protection) of a person subject thereto. The effect of sanctions envisaged in the Lustration Act does not have the nature of a penalty (within the meaning adopted in the penal law), but rather consists in the deprivation of certain privileges, which the persons subject to lustration enjoyed (or would enjoy).
- (…) the right to lodge a cassation within the penal procedure is not encompassed by a constitutional guarantee. Hence, the legislator may limit the scope thereof by narrowing the availability of cassation to only certain proceedings or certain types of cases. The legislator has the possibility to decide upon the extent of the right to lodge a cassation on account of the severity and character of a sanction imposed on a collective entity (…). The Constitution does not provide for any substantive criterion allowing for the acknowledgment of any obligation on the part of the legislator to introduce cassation. In particular, the Constitution does not point to the significance of a case, though, undoubtedly, teleological issues may justify the introduction of the cassation procedure to proceedings concerning more serious matters. Yet, the assessment of the appropriateness thereof remains within the domain of the legislator and the Constitutional Tribunal is not authorised to question the decision. (…) The limitation upon the scope of the subjective right to lodge a cassation on the grounds of the Lustration Act is encompassed within the scope of the aforementioned "freedom of the legislator".

Judge Maria Gintowt-Jankowicz

The dissenting opinion was submitted in relation to the Judgement, insofar as it finds the unconstitutionality of the challenged provisions, except for findings concerning Article 4 point 23, Article 18 paragraph 2 point 2 as well as Article 21a paragraph 3 of the Lustration Act, and insofar as it finds the constitutionality of Article 3a paragraph 1 (definition of collaboration) only within the meaning adopted in point 7 of the sentencing part of the Judgement.

- (...) I do not find any grounds in the Constitution in force for the Tribunal's formulation in the reasoning of "a statutory framework of regulation concerning lustration issues", or any specific standards for the legislator with regard to this matter. (…) the principles of the functioning of a state based on the rule of law do not justify the temporary limitation of the binding force and the application of the Lustration Act until the state has achieved minimum standards of democracy.
- Both (...) the general (...) and detailed assessment undertaken by the Constitutional Tribunal as regards the "normative novelties" introduced by way of the challenged Act of 2006 suggests that the Constitutional Tribunal has in advance presupposed that the model of lustration adopted in the Act of 1997 and shaped on the basis of the hitherto jurisprudence of the Tribunal may not, as a matter of principle, be altered, while the leg-

islator does not even exercise its relative legislative autonomy in this respect. Such direction of adjudication leads to the contravention of the constitutional role of the Tribunal, and, accordingly, threatens the mechanisms of a democratic state ruled by law.

- (…) the review of constitutionality performed by the Constitutional Tribunal of challenged regulations should primarily consist in the review of the conformity thereof to constitutional provisions constituting bases of review in a given case, and also take into consideration the well-established jurisprudential line of the Constitutional Tribunal relating to the case. (…) these (…) observations are all the more significant where the subject of review by the Constitutional Tribunal concerns the so-called lustration, i.e. a normative act reflecting a difficult and unequivocally political decision of the legislator. (…) a decision of the legislator as regards the carrying out of the so-called lustration, as well as choice of the adequate model thereof lies within the so-called relative autonomy of the legislator. (…) According to the principle of a democratic state ruled by law, implementing the principles of social justice (Article 2 of the Constitution) as well as the principle of the separation of and balance between the legislative, executive and judicial powers (Article 10 of the Constitution), the legislator enjoys the autonomy in respect of the regulation of the so-called lustration regime. This is because this issue belongs to the realm of politics, and the Constitutional Tribunal, while evaluating such a regulation, should be guided by particular circumspection and prudence. (…) Accordingly, the assessment by the Constitutional Tribunal should not ignore, but rather on the contrary – should respect the specific social and historical context of such a regulation.
- (…) the Constitutional Tribunal, as a matter of principle, should not assess goals or means adopted by the legislator. In a democratic state ruled by law, whose system is based on the principle of separation of powers, law-making rests in the legislative branch of power, which has been vested a significant extent of freedom in specifying the content of legal regulations, particularly, the goals and means aiming at the realisation of particular political objectives. (…) these are political organs that are responsible for the politics of the State, namely the legislative and the executive powers. This is the legislator who is politically accountable for the manner in which it exercises the right to make law with reference to the choice of the adequate and accurate manner of utilisation of goals and means for the realisation of political objectives. (…) As a matter of principle, the freedom of the legislator within the aforementioned scope is not subject to an assessment by the Constitutional Tribunal. (…) the assessment of purposefulness and appropriateness of decisions taken by the Parliament goes beyond the competence of constitutional jurisdiction.
- The freedom of the legislator, also in respect of political matters, [is not unlimited] (…). On the contrary, the limits thereof are outlined, above all, by the constitutionally safeguarded rights and freedoms. (…) Nevertheless, also in such instances the point of departure for the assessment of conformity to the Constitution should be based on the presumption of constitutionality (…). This is of particular significance in the event of an allegation against the legislator as regards the non-conformity of a statute to constitutional requirements of such general nature as, for example, the principle of a democratic state ruled by law.
- The very idea of lustration (…) does not contradict the principle of a democratic state ruled by law, since, as a rule, it aims at ensuring the transparency of public life and protecting the interest of the State, primarily, by way of eliminating the possibility of blackmail by facts from the past, which may be deemed compromising and by way of subjecting such facts to the assessment by the public.
- Lustration may (…) serve not only the purpose of the principle of transparency of public life or the system of public power, but also for the purpose of the protection of democracy of the Republic of Poland, which is the common good of all its citizens (…).
- Adoption of a particular model of lustration lies within the relative autonomy of the legislator and is encompassed by the presumption of constitutionality so long as it is possible to demonstrate that particular normative provisions serving to accomplish its goal transgress the admissible boundaries as regards the limitation upon the constitutional rights and freedoms.
- According to the adopted jurisprudential line of the Tribunal, a decision upon the unconstitutionality of a statute should not be issued where a possibility exists to assign such meaning thereto that could result in the conformity thereof to norms, principles and values provided for by the Constitution. (…) While challenging the constitutionality of a normative act on the ground that it infringes the so-called principles of correct or appropriate legislation, one should not ignore the above-presented assumptions, nor lose from sight the fact that the above principles have been derived from the general principle of a democratic state ruled by law, which is, above all, supposed to implement social justice.
- The narrowing interpretation adopted by the Tribunal in respect of the expression “persons discharging public functions”, stating that the catalogue of persons discharging public functions may not encompass functions, positions or jobs that are in no way connected with the sphere of public power (*imperium*) nor with managing communal assets or the property of the State Treasury (*dominium*), does not take into account the *ratio legis* of the challenged Act of 2006. (…) This is the existence of the necessity to fill functions, positions and jobs in which the public repose confidence with persons who, owing to their ethical

qualifications, unblemished reputation, impeccable character or their hitherto conduct have guaranteed proper exercise of an occupation or fulfilment of a function that was decisive as regards the subjective scope as specified in Article 4 of the challenged Act of 2006.

- Defining "collaboration" is one of the elements serving to realise the fundamental goal of the Act of 2006, that is, dismantling the fundamental part of the heritage of the former totalitarian system of the Polish People's Republic. (…) Linguistic rules of interpretation allow for an unambiguous determination of the meaning of the term "collaboration", whose essence lies in undertaking activities, as opposed to a mere declaration to undertake them. It is beyond any doubt that such "collaboration" had to be real, i.e. it had to materialise in conscious and concrete activities fulfilling the above-mentioned and above-detailed criteria. Still a different issue subject to the *in casu* assessment is the determination of the type, intensity or the so-called social harmfulness of activities materialising such collaboration.
- It is impossible to speak about an infringement of the principle of correct legislation, where by means of an elementary interpretation the conformity of the content to the Constitution is obvious.
- It is beyond any doubt that the promulgation of a consolidated text of a normative act considerably facilitates its use, particularly in instances where the act had previously been amended on numerous occasions or where the number of amendments to the act had been significant. This does not, however, signify that it is justifiable to support the allegation of unconstitutionality – arising from the infringement of the principle of correct legislation – against any normative act, in particular against one that regulates the spheres of constitutional rights and freedoms, solely on the grounds that no consolidated text thereof has been promulgated. This would lead to peculiar absurdities, since it would make it possible to challenge such regulations as, for example, the Civil Code (…).
- The limitation of the right to privacy, as stemming from the guidelines of lustration, must be deemed necessary in a democratic state ruled by law for its security, thus fulfilling the prerequisites of Article 31 paragraph 3 of the Constitution (the principle of proportionality). No citizen is obliged to apply for or discharge any public function, and while being aware of the implications of the fact that it involves making certain private information public, they make autonomous and conscious decisions, based on the assessment of both positive and negative consequences and by taking account of certain limitations as well as discomfort related to the interference with their private lives (…).
- Making the contents of lustration declarations of persons discharging public functions available to the society, within the meaning of the Act, needs to be regarded as a limitation of freedoms and rights of the persons concerned for the purpose of protection of public interest and rights and freedoms of other persons, hence being justifiable in light of Article 31 paragraph 3 of the Constitution. (…) publicising the register of lustration declarations realises one of the fundamental guarantees of a democratic state ruled by law, namely the transparency of public life, which manifests itself in the right of every citizen to information (…).
- The catalogue (…) was supposed to include personal data of the persons, whose materials have been preserved in the form of documents, which, firstly, were drawn by a given person by him/herself or in collaboration with the person in connection with activities undertaken by them as an informer or assistant in operational gathering of information, and, secondly, which show that the person was realising tasks assigned to them by a State security agency, and, in particular, that the person provided the organ with information. (…) The data published were supposed to concern persons who collaborated with State security agencies as secret informers or assistants in operational gathering of information. The catalogue was also intended to include personal data of persons, in relation to whom other documents have been preserved. These include documents confirming that a given person was regarded by a State security agency as a secret informer or an assistant in operational gathering of information. At issue are personal data of persons whose "cooperation" did not take the form of "collaboration", as referred to in Article 3a paragraph 1 of the Act of 2006, since such documents merely confirm that a given person was either only regarded by State security agencies as the so-called secret informer or an assistant or that the person had only committed him/herself to providing information. Accordingly, there are no documents that could confirm that a person had actually undertaken any collaboration with State security agencies.
- A supplement to the Act on the INR comprises a table which lists all categories of collaboration with State security agencies, concomitantly accounting for changes in the nomenclature as well as various degrees of formalisation of collaboration over several years. (…) The terms used in the table reflect various categories, names of collaboration or cooperation with State security agencies, as used by various organs throughout years. The mere fact of using the terms does not aim at legitimising the instructions, nor much less acceptance of activities undertaken by security agencies of the Polish People's Republic. It serves to reconstruct the historically accurate background of different forms and types of collaboration and cooperation with State security agencies, reflecting the content of documents drawn in the period of the Polish People's Republic by State security apparatus. Regardless of the negative assessment of activities undertaken by security agen-

cies of the Polish People's Republic, it is not feasible at present to determine either any collaboration therewith or the nature of such collaboration without making use of documents drawn by the organs.

Judge Wojciech Hermeliński

The dissenting opinion was submitted in relation to points 4, 13, 18, 22 and 40 of the Judgement, insofar as they refer to the finding of unconstitutionality of Article 2 paragraph 1 points 13 and 14, Article 4 point 44 letter a and point 52, Article 11 paragraphs 1 and 2 as well as Article 57 paragraph 1, read in conjunction with Article 21e paragraph 1 of the Lustration Act.

- Had the legislator intended to define State security agencies as organs that possess investigative or operations units, the fact would be expressed directly in Article 2 paragraph 1 of the challenged regulation. Yet, since this was not the case, it is necessary to assume that while formulating the catalogue of State security agencies the legislator also took into consideration other criteria which the law-maker did not deem expedient to enumerate. Based on the preamble to the challenged Act, one should, in the first place and in this respect enumerate activities consisting in combating democratic opposition, trade unions, associations, churches and religious unions, violating the right to the freedom of speech and assembly, as well as the right to life, freedom, property and security of citizens for the benefit of the communist totalitarian system.
- (…) it is not the task of the Constitutional Tribunal to adjudicate upon the substantive appropriateness of solutions adopted by the legislator.
- (…) lustration must be based on the principle of individual (as opposed to collective) accountability. Each case must, therefore, be assessed separately, taking into account both the personal situation of individuals subject to lustration and the specific features of the institution the person collaborated with.
- Despite rich jurisprudence and doctrine, there exists as yet no formulation of the universal criterion allowing for an unambiguous *in concerto* identification of the characteristics of the public function, which has been confirmed, *inter alia*, by the Supreme Court. (…) Substantial problems arise, primarily, while identifying mutual scope of the following notions: "a public person", "a person discharging public functions", "public functionary" or while determining their content-based relations to the notion of "functions/positions in which the public repose confidence" or "professions in which the public repose confidence".
- In the opinion of the Constitutional Tribunal, researchers and journalists are, admittedly, public persons, yet not persons who discharge public functions, and since the notion of a person discharging public functions has been "precisely defined" at the constitutional level, "the legislator [...] may not give thereto, by way of a statute, a different meaning than the one stemming directly from constitutional norms". (…) The sole derivation of this criterion from provisions identified in the present case as constitutional bases of review, as well as the application thereof may be questioned.
- The Constitutional Tribunal has hitherto considered issues concerning persons discharging public functions in instances, where the Constitution imposed on the persons certain restrictions regarding, for example, the limitation of privacy on account of the right to public information (…). Accordingly, the hitherto jurisprudence must be considered as appropriate, taking into account the fact that neither lustration, nor the subjective scope thereof is directly regulated by the Constitution. This postulate is all the more legitimate because the Constitutional Tribunal has to date been relatively cautious in formulating the general definition of 'persons discharging public functions'.
- It is beyond any doubt that (...) [besides scientists and employees of institutions of higher education (except for non-public institutions of higher education) holding managerial positions, also ordinary employees in science and higher education (full professors, extraordinary professors, visiting professors, associate professors, readers, senior lecturers) – on account of the nature of their work] – are the persons, from whom one could expect the fulfilment of the exceptionally high moral and ethical standards.
- (…) the task of journalists is to "serve the society and the State". (…) all journalists, including those who do not hold any positions among editorial staff, discharge public functions in the broadest sense of the term. They have extensive possibilities to shape public opinion (it is not without significance that the media are called the "fourth estate"), often greater than other categories of persons subject to lustration (e.g. Deputies or advocates). Accordingly, it seems well founded to acquire information concerning the past of such persons. The fact that the persons do not issue administrative decisions, nor manage communal assets or the property of the State is of secondary importance here. (…) it seems that this view is shared by at least part of the professional group of journalists.
- From the perspective of the goals of the challenged Act the definition of a journalist, as specified in the press law, does not seem to be precise enough. Above all, it may in practice prove too broad, since – when applied literally – it imposes lustration obligations, for example, on a person who prepared even only one press material in their life. Moreover, the definition does not explicitly determine in what way one should consider, for example, foreign journalists or persons publicising glosses to judicial decisions, expert opin-

ions or research articles in professional magazines. (…) it is necessary to acknowledge that lustration should be admissible, at least, towards these journalists who professionally and permanently cooperate with editorial staff; yet it would also be desired that the legislator further narrowed the circle.

- Owing to the extensive possibilities of influence by both journalists and scientists on public opinion, the obligation of disclosure by the persons of the fact of collaboration with security agencies (…)[seems to be] justified and proportional to the safeguarded value of limitation upon their rights. [Additionally], this contributes to the safeguarding of security and public order.
- No citizen is obliged to apply for or discharge any public function, and while being aware of the implications of the fact that it involves making certain private information public, they make autonomous and conscious decisions, based on the assessment of both positive and negative consequences, and by taking account of certain limitations as well as discomfort related to the interference with their private lives.
- (...) the principle stating that persons discharging public functions must agree to the limitation of their privacy and informational autonomy to an extent incomparably greater than that of ordinary citizens also applies to the past of these persons. „The justified interest" on the part of the public as regards the lives of such persons may also encompass the facts of the persons' collaboration, if any, with security agencies of the Polish People's Republic. Furthermore, "limitations imposed on persons discharging public functions may not be [...] considered in terms of the limitation of freedoms and rights of such persons, but rather as a means for ensuring the proper functioning of public institutions".
- The discretionary power of the legislator to encroach onto the right to privacy and informational autonomy of public persons is, in this respect, limited by principles stemming from Article 31 paragraph 3 and Article 51 paragraph 2 of the Constitution. The limitation upon the right to informational autonomy and to privacy must be subsidiary in nature, that is, it has to be the means that is – if possible – least onerous for the persons concerned.
- Data included in the register must be, after all, sufficient for the unambiguous identification of the author of a given lustration declaration, since any errors concerning the identity of such persons could lead to ostracism within their community and, as has been put by the Tribunal, could result in "a specific punishment in the form of infamy". Therefore, it remains in the interest of the persons submitting declarations to provide sufficient scope of information in order to minimise the risk of potential errors.
- Devoid of any legal sanctions the challenged Act becomes a dead letter, and the obligations arising therefrom are, in practice, rendered unenforceable, which undermines the entire purposefulness of the adoption thereof.
- Mechanical deprivation of the right to discharge a function violates the universally recognised general rule of law stating that a sanction should be differentiated proportional to the degree of guilt and depend on circumstances in which the perpetrator operated, or otherwise it is unjust.
- (…) the Lustration Act does not directly lay down that the sanction for the failure to keep the deadline for the submission of lustration declarations amounts to 10 years, i.e. as long as the sanction for submitting untrue declaration. (…) taking into account the quasi-penal nature of the entire Lustration Act, lack of specificity as regards the sanction for the failure to submit a lustration declaration is highly unlikely from the perspective of the legal certainty and the citizens' trust in the State principles, as stemming from Article 2 of the Constitution.

Judge Teresa Liszcz

The dissenting opinion was submitted in relation to the Judgement, in particular to the following points: 1, 4, 9, 11, 13, 14, 15, 17, 18, 21, 22, 30, 31, 33, 51, 60, 62, 65, 69 and 76 of the sentencing part of the Judgement, as well as to the reasoning thereof.

- The Lustration Act is not of criminal (penal) nature, [since] sanctioning of collaboration with security agencies of the totalitarian state is not central thereto.
- The lustration procedure is a mechanism for reviewing the veracity of declarations revealing the existence of particular connections and relations of persons holding or aspiring to hold public positions who bear a particularly high degree of responsibility, with the aim to disclose truth on their functioning in the totalitarian State. The sanctions envisaged by the Act are not imposed on account of collaboration with the communist regime, but rather as a result of a lustration lie, proved in court proceedings, or in consequence of the failure to observe the binding provisions of the law, namely failure to submit a lustration declaration by persons encompassed by the subjective scope of the Act.

- The requirement to apply provisions of the Code of Penal Procedure (hereinafter referred to as: the CPP) as appropriate signifies that lustration procedure is not of penal nature; were this a case, the provisions of the CPP would have to be applied directly, and not 'as appropriate'. (…) Paradoxically, the Tribunal infers the penal nature of the regulation, *inter alia*, from the obligation of appropriate application of the CPP in lustration proceedings. Meanwhile, the obligation to apply provisions of the CPP as appropriate seeks to guarantee all procedural guarantees to the person subject to lustration, such as, for example, the application of the *in dubio pro reo* principle (where unexplained doubts are determined in favour of the lustrated person) as well as the right to defence.
- The request by the applicants in the present case was of alternative character. However, the Tribunal applied a specific and a hitherto unknown to the jurisprudence, compilation of alternative applications. The Tribunal did not review the conformity of the entire Act to the Constitution and other bases of review, but rather addressed all the challenged provisions, additionally (selectively) reviewing a number of provisions that had not been challenged individually. The Tribunal independently extended the scope of review by analysing both the challenged provisions and provisions of the Lustration Act chosen by the Tribunal itself. Such character of the sentence shows a certain degree of Tribunal's discretion in identifying and analysing provisions of the Lustration Act. This goes beyond the acceptable limits of the rule concerning the evaluation of a motion in favour of the applicant.
- The review of constitutionality of statutes is based on the presumption that the norms under review conform to the Constitution, while the responsibility of proving the unconstitutionality thereof lies with the entity challenging the presumption. So long as there are no specific and convincing arguments supporting the view of lack of conformity to the Constitution, the Tribunal must deem the norms under review constitutional. Otherwise, the principle of adversary nature of proceedings before the Constitutional Tribunal is violated, with the Tribunal itself becoming an organ adjudicating upon its own initiative.
- It is within the competence of the legislator to make law that satisfies the predefined political and economic goals and to adopt such legal solutions that – in the opinion of the legislator – will best serve the realisation of the objectives.
- In its hitherto jurisprudence the Tribunal has negated the continuity of the axiological bases of statehood and the legal system in force before and after the political breakthrough of 1989, accepting the assessment included in the Resolution of the Senate of 16th April 1998 on the legal continuity between the Second and the Third Republic of Poland (the Official Gazette of the Republic of Poland – Monitor Polski – M. P. No. 12, item 200). It is worth mentioning that the Resolution recognised "the State established as a result of the Second World War in the territory of Poland and functioning between the years 1944-1989 as an undemocratic totalitarian state operating within a global communist system, deprived of its independence, and not realising the principle of the sovereignty of the Polish People. A tendency has also been seen as regards the more flexible interpretation of constitutional provisions applied during the political transformation.
- A number of arguments fundamental for the solution of the case were derived directly from the content of the Resolution No. 1096 of the Parliamentary Assembly of the Council of Europe on means for dismantling the heritage of former communist totalitarian systems. (…) the Resolution is not, however, an act that is normative in nature (or absolutely binding); it is merely a collection of recommendations addressed to particular Member States. (…) furthermore, by its very nature, it is a framework document and constitutes a synthesis of the results of legislative activities of a number of states of the region.
- Decisions of the Tribunal are final and universally binding. They shape the legal situations of not only the parties to proceedings, but also of all addressees of provisions subject to review. One correlate of this feature of Constitutional Tribunal's decisions is the obligation to thoroughly consider all circumstances of a case, while maintaining conditions that guarantee complete impartiality. (…) In proceedings before the Tribunal the adversary nature of proceedings and the principle of formal truth do not apply to their full extent (as is the case in civil proceedings).
- Given the degree of complicity of the matter under review, fixing the dates of hearings on 9 and 10 [May 2007] did not allow for a comprehensive preparation thereto or for taking up a stance to the proposed argumentation in depth.
- (…) the competence to make a decision as regards the exclusion of Judges has been vested in the entire adjudicating bench of the Tribunal, and not individually in the President thereof. Furthermore, as of the moment of their commencement, proceedings before the Tribunal are led, except for cases expressly indicated, the Presiding Judge of the bench. As a matter of principle, there are no normative bases specifying procedural activity of the President of the Constitutional Tribunal in the course of proceedings.
- Opinions presented in the doctrine and jurisprudence as regards the legal nature of the preamble to a legal act are divided, yet, according to the prevailing view, it should be assessed *ad casum.* (…) the preamble to the Lustration Act is not of autonomous normative nature. It specifies general goals of the Act, which is of fundamental importance for the interpretation of provisions contained in the part of the Act containing indi-

vidual articles. As a matter of principle, a preamble does not constitute a source of any authorisations for any subjects, and it is inadmissible to issue any individual decisions on the basis thereof. [In its hitherto jurisprudence] (…) the Tribunal has already stated that one may not derive any legal norms *stricto sensu* on the basis of the text of a preamble.

- (…) there is no constitutional or statutory definition of the notion of "State security agencies". Admittedly, the existing interpretational clues bring to mind the so-called security force organs, applying direct coercion and undertaking operational or investigative activities, yet the legislator, guided by the objectives specified in the preamble to the Act, had the right to endow the notion with different, broader meaning. It is worth mentioning that the more liberal approach put forward by the Tribunal – with regard to a similar issue – in case numbered *K 15/93* („Collaboration with bodies of repression aimed at combating Polish independence movements needs to be assessed negatively, irrespective of the positions held and the form of employment in the organs. This concerns both repression apparatus of foreign states, and communist repression apparatus in Poland") as well as in case numbered *K 11/99* (…).
- Rejection by the Tribunal of the clearly identified (and justified) criterion adopted by the legislator and decisive as regards inclusion of certain organs of authority of the Polish People's Republic in the catalogue of "State security agencies", followed by the Tribunal's formulation of its own criterion seems to go beyond the admissible limits of review.
- While referring to the subjective scope of lustration acts the Tribunal has in its hitherto jurisprudence used more general expressions: "public functions" (file Ref. No. *K 7/01*) or "public offices in which the public repose confidence, and which entail a particularly high degree of responsibility" (file Ref. No. *K 24/98*). Meanwhile, in the present decision the Tribunal found that the subjective scope of the Lustration Act should be convergent with the *designatum* of the notion of "person discharging public functions". Moreover, the Tribunal adopted the narrow understanding of the expression, based solely on the grammatical interpretation of Article 61 of the Constitution.
- The goal of lustration consists not only in purging organs of public authority of persons involved in connections with communist regime. The mechanism serves to the create a pluralistic and truly free civil society, which may not be identified solely with authorities and organs thereof. One may not limit the mechanisms ensuring the transparency and openness of public life by adopting – as an exclusive criterion – the possession of decision-making competencies, managing public property or permanent, structural connections with organisational units of the authority.
- While aiming at achieving the goals specified in the preamble (which, after all, have not been challenged), the Parliament had the right to extend the subjective scope of the Lustration Act to include other public persons, who, concomitantly, were not deemed persons discharging public functions *stricto sensu*, for example, journalists, who indeed are universally deemed "the fourth estate", or researchers and academic teachers. The two groups, while not possessing any formal competencies to influence legal situations of other persons, do shape to an unquestionable and considerable extent public opinion.
- Effect in the form of unconstitutionality occurs only where it is impossible to derive any rational interpretation of a provision under review undertaken with the utilisation of all known methods of interpretation. Otherwise, any notion possessing an unclear scope of meaning would cast doubts as regards the constitutionality of the provision.
- It is beyond any doubt that the sphere of privacy is violated by way of the very obligation to submit a lustration declaration. Yet, in the hitherto jurisprudence the Tribunal has pointed out that this finds its confirmation in the general concept of lustration, as adopted by the rational legislator, and is a direct result of the willingness to discharge a public function.
- It amounts to a certain abuse to claim that the Act "was formally promulgated", yet that only the consolidated text thereof could be "the source for the interpretation of the Lustration Act in the wording introduced by the Amending Act of 14th February 2007", and that lack thereof sets a "trap" for the addressees of the legal provisions. Lack of such consolidated text could make it difficult, yet not impossible to acquaint oneself with the content of the Lustration Act in the wording introduced by way of the Amending Act of 14th February 2007. After all, the functioning of the entire legal system is based on knowledge of legal provisions promulgated in an appropriate manner.
- The Lustration Act envisages that a legally binding court decision finding that a lustration person had submitted an untrue lustration declaration is considered as an obligatory prerequisite for the deprivation of a function discharged by the person. (…) Accordingly, in case of a "lustration lie" the sanction consists in the obligatory deprivation of a public function. The sanction is (…) both necessary and sufficient to make the persons obliged to submit lustration declarations in order fulfil the requirement. In the event of a failure to do so, they agree to be deprived of the right to perform certain public roles.

- It amounts to a misunderstanding to demand that the legislator made it possible to individualise the sanction, imposed in court proceedings for the submission of an untrue lustration declaration, in which the person states that they had not undertaken any collaboration, and, in particular, to expect that the Act allowed for the differentiation of the period of deprivation of the "lustration liar" of the right to discharge public functions specified in the Act. This postulate could be deemed rational, where it was concerned with punishment for reprehensible collaboration with security agencies which, obviously, in particular cases had different extent of social harmfulness and degree of guilt.
- The stance of the majority of the bench of the Tribunal acknowledging the unconstitutionality of the provision specifying a uniform, rigid period of deprivation of the persons deemed "lustration liars" of the right to discharge functions has its roots in an erroneous assumption that the sanction is of penal nature. Meanwhile, such sanctions have been for many years functioning in labour regulations.
- The role of a court in lustration proceedings does not consist in adjudication upon a sanction (severity thereof), but in reviewing the veracity of lustration declarations.
- Worthy of criticism is lack of proportionality in equalling sanctions against a person who intentionally and permanently evades fulfilling the obligation to submit a lustration declaration, hence preventing the attainment of the goal specified in the Act, and against a person who, marginally, failed to meet the deadline specified for the submission of declarations, especially when the negligence was not the person's intentional fault. A critical assessment of such a solution constitutes a standard in the European jurisprudence.
- The constitutional standard encompasses the right of access to court (more specifically – access to a two-instance court system), yet it does not guarantee "the right to cassation", especially as it has been shaped as an extraordinary appellate measure.
- In the reasoning [the Tribunal] failed to invoke the issue – already addressed in the hitherto jurisprudence thereof – concerning the inadmissibility of adjudication upon a case based on norms stemming from conventions, where an analogous, relatively precise constitutional regulation exists.
- Lack of statutory limitations upon the discretion in decision-making [of the President of the INR] (…) poses (…) a risk consisting in the arbitrary and unequal treatment of similar subjects.
- The present Judgement by the Tribunal renders lustration a seeming and ostensible mechanism. On the one hand, the jurisprudential practice of the Tribunal acknowledges the admissibility and necessity of lustration, yet – on the other hand – hedges it with requirements that may prevent effective realisation thereof. For one thing, the Tribunal acknowledges the inviolability of documents drawn by security agencies, as resources of historical value, yet, for another, it specifies the requirements as regards access and use thereof in a manner which fundamentally limits the freedom of the legislator and renders it difficult (or, in fact, impossible) to enact operative provisions in this respect.

Judge Ewa Łętowska

The dissenting opinion was submitted in relation to point 7 of the sentencing part of the Judgement, insofar as it finds the conformity to the Constitution of Article 3a paragraph 1 (definition of collaboration) of the challenged Act.

- The definition of collaboration, as provided for in the challenged Act, does not satisfy the criteria inherent to lustration procedure, which in directly in a provision requires that the collaboration be conscious, secret, one that entailed operational gathering of information and was materialised (real). Requirements of this kind were formulated in the *acquis constitutionnel* (cases numbered *K 39/97* and *K 31/04*) against the background of the already-in-force Constitution of 1997, which, given the unchanged constitutional circumstances, constitutes a necessary prerequisite for the activity of the ordinary legislator, also when the legislator intends to amend the act which led to the development of a constitutional basis of review.
- The formula, as used in the Judgement, (…) failing to enumerate the above-presented criteria may prompt the outdated nature of the *acquis constitutionnel* developed already under the rule of the Constitution of 1997, whose *acquis* the Constitutional Tribunal is obliged to respect. The formula may also be a source of unjustified doubts as regards the relevance of legally valid exonerating judgements, issued in lustration proceedings conducted under the rule of the Act of 11th April 1997 (…).

Judge Marek Mazurkiewicz

The dissenting opinion was submitted in relation to points 7 and 8 of the sentencing part of the Judgement, insofar as if refers to the conformity to the Constitution of Article 3a paragraph 1 (definition of collaboration) and Article 3a paragraph 2 (specific case of collaboration) of the challenged Act.

- The principle of a state ruled by law (…) requires that the enacted norms be faultless from the perspective of the legislative technique. (…) General principles stemming from Article 2 of the Constitution should be ob-

served particularly closely when one considers legal acts imposing limitations upon freedoms and rights of the citizens as well as imposing obligations towards the State (…). In particular, a statutory regulation should satisfy the imperative of sufficient specificity and stability, which is a derivative of a democratic state ruled by law. (…) It is indisputable that the Lustration Act is repressive in nature. In consequence provisions concerning a sphere as sensitive as lustration should be constructed in a manner creating as low as possible a degree of legal uncertainty for the persons concerned.

- (…) the provision of Article 3a paragraph 1 of the Act of 18th October 2006 was adopted in the wording identical to the original wording of Article 4 paragraph 1 of the Act of 11th April 1997, i.e. prior to the delivery by the Constitutional Tribunal of the Judgement in case numbered *K 39/97*. While formulating the provision of Article 3a paragraph 1 of the new Lustration Act the legislator failed to account for guidelines stemming from the content of the above-indicated Judgement concerning legal lacunae found by the Constitutional Tribunal as regards lack of sufficient specificity and precision of the permissible limits of interference on the part of the legislator with the sphere of rights and freedoms of citizens, as well as lack of guidelines for proper understanding of the term "collaboration" (five prerequisites put forward in the reasoning of the Judgement numbered *K 39/97*). (…) the legislator reintroduced the state of uncertainty within the scope of the constitutionally safeguarded freedoms and rights of citizens and violated the principle of trust in the State and its laws. It failed to fulfil the obligation to guarantee the citizens legal security in lustration proceedings.
- Even greater reservations as regards the conformity to Article 2 of the Constitution arise in case of the provision of Article 3a paragraph 2 of the [challenged] Act, (…) [which] states that "Collaboration, within the meaning of the Act, shall also encompass intentional activities stemming from an obligation imposed by way of a statute operative at the time of undertaking such activities, and related to the function, office or work carried out or fulfilled by the person if the information gathered by them had been provided to State security agencies with the intention to violate freedoms and rights of the person and the citizen".
- The introduction by the legislator, 18 years after the political transformation in Poland, of the provision of Article 3a paragraph 2 of the Act, regulating a new, hitherto unknown form of activity encompassed by the obligation of inclusion in a lustration declaration, not only extents the scope of the repressive nature of the Act under review, but also forces persons whom the provision concerns to self-accuse of a potential commitment of a crime, which is impermissible in a democratic state ruled by law (Article 2 of the Constitution), and which does not conform to Article 6 of the Convention for the Protection for Human Rights and Fundamental Freedoms already ratified by the Republic of Poland.
- (…) expressions used in Article 3a paragraph 2 are too general and allow for an excessive freedom and discretion of the interpretation thereof. This is all the more so because they provide for the possibility to consider any accidental providing of information, irrespective of its weight, as collaboration if the person providing the information was aware that they had conversed with a representative of a security agency.
- The provision of Article 3a paragraph 2 [also envisages] both for employees of the Institute of National Remembrance and for organs applying the Act the possibility of too extensive a discretion in relation to deciding as to whether or not classify a given person as one that had collaborated with State security agencies, and, in consequence, to deciding upon the veracity of a declaration, as referred to in Article 7 paragraph 1 of the Act of 18th October 2006, submitted by a person obliged to do so. This is also decisive as regards both the inclusion of a given person in catalogues, the opening of which is envisaged by the Act of 18th December 1998 on the Institute of National Remembrance, and the application of a sanction for the "lustration lie".

Judge Mirosław Wyrzykowski

The dissenting opinion was submitted in relation to the Judgement, as regards Article 3a paragraph 1 (definition of collaboration) of the challenged Act (point 7 of the sentencing part), for reasons specified in detail in the dissenting opinions of Judges: Jerzy Ciemniewski, Ewa Łętowska and Marek Mazurkiewicz.

- (...) the definition of collaboration fundamentally determines the effects of the Lustration Act (...) it outlines (...) the legal situation of persons submitting lustration declarations, and, accordingly, the extent of severe (...) consequences envisaged for the addresses of the legal norm.
- Repetition by the legislator of the definition of collaboration, as contained in the Act of 1997, without modifying the content thereof within a scope stemming from the Judgement issued in case numbered *K 39/97*, prompts a deliberate disrespect for the significance of a judgement issued by a constitutional court and, concomitantly, deliberate inclusion of imprecise wording (preventing from the determination of an unambiguous extent) of the definition (...). Failure to reflect the content of the previous decision by the Constitutional Tribunal within the definition of collaboration while adopting a new statutory regulation may suggest that it had been the intention of the legislator to omit the Tribunal's decision, and, accordingly, to consolidate the unconstitutional wording of the provision which is of fundamental importance for lustration.

- The obligation of the legislator is to strive to achieve optimum – under given circumstances – extension of the rights of the individual and removal of any limitations upon their freedoms. This is a requirement, whose realisation requires the utmost legislative diligence.

Judge Bohdan Zdziennicki

The dissenting opinion was submitted in relation to the Judgement, insofar as the Constitutional Tribunal had not shared the view of the applicant that the entire Lustration Act 2006 in the wording introduced by the Amending Act of 2007 is unconstitutional. All of the indicated provisions are unconstitutional both on account of the non-observance of the procedure governing their promulgation and on account the content thereof.

- While adjudicating the Tribunal takes into account both the content of acts under review and the manner – as envisaged by legal provisions – of adoption thereof, as well as competence of as regards the adoption thereof. It always, *ex officio,* examines the manner, as envisaged by legal provisions, in which a given act was promulgated, hence "irrespective of the content and scope of the submitted application". Finding that the challenged provisions were promulgated with violation of the legislative procedure in force constitutes a "sufficient prerequisite for declaring them unconstitutional". This issue is of absolutely fundamental importance when the introduced legal provisions concern matters related to freedoms, rights and obligations of persons and citizens.
- Within the meaning of Article 122 paragraph 3 of the Constitution the President of the Republic of Poland may refuse to sign a bill which he/she deems as non-conforming to the Constitution, without utilising the procedure, as envisaged in the above-mentioned provision connected with a preliminary review of constitutionality of a bill (...). [Yet], the President while signing the Lustration Act in its original wording publicly announced that a number of principles adopted in the Act gave rise to his reservations as regards fundamental constitutional issues (...). (...) Still, he had not initiated procedure envisaged for the removal of the reservations concerning the unconstitutionality of the Act. Accordingly, this constituted to an infringement of Article 122 paragraph 3, read in conjunction with Article 7 and Article 126 paragraph 2 and 3 of the Constitution. [Instead,] (...) in accordance with a proposal of an amendment put forward by the President (...), the legislator adopted the Amending Act of 14th February 2007 (...). Consequently, the indicated infringement of the legislative procedure resulted in the unconstitutionality of the Act of 18th October 2006 (original Act), hence also rendering its subsequent Amendment unconstitutional.
- Law serves to meet current needs. One refers to history and documents connected therewith to emphasise the continuity of the functioning of legal principles and institutions. This strengthens respect for tradition and serves to raise prestige and authority of the law connected therewith. The very title of the Lustration Act indicates that it is concerned with history ("between the years 1994-1990"). From the perspective of the national legal order this situation is untypical, since an attempt is being made to make use of legal regulations to handle with events and phenomena from the past. Therefore, one deals with extraordinary solutions, alien to ordinary legislation.
- It is impermissible to punish persons identified in a discretional manner for acts or omissions, which – at the time when they took place – were permissible. Neither may they be deemed an offence in accordance with general legal principles adopted by civilised nations.
- Resolution No. 1096 (1996) of the Council of Europe outlines the intransgressible framework for all lustration activities. It is necessary to distinguish lustration from prosecution of criminal offences, committed by individuals during communist totalitarian regime, which should be prosecuted and punished under a penal code in force. In relation to lustration, one may only apply administrative measures (...). (...) Therefore, the aim of lustration carried out by way of administrative measures does not consist in more or less open or disguised punishment of persons. [Accordingly,] given such an unambiguous goal of lustration stemming from the European standards in force, the procedure should be limited in time.
- A Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (Document No. 7568 of 3rd June 1996) emphasises that disqualification from office (posts) based on lustration should not be longer than five years, since the capacity for positive change in an individual's attitude and habits should not be underestimated. Pursuant to the Report, lustration measures should cease to take effect no later than 31st December 1999, because the new democratic system should have been consolidated by that time in all former communist totalitarian states.
- The foundation of a democratic state ruled by law, as is the case with the Republic of Poland, lies in the principle of the supremacy of the Constitution. All statutes must conform to constitutional requirements and rigours. It is categorically inadmissible to reverse the situation, that is, to amend the Constitution in order to adapt it to the requirements and purposes of particular statutes.

- The freedom of thought and conscience, as guaranteed by a democratic state ruled by law, ensures that everyone is free to observe, assume and manifest individually or with other persons his/her beliefs. This also applies to the assessment of history.
- Throughout the period when the Constitution of the Republic of Poland has been in force, as has already been stated, the processes of both making and enforcing the binding law must comply with all principles of a democratic state ruled by law (Article 2 of the Constitution). There are no, and it is impermissible to crate any special, extraordinary constitutional rules for the handling of the past connected with the Polish People's Republic, as this would amount to a division of the Polish State by way of introducing parallel legal-material, procedural and systemic structures, resulting, in consequence, in legal dualism.
- The preamble to the Lustration Act puts forward a binding version of Polish history following the conclusion of the Second World War. It introduces moral assessment, which is binding upon everyone, and which constitutes a basis for the creation of various forms of legal responsibility in the Act, and departs from the continuity of the State by way of a sharp dividing line between the years 1944-1990 (the communist State) and the present-time period, which has lasted since 1st August 1990 until the present day. Such a wide scope and the lofty style of the preamble to the Act of 18th October 2006 render it, in a sense, competitive with the Preamble to the Constitution.
- Never before has the Constitutional Tribunal, while reviewing the constitutionality of an act possessing a preamble, evaluated the preamble to the act solely as regards the conformity thereof to the Preamble to the Constitution. Assuming that such a review were admissible, then finding the non-conformity of a preamble to an act to the Preamble to the Constitution would make it possible, based solely on this fact, to find the entire act as non-conforming to the Constitution.
- The aim of the Lustration Act consists in a penal stigmatisation of persons connected in one way or another with "security agencies of the communist State" and to realise "constitutional guarantees providing citizens with the right to information on persons" discharging functions, holding positions and professions that require the so-called public trust.
- The aim of lustration should be to prevent the resurgence or consolidation of a totalitarian system. Where the risk of resurgence of the communist totalitarian state does not exist, then lustration is unnecessary. In such cases it is only necessary to prevent any attempts aiming at the resurrection of totalitarian methods connected with the limitation or violation of constitutional rights and freedoms of persons and citizens, whereas criminal acts committed by individuals during the communist totalitarian regime should be prosecuted and punished under penal provisions in force.
- For the purpose of the handling of past events and phenomena the preamble to the Act of 18th October 2006 envisages a completely unconventional legal construction. The legislator established a universally binding version of history concerning Poland between the years 1944-1990. The above-mentioned historical assessment introduced to the legal order render the Polish People's Republic illegal, and, accordingly, break the continuity of the State and the legal order.
- In accordance with the standards of a democratic state ruled by law (Article 2 of the Constitution) law should not impose one and only assessment of the past and produce on this basis any legal effects against the citizen. A living human being is a subject, as opposed to an object, thus he/she is neither a "clue", "disclosure" nor "another lustration scandal". Historians should make use of documents only on condition that they observe all constitutional guarantees granted to all citizens. No imposed version of history may constitute the basis for treating anybody as an excluded person, or merely an "object of research".
- In no civilised state can a historian substitute the judicature. Law, politics and history are distinctly separated from one another. Judicature should not deal with politics, politics must not exert influence on the judicature, and historians must not decide upon legal matters (in particular concerned with rights and freedoms of the person and the citizen) or devote themselves to activities constituting a surrogate for politics.
- All decisions may solely be made by the judge, who should maintain an adequate distance from facts and various interests connected therewith. The judge is burdened with the weight of a decision, which he/she declares as lawful. The person is vested with independent power and one expects objectivity from them. They should not succumb to emotions or any pressures or expectations.
- It is inadmissible to *ex post* penalise activities which at the moment of their performance were legal, and remain legal at present, unless one departs from the continuity of the State and the legal order.
- The lawfulness of activities performed by State security agencies between the years 1944-1990 needs to be acknowledged in the Act on the INR. Were the security agencies operating between the years 1944-1990 illegal, then they could not draw lawful documents constituting resources of the archives of the INR.
- These are international treaties ratified by the Polish People's Republic, concerning the most vital interests of Poland (e.g. its borders) or participation in the international legal life (e.g. the UN) etc. that make it inadmissible to render both the Polish People's Republic and its organs illegal.

- Breaking the continuity of law requires particular prudence, as it needs to be undertaken with full awareness of the consequences thereof for both the internal and international law. It may not be performed in an unspecified manner, as it were, incidentally in a preamble to an act, hence with violation of fundamental principles of correct legislation.
- Regulating moral issues by way of the law does not prove the strength of the authority; rather on the contrary, confirms its weakness.
- By regulating moral and customary standards the preamble to the Act went beyond the scope of admissible content envisaged for the legislature (Article 2 of the Constitution). The universally binding moral standard, introduced by way of the preamble, serves to punish (by way of penal stigmatising) persons discharging functions, holding positions and professions that require public trust. The Act creates a multistage repressive system. The stigmatisation must be instantly made public "on account of the constitutional guarantees providing citizens with the right to information". Accordingly, in a manner devoid of any specificity demanded of penal regulations, [the legislator] introduced a new and unknown to penal legislation punitive measure – the punishment in the form of infamy. The punishment is not encompassed within the scope of standards for imposing a penalty required by Article 42 paragraph 1 of the Constitution. It replaces accountability of the individual with collective responsibility. It departs from the *lex retro non agit* principle and allows punishing for activities which were not deemed offences at the time of commitment thereof.
- The completely unconventional regulations adopted in the preamble to the Lustration Act for the purpose of the handling of the past are not encompassed within the scope of the principle of a democratic state ruled by law.

[Translation: *Marek Łukasik*]