Strasbourg, 24 March 2014

Opinion No. 788 / 2014

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

Law "on Government Cleansing" ("lustration law") of Ukraine

Search results for relevant case-law in the CODICES database of the Venice Commission

1. ROM-2010-2-002

a) Romania / **b)** Constitutional Court / **c)** / **d)** 07-06-2010 / **e)** 820/2010 / **f)** Decision concerning the application for review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 / **g)** *Monitorul Oficial al României* (Official Gazette), 420/23.06.2010 / **h)** .

Keywords of the Systematic Thesaurus:

3.12. General Principles - **Clarity and precision of legal provisions.**
3.16. General Principles - **Proportionality.**
5.3.13.22. Fundamental Rights - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - **Presumption of innocence.**
5.3.38. Fundamental Rights - Civil and political rights - **Non-retrospective effect of law.**

Keywords of the alphabetical index:

Penalty, collective / Lustration, delay.

Headnotes:

The Law of Lustration regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 establishes a new basis for limiting access to public offices, consisting in affiliation to the structures of the communist regime. However, a law cannot introduce collective penalties, based on a presumption of guilt resulting from a mere affiliation to the regime. A law cannot be adopted in violation of the principle of non-retroactivity, and, moreover, the delay in passing this Law - 21 years after the fall of communism - is relevant in determining the disproportionate nature of the restrictive measures.

Summary:

Acting in accordance with Article 146.a of the Constitution, within the context of *a priori* review, a group of 29 senators and 58 deputies made an application for the review of the constitutionality of the provisions of the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989.

The applicants alleged that the Lustration Law breached Article 37.1 of the Constitution in conjunction with Articles 16.3 and 40.3 of the Constitution, in that the Law provided for a new situation which would justify a restriction on the right of access to public offices - a situation not provided for by Article 53 of the Constitution. Even if it were possible to restrict the right of access to public offices on grounds of membership in certain bodies of the communist regime, the question would still arise of the proportionality and legal effectiveness of such measures in the light of their adoption more than 21 years after the fall of the communist regime. Thus, the Law violated the requirement of foreseeability of the rule of law by introducing a limitation on the right to stand for election on the basis of a general guilt founded on the mere criterion of membership in the structures of a system which, at the time of its existence, was consistent with the constitutional and statutory provisions applicable in the Romanian State. The applicants further submitted that the Lustration Law clearly created discrimination between Romanian citizens with respect to access to public functions, appointed or elected, on the ground of membership in the Communist Party between 6 March 1945 and 22 December 1989.

The Lustration Law contravened Articles 11.2 and 20 of the Constitution on the supremacy of international legal instruments ratified by Romania in the field of human rights.

The main flaw of the Lustration Law was that it created a genuine collective sanction, based on a form of collective responsibility and general guilt based on political criteria. Thus, mere membership in a political structure or a body belonging to a political regime amounted to a presumption of guilt, regardless of how a person acted and behaved while holding a position. In that connection, the applicants invoked the conclusions by the Venice Commission in Opinion no. 524/2009 (CDL(2009)132) with respect to the Lustration Law of Albania stating the provisions of the Lustration Law on the termination of mandate violated the constitutional guarantees of their [the persons holding the offices in question] mandate, and it found "there are several elements which indicate that the Lustration Law could interfere in a disproportionate manner with the right to stand for election, the right to work and the right of access to the public administration."

Analysing the application to the Court alleging the unconstitutionality of the law as a whole, the Constitutional Court holds as follows:

In Romania, communism was condemned as doctrine, and the change of the regime was established by legal acts which rank as constitutional law, such as the Message to the People of the Council of the National Salvation Front (FSN), published in the Official Gazette, Part I, no. 1 of 22 December 1989, and the Legislative Decree on the establishment, organisation and functioning of the National Salvation Front and of regional councils of the National Salvation Front, published in the Official Gazette, Part I, no. 4 of 27 December 1989.

Every country faced with the problem of lustration has adopted a certain method of achieving lustration based on the aim pursued and the national specific situation. The Czech Republic adopted a radical model, Lithuania and the Baltic countries adopted an intermediate model, and Hungary, Poland and Bulgaria adopted a moderate model.

After an unsuccessful attempt - that of 1997 - the adoption of the Lustration Law in Romania has no legal effect - it is not up-to-date, necessary or useful; it is only of moral significance, given the long period of time which has elapsed since the fall of the communist totalitarian regime. Citing Article 53 of the Constitution, the initiators of the Law themselves state that the Lustration Law refers to the constitutional rule that the "the exercise of certain rights or freedoms may solely be restricted by law, and only if necessary, as the case may be: for the defence of [...] morals, [...]", morals tainted by customs of communism.

With respect to high public positions in Romania, non-affiliation with the old communist structures is currently not a condition of employment; there is only an obligation for such persons to declare their affiliation or non-affiliation with the former political police.

The Court notes the imprecise, confusing and inadequate wording of the preamble to the Law, which leads to the conclusion that the restrictions and prohibitions in this Law are aimed at the "restriction on the exercise of the right to be appointed or elected to public offices of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989".

The Court also notes that the provisions of the Lustration Law, not being sufficiently clear and precise, have no regulatory rigour.

The Court observes that according to the impugned law, liability and penalties are based on the fact that a person held an office in the structures and repressive apparatus of the former communist totalitarian regime. Liability, regardless of its nature, is primarily an individual

responsibility, and it arises only on the basis of acts and actions carried out by a person and not on presumptions.

The Lustration Law is excessive in relation to the legitimate aim pursued, since it does not allow for the individualisation of its measures. The Law establishes a presumption of guilt and a genuine collective punishment, based on a form of collective responsibility and a generic, comprehensive guilt, established on political criteria; this contravenes the principles of the rule of law, the legal order and the presumption of innocence laid down by Article 23.11 of the Constitution. Even if the impugned law allows recourse to justice for justifying the prohibition of the right to stand for election and be elected to certain offices, it does not provide for an adequate mechanism for determining the actual activities carried out against fundamental rights and freedoms.

No one shall be subjected to lustration for his or her personal opinions and own beliefs, or for the mere reason of association with any organisation which, at the time of association or carrying out of the activity, was legal and did not commit any serious human rights violations. Lustration is permitted only with respect to those persons who actually took part, together with State bodies, in serious violations of human rights and freedoms.

Article 2 of the law under constitutional review provides for one of the major collective penalties listed concerning the right to stand for election and the right to be elected to high public offices for persons who belonged to certain political and ideological structures. The statutory provisions of that article are contrary to the constitutional provisions of Articles 37 and 38, which enshrine the right to be elected, with the prohibitions being expressly and exhaustively listed. It is clear that the provisions of Article 2 of the Lustration Law exceed the constitutional framework, creating a new ban on the right of access to public office, which fails to comply with Article 53 of the Constitution relating to restrictions on the exercise of certain rights or freedoms.

The Court considers that the Lustration Law infringes the non-retroactivity principle enshrined in Article 15.2 of the Constitution, which states: "The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions." A law applies to facts occurring and acts committed after its entry into force. Therefore, it cannot be maintained that when respecting the laws in force and acting in the spirit thereof, citizens should consider any possible future regulations.

The Court notes that the Lustration Law was passed 21 years after the fall of communism. Consequently, the late enactment of this law, without being decisive in itself, is considered by the Court as relevant with respect to the disproportionate nature of the restrictive measures, even if they pursue a legitimate aim. The proportionality of the measure to the aim pursued must be considered in each case in the light of an assessment of the country's political situation as well as other circumstances.

In this respect, the case-law of the European Court of Human Rights on the legitimacy of lustration law over time is relevant; here, the Court refers to the case of *Zdanoka v. Latvia*, 2004.

For the reasons set forth herein, the Constitutional Court finds that the Lustration Law regarding a temporary limitation on access to certain public functions of persons who were members of the power and repressive bodies of the communist regime between 6 March 1945 and 22 December 1989 is unconstitutional.

Languages:

Romanian.

2. MKD-2010-1-002

a) "The former Yugoslav Republic of Macedonia" / **b)** Constitutional Court / **c)** / **d)** 24-03-2010 / **e)** U.br.42/2008 / **f)** / **g)** *Sluzben vesnik na Republika Makedonija* (Official Gazette), 45/2010, 01.04.2010 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

3.3. General Principles - **Democracy.**
3.10. General Principles - **Certainty of the law.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.** (Lustration, law, holders of public office)
5.3.29. Fundamental Rights - Civil and political rights - **Right to participate in public affairs.**
5.3.31. Fundamental Rights - Civil and political rights - **Right to respect for one's honour and reputation.**

Headnotes:

The case concerned provisions of the Lustration Law and its application to holders of public office in the period after the adoption of the 1991 Constitution, as well as provisions relating to the publication of the names of those who cooperated with the state security organisations in the Official Gazette, and the application of these provisions to holders of posts in public office, political parties, citizens' associations and religious organisations.

Summary:

Three individuals and one NGO asked the Court to review the constitutionality of the Law on Determination of an Additional Condition for the Performance of a Public Office (Official Gazette nos. 14/2008 and 64/2009), hereinafter, the "Lustration Law", in its entirety, together with selected articles of the Law.

The applicants argued that the Lustration Law had an ideological-political character, and was an undesirable and negative example of legislation that has a retroactive impact, and that it violated fundamental rights and freedoms. It condemned the entire social-political system from 1944 to the present day, and the provision of the Lustration Law that states that it will be applied only to holders of public office or candidates for those positions in the next five years "spoke volumes" about the nature of this Law. They also claimed that there were no constitutional grounds to adopt the Lustration Law, and, as a result, it was unsustainable in the constitutional order of the Republic of Macedonia. One of the applicants claimed that the offices of the President and the office of a judge at the Constitutional Court are public offices for which the conditions for election are defined by the Constitution and for which there is a constitutional guarantee for an unobstructed performance of competences. The stipulation of additional conditions by the Lustration Law for these offices was an interference in a matter that has solely a constitutional character.

Under Article 2.1 of the Lustration Law, an additional condition was imposed on holders of public office or candidates for those positions. In the period prior to the adoption of the Declaration of the Antifascist Assembly of the National Liberation of Macedonia (ASNOM) for the fundamental rights of the citizen of Democratic Macedonia at the First Session of ASNOM on 2 August 1944 until the date of entry into force of this Law, they must not have been registered in the dossiers of the state security bodies and the civilian and military bodies of the

SFRY state security as collaborators or secret informers in the operational collection of information and data that were the subject of processing, maintenance, and use by the state security bodies, in the form of automated or manual collection of data and dossiers, created and kept for certain persons, with which fundamental rights and freedoms were violated or restricted for political or ideological reasons.

Under Article 8 of the Lustration Law, the Commission shall, *ex officio,* promptly and without debate, establish with a resolution the failure of the candidate for a holder of a public office or the holder of a public office to submit a written statement and publish it in the "Official Gazette of the Republic of Macedonia".

Pursuant to Article 13, the Commission shall, immediately after the conclusion of the procedure for verification of the facts before the Commission (that is, if a procedure was conducted before a competent court after the court decision became effective) publish in the Official Gazette the first name, the father's name, and the last name of the person who cooperated with the state security bodies.

Article 34.1 of the Lustration Law allows political parties to impose an additional condition on holders of party office, members of organs, employees in the expert services and candidates for these positions. Paragraph 2 of this Law allows associations of citizens and foundations to impose an additional condition, in line with the Law, on holders of management positions, members of organs, employees in expert services and candidates for these positions. Paragraph 3 of the same Law allows religious communities and religious groups to do the same.

The Court assessed the extension of the temporal scope of the Law, defined in Article 2 of the Law, to the period after 1991. Previously, the law only applied to those individuals who violated or restricted fundamental rights and freedoms for political or ideological reasons in order to realise material advantage or benefits in employment or promotion in the previous social-political system, which was based on a one-party rule and a legal system under which victims could not exercise their rights and perpetrators were not properly punished. After 1991, when the current Constitution was adopted, a democratic system was established on the basis of the separation of powers, with the protection of human rights and freedoms at its core, as a fundamental value of the constitutional order, on the basis of which normative rules and institutions have been established in order to protect human rights and freedoms. The Court found that the temporal extension was not constitutionally justified. The present national Constitution provides the cornerstone for the building of a democratic society in which the rule of law and the protection of human rights and freedoms are elevated to the level of fundamental values of the constitutional order, as a result of which the inclusion of this period in the Law actually means the negation of the values and institutions established in the Republic of Macedonia in accordance with the current Constitution. This also casts doubts over the functioning of the legal system, that is, the rule of law, as a fundamental value of the current social-political system.

Lustration is a method of dealing with the past, with a view to highlighting and eliminating the potential for further violation of human rights in the current social-political system. It should apply to the period when people were able to violate human rights and misuse them for their own purposes, in the absence of established constitutional and legal mechanisms to sanction them. This would indicate that lustration should not apply to the period when the state has built a new social-political system, based on human rights and their protection. The principle of a democratic society under the rule of law implies that breaches of human rights should be sanctioned within the framework of an established and lasting legal system, and not by measures of an occasional and temporal nature, which is the case with the Lustration Law in the given historical circumstances.

The Court further noted that the solution referred to in Article 8 of the Lustration Law, whereby the names of persons who have failed to submit a statement are to be published in the Official Gazette, *ex officio* by the Commission and without a debate, is a violation of citizens' dignity, moral, and personal integrity, enshrined in Articles 11 and 25 of the Constitution. The Lustration Law also provides that the failure by a holder of a certain office or a candidate for that post to submit a statement will result in the public announcement of his or her name in a public medium. No enquiry is made into the reasons behind the failure to submit the statement and no arrangements are made to conduct proceedings to establish the facts about this person's cooperation with the secret services. This results in indiscriminate, unchecked and public stigmatisation of that person as a former associate or informer, as somebody who ordered or made use of information in order to abuse or restrict human rights and freedoms for ideological or political reasons and who gained personal or material advantage as a result. The Court found this state of affairs to be unconstitutional and a disproportionate solution, as it exceeds the justification of the stipulation of the special condition for the performance of public office. It also entails disrespect for the moral integrity and dignity of the citizen.The Court also found that the stipulation of a possibility in Article 34 of the Lustration Law for the obligation to provide a statement (in other words, an additional condition for the performance of a public function which will also apply to those who carry out party-related duties for political parties, belong to associations of citizens and foundations and religious communities and religious groups) results in the interference by the state in their work. This oversteps the constitutional guarantees for citizens of freedom of association for the purposes of exercising and protecting their political, economic, social, cultural, and other rights and convictions. It also entails violation of the constitutional determination for the separation of the church, religious communities and religious groups from the state.

As a consequence, the Court repealed Article 2.1 in the part: "until the date of entry into force of this Law", Article 8 in the part: "and publishes it in the "Official Gazette of the Republic of Macedonia", Articles 13 and 34 of the Lustration Law.

Languages:

Macedonian.

3. CZE-2008-1-003

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 13-03-2008 / **e)** Pl. US 25/07 / **f)** Institute for the Study of Totalitarian Regimes - Petition to Annul Act no. 181/2007 Coll. / **g)** *Sbírka zákonu* (Official Gazette), 160/2008; *Sbírka nálezu a usnesení* (Collection of decisions and judgments of the Constitutional Court); http://nalus.usoud.cz / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.3.1. Constitutional Justice - Jurisdiction - **Scope of review.**
3.10. General Principles - **Certainty of the law.**
3.12. General Principles - **Clarity and precision of legal provisions.**
3.18. General Principles - **General interest.**
3.22. General Principles - **Prohibition of arbitrariness.**
5.3.27. Fundamental Rights - Civil and political rights - **Freedom of association.**
5.3.29. Fundamental Rights - Civil and political rights - **Right to participate in public affairs.**
5.4.9. Fundamental Rights - Economic, social and cultural rights - **Right of access to the public service.**

Keywords of the alphabetical index:

Political party, membership / Totalitarian regime, values / Public office, access / Democracy, capable of defending itself.

Headnotes:

In view of the principle of separation of powers under Article 2.1 of the Constitution, it is not the role of the Constitutional Court to consider the purposefulness of the establishment of a state institution that is to study a particular segment of history; that question falls into the area of the legislature's political decision-making.

The statutory requirement that those serving as members of the Council of the Institute for the Study of Totalitarian Regimes or as managing employees of the Institute and the Archive of Security Services do not belong to any political party or movement is "legitimate". It is not inconsistent with the right to establish political parties and associate in them under Articles 20.2 and 20.3 of the Charter of Fundamental Rights and Freedoms (the "Charter"), or with Article 44 of the Charter.

The condition of trustworthiness for serving as a member of the Council of the Institute for the Study of Totalitarian Regimes or a managing employee of the Institute and the Archive consists of the fact that a person was not a member of or candidate for the Communist Party of Czechoslovakia or the Communist Party of Slovakia between 25 February 1948 and 15 February 1990. This is not counter to the Constitution; in view of the concept of "a democracy capable of defending itself," the nature of that condition, and the significance and purpose of Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Services, and Certain Amending Acts (hereinafter the Act).

The statutory authorisation of the Senate, as a political institution, to recall a member of the Institute Council in the event that - in the words of the statute - he or she "does not properly perform" his role, creates room for arbitrariness. In the context of the constitutional guarantee of the right to freedom of scholarly research under Article 15.2 of the Charter, this is unacceptable from a constitutional viewpoint for a scholarly institution built on the principle of autonomy, independence, and separation from the state power. In terms of the subjective, fundamental right of a Council member to perform his or her office without interference, this condition is also inconsistent with the right to equal access to elected and other public offices under Article 21.4 of the Charter.

Summary:

A group of deputies petitioned the Constitutional Court regarding the Act under Article 87.1 of the Constitution, on annulling statutes. The Constitutional Court annulled part of § 7.9 of the Act, specifically the words "properly or." The plenum denied the deputies' petition calling for the repeal of the Act in its entirety, and various individual provisions. It also refused the petition to annul related provisions of other statutes.

The Act set up and regulates the Institute for the Study of Totalitarian Regimes and the Archive of the Security Services. The original wording of § 7.9 of the Act, with which the judgment was concerned, was, "The Senate may recall a member of the Council if he does not perform his office properly or for a period longer than six months."

The petitioners objected to the very existence of the Institute and its mission. They questioned the constitutionality of its institutional framework, criticised the purpose of the Act, consisting of nationalising historical research on a particular segment of history, and the ideological and blanket evaluation of that segment of history by the legislature. The deputies argued that this violated the freedom of scholarly/scientific research guaranteed by the Charter. They criticised

the Act as a whole, and a number of its individual provisions, because it was incomprehensible and imprecise. They challenged the condition of trustworthiness, under which somebody who was a member of or candidate for the Communist Party of Czechoslovakia (KSC) or the Communist Party of Slovakia (KSS) cannot join the Institute Council, arguing that this was inconsistent with equal access to public office. They pointed out that the condition of non-membership in a political party or movement is inconsistent with the right to establish political parties and associate with them, with the right to equal fundamental rights. It is also inconsistent with Article 44 of the Charter.

The Constitutional Court stated that the mere establishment of the Institute has no constitutional law dimension. The state has a legitimate right to establish such an institution. The Constitutional Court cannot review the purposefulness of an institution established by statute, because such consideration falls into the field of political decision-making.

The Constitutional Court concluded that the very designation of the historical period with the terms "the time of lack of freedom" and "the period of communist totalitarian power" cannot justify a straightforward conclusion that there is a restriction on scholarly research, because they merely define the historical segment of time that is to be the subject of researched. It is not a matter of evaluation of these historical periods, but only of a simplifying name. The Court pointed to Judgment Pl. ÚS 19/93, where it ruled on the repeal of Act no. 198/1993 Coll., on the Illegality of the Communist Regime and Resistance against it. The Constitutional Court commented that the circumstances of that case resembled those of the present one, in that both concern a morally and legally political proclamation by Parliament.

As regards the condition of non-membership in a political party or movement, the Constitutional Court emphasised the aim pursued by the establishment of the Institute. The Constitutional Court noted that this aim arises particularly from the preamble to the Act. In this situation, the Institute Council has a profound influence on the operation of the institution, and the overriding will of the legislature is, given the means at its disposal, to achieve the greatest possible independence for that institution. The Constitutional Court took the view that it is completely "legitimate" to make "non-partisanship" a condition for membership.

Only those who had not been members of or candidates for the Communist Party of Czechoslovakia or the Communist Party of Slovakia between 1948 and 1990 could satisfy the condition of trustworthiness in this context. The Constitutional Court referred to the last judgment in the matter of the so-called "lustration Act," Pl. ÚS 9/01. It emphasised that the promotion of the idea of "a democracy capable of defending itself" is a legitimate aim of the legislature of every democratic state, at any phase of its development. A democratic state may require an individual to fulfil certain conditions, in order to enter into the state administration and public services. The majority of the plenum was of the opinion that an individual's close association with the regime of pre-November 1989, and its repressive elements, is a fact which could negatively affect the trustworthiness of a public office held by that individual in a democratic state. The Parliament of the Czech Democratic State, in Act no. 198/1993 Coll, described the communist regime as "criminal, illegitimate, and despicable." In the Constitutional Court's opinion, it is up to the legislature to set the prerequisites for holding office in a manner that corresponds to the purpose for which an office is established - it is not the Constitutional Court's role to assess the suitability of the criteria specified. This was not a case of declaring the general untrustworthiness of persons who were members of or candidates for the Communist Party of Czechoslovakia or the Communist Party of Slovakia during the period, but more a matter of a form of bias *sui generis*. The Constitutional Court weighed up the proportionality between the right to access to public office under Article 21 of the Charter on the one hand, and the principle of protection of democracy on the other. It concluded that the public interest in protecting democracy is, at this time, i.e. at the time of the decision, stronger. The relevant majority of the members of the plenum took the view that if somebody belonged to or

was a candidate for the Communist Party of Czechoslovakia or the Communist Party of Slovakia, even briefly, in his case there are "grounds to doubt his freedom from bias". At this time, without a historical analysis of the regime in question, any evidence that could be presented for or against such doubt can only be relative. The Constitutional Court also measured the intensity of the interest in protecting democracy and the interest in understanding the past against the right to access to a very narrowly defined public office, which is a point of concern for a diminishing circle of persons. It concluded that the public interest in protecting democracy is, at this time, i.e. at the time of the court's decision, stronger.

The Constitutional Court only found § 7.9 of the Act to be unconstitutional. In the Constitutional Court's opinion, under Article 21.4 of the Charter, members of the Council must be protected from arbitrariness on the part of the state during the entire period when they hold office, (i.e. included in the specification of grounds for their term in office to terminate). However, the wording of the statutory provision in question, which permits the Senate to recall a member of the Institute Council, if he does not "properly" perform his office, does not meet this requirement. The formulation, in the context of freedom of scholarly research, creates a risk of arbitrariness in recalling members of the Institute Council.

The original judge rapporteur was J. Nykodým; however his draft decision was not accepted, and Judge S. Balík was assigned to draft the judgment. A dissenting opinion to the reasoning of the judgment was filed by Judge V. Güttler. A dissenting opinion to the verdict of denial and the reasoning of the judgment was filed by Judges F. Duchon, V. Kurka, J. Musil, J. Nykodým, P. Holländer, P. Rychetský and E. Wagnerová.

Languages:

Czech.

4. POL-2007-3-005

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 11-05-2007 / **e)** K 2/07 / **f)** / **g)** *Dziennik Ustaw* (Official Gazette), 2006, no. 85, item 571; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2007, no. 35, item 48 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

1.3.1. Constitutional Justice - Jurisdiction - **Scope of review.**
1.5.6.3. Constitutional Justice - Decisions - Delivery and publication - **Publication.**
1.6.5. Constitutional Justice - Effects - **Temporal effect.**
1.6.7. Constitutional Justice - Effects - **Influence on State organs.**
3.9. General Principles - **Rule of law.**
3.12. General Principles - **Clarity and precision of legal provisions.**
3.15. General Principles - **Publication of laws.**
3.16. General Principles - **Proportionality.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.** (Lustration, procedure)
5.3.13.1. Fundamental Rights - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - **Scope.**
5.3.13.22. Fundamental Rights - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - **Presumption of innocence.**
5.3.24. Fundamental Rights - Civil and political rights - **Right to information.** (Right to information, condition)
5.3.25.1. Fundamental Rights - Civil and political rights - Right to administrative transparency -

Right of access to administrative documents.

5.3.31. Fundamental Rights - Civil and political rights - **Right to respect for one's honour and reputation.**

5.3.32.1. Fundamental Rights - Civil and political rights - Right to private life - **Protection of personal data.**

5.3.38. Fundamental Rights - Civil and political rights - **Non-retrospective effect of law.**

5.3.41.1. Fundamental Rights - Civil and political rights - Electoral rights - **Right to vote.**

5.3.41.2. Fundamental Rights - Civil and political rights - Electoral rights - **Right to stand for election.**

Keywords of the alphabetical index:

Public function, person discharging / Collaboration / Data, correction, right / Act, secret, binding force / Legislation, correct, principle.

Headnotes:

The Polish Constitution envisages the universal right of access to official documents and data collections regarding the subject, and the right to demand the correction or deletion of untrue or incomplete, or information acquired by means contrary to statute. The constitutional right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute, which constitutes a reference to and elaboration of the right of privacy shall not be effectively limited to any one category of persons by way of statute. There is an unlimited scope of application to the right to informational autonomy, due to the guarantee function of the right to legal protection of one's honour and good reputation. Any limitation of the above right must be in line with the principle of proportionality.

The State may acquire, gather and make accessible only such information on citizens as is necessary in a democratic state ruled by law. On the one hand, the individual is entitled 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 are binding upon any lustration procedure.

The principle of proportionality should be understood not only as a component 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.

Under the Constitution, in a state ruled by law, secret normative or quasi-normative acts do 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 be determined solely by means of constitutional sources of law.

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 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. An appropriate adaptation period in such cases would be the term of office of persons elected in universal and direct elections.

Summary:

The subject of review in the present case was the Lustration Act (hereinafter: "the Act") which introduced amendments to other acts in matters concerning the submission of lustration declarations and the conduct of lustration (vetting).

The review was initiated by a group of *Sejm* Deputies.

The judgment 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.

The subject of the constitutional review in the case of lustration consists in examining whether the choice of values has been arbitrary, and - in particular - whether it adequately takes into account the protection of the constitutional freedoms and rights of the individual, and whether 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.

Lustration should focus on threats to the fundamental rights of the individual and to the process of democratisation. Its purpose should not be the punishment of persons presumed guilty. This task has been vested in public prosecutors applying penal law. The aim of lustration proceedings should not be revenge. Abuse of the procedure for political or social goals should not be tolerated.

A democratic state ruled by law possesses all necessary means to guarantee that 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 fair trial, the right to be heard or the right to defence, and apply such rights also to persons who failed to apply them when they were in power. Provisions of penal law must not be adopted which would be given retroactive force. However, it will be permissible to bring to court all persons responsible for any acts or negligence which, when perpetrated, were not recognised as offences according to the national law then in force, but which were deemed such in the light of general legal principles adopted by civilised nations. If the 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 Act may only be applied towards an individual, not collectively.

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 where appropriate, that a lustrated person shall enjoy all procedural guarantees, including the application of the *in dubio pro reo* principle, where the person undergoing lustration is to be given the benefit of the doubt 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.

The Tribunal has assessed the definition of collaboration (Article 3a.1 of the Act) as being in conformity with the indicated bases of review, provided that it is understood that the mere

expression of somebody's willingness to engage in collaboration with the security organs will not suffice; actual activities undertaken that materialise the collaboration.

The definition of collaboration with security agencies shall be characterised as follows. Collaboration must consist of contacts with State security agencies, where the person collaborating provides the organs with information. The collaboration must be conscious, that is, the person undertaking such collaboration must be aware that he or she has established contact with representatives of one of the agencies enumerated in Article 2.1 of the Act. It 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 about whom the information was gathered. It must involve the operational gathering of information by the agencies enumerated in Article 2 of the Act. Lastly, collaboration may not be limited to a declaration of will; there has to be a conscious undertaking of particular activities in order to fulfil duties arising from such collaboration.

The submission of any declaration by a citizen at the request of authorities must be protected by the presumption of the veracity of facts and circumstances 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 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 Act, has been found to be unconstitutional. "Similarity" is not a sufficiently precise notion, and raises doubts as to the specificity of provisions of penal law, as stemming from the principle of a democratic state ruled by law.

Distinguishing State security agencies from the body of organs and institutions making up the apparatus of the totalitarian state, shall not be entirely arbitrary in nature; it must consist in the indication of an essential feature common to all units, and which could determine that State security agencies should be considered individually in the light of the goal of the Act.

Judging from the constitutional regulations (Articles 61.1 and 103), somebody discharging a public function undoubtedly becomes a public person by way of performing tasks of public authority, managing communal assets or the property of the State Treasury. The notion of a "public person" shall not be synonymous with the notion of a "person discharging public functions". Not every public person may be considered as one who discharges a public function. Discharging a public function entails the performance of certain tasks in an office, within the institutional framework of public authority, within other decision-making positions in the public administration, and any other public institutions. Therefore, whether or not a function is a public one will depend upon whether a given person has been vested with at least a narrow scope of decision-making competence within a given public institution.

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

Legislation provides for a sanction of a fixed period of forfeiture of right to discharge public functions, (i.e. for 10 years). This takes place automatically, where lack of veracity of a lustration declaration is found. The Tribunal has judged this to be unconstitutional.

Where loss of veracity is found, this penalty of forfeiture also applies to people who collaborated with security agencies under compulsion or in fear of loss of their lives or health. If somebody

was acting under compulsion in fear of losing their lives or jeopardising their health or that of those closest to them should not be subject to sanction, because the compulsion leads to the invalidity of a declaration of will. 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 meet the standards of the principles of correct legislation (Article 2 of the Constitution) or the requirements of the principle of proportionality.

The obligation to submit lustration declarations by persons elected in universal elections which had taken place before the Act came into force has been found by the Tribunal as unconstitutional.

Insofar as the second Sentence of Article 21.2 of the Act deprives a court of the right to specify the lower limit on the period of forfeiture of the right to stand as a candidate in elections, it 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 ten years).

The automatic nature of sanctions for submitting untrue lustration declarations, operating under legislation, with no scope for specialist disciplinary courts, familiar with the 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.

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

When devising a system of universal access to information relating to persons discharging public functions, the legislator, for reasons that are inexplicable in light of the Constitution, limited such access, but excluded only some of the so-called sensitive data. These included racial or ethnic origins, religious convictions, religious affiliation and data on the state of health or sexual life. This list was too narrow.

The Act, as its 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 threats emerging from the totalitarian past. However, this does not provide a reason why 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, the mechanism for which is specified in Articles 47 and 51 of the Constitution.

Norms declared unconstitutional lose their binding force at the date of the promulgation of a judgment by the Constitutional Tribunal in the Journal of Laws. Nonetheless, the mere pronouncement of the judgment by the Tribunal, upon completion of review procedures, shall not be without legal significance. As of the date of public delivery of a judgment (which always occurs prior to the derogation of the unconstitutional provision by way of promulgation of the judgment in the Journal of Laws) the provision under review shall lose its presumption of constitutionality. Bodies applying provisions which have either already been declared unconstitutional or which are within the delay period when the entry into force of a judgment has been postponed by the Tribunal should take into account the fact that they are dealing with provisions that have lost their presumption of constitutionality.

Formerly, double negation (as in the expression "is not inconsistent") often resulted in the confirmation of constitutionality, based on the rules of logic. At present it has 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.

In order to fulfil the condition of "promulgation of a statute", publication of the next issue of the Journal of Laws is necessary, and the issue has to be available for distribution. From the perspective of Article 88 of the Constitution, it is irrelevant 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 an 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.

Pursuant to Article 190.2 of the Constitution, this is the promulgation of judgments 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 because in the case of a decision issued by the Tribunal, the elimination from the legal system of norms deemed unconstitutional as quickly as possible is at issue. In the case of promulgation of statutes, one is dealing with the introduction of norms encompassed by the presumption of constitutionality. Accordingly, as a matter of principle, it will 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.

The Tribunal undertook the review of constitutionality only in respect of provisions that had been expressly identified by the applicants for review, and only where the request for constitutional review had been well-founded by them. Adjudicating upon the remaining provisions would go beyond the scope of the application, and hence would be inadmissible.

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 also necessary to take into consideration a different part of the same act (not directly identified by the applicant), the Tribunal will face no restrictions in reviewing all those provisions of the act which in aggregate contain the challenged normative content.

Nine dissenting opinions were filed with the judgment.

Cross-references:

Decisions of the Constitutional Tribunal:

- Judgment U 6/92 of 19.06.1992, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1992, no. I, item 13;

- Resolution W 5/93 of 14.07.1993, *Orzecznictwo Trybunalu Konstytucyjnego* (Official Digest), 1998, no. 2, item 48;

- Judgment K 25/95 of 03.12.1996, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1996, no. 6, item 52; *Bulletin* 1996/3 [POL-1996-3-018];

- Judgment K 24/97 of 31.03.1998, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1998, no. 2, item 13; *Bulletin* 1998/1 [POL-1998-1-007];

- Judgment K 24/98 of 21.10.1998, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1998, no. 6, item 97;

- Judgment K 39/97 of 10.11.1998, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1998, no. 6, item 50; *Bulletin* 1998 *Bulletin* 1998/3 [POL-1998-3-018];

- Judgment K 30/98 of 23.06.1999, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1999, no. 5, item 101; *Bulletin* 1999/2 [POL-1999-2-023];

- Judgment K 4/99 of 20.12.1999, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1999, no. 7, item 165; *Bulletin* 2000/1 [POL-2000-1-003];

- Judgment K 21/99 of 10.05.2000, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2000, no. 4, item 109; *Bulletin* 2000/2 [POL-2000-2-013];

- Judgment SK 18/01 of 08.04.2002, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2002, no. 2, item 16; *Bulletin* 2002/3 [POL-2002-3-024];

- Judgment SK 5/02 of 11.06.2002, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2002, no. 4, item 41; *Bulletin* 2002/2 [POL-2002-2-018];

- Judgment K 7/01 of 05.03.2003, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 3, item 19; *Bulletin* 2003/2 [POL-2003-2-017];

- Judgment K 44/02 of 28.05.2003, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 5, item 44;

- Judgment SK 12/03 of 09.06.2003, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2003, no. 6, item 51; *Bulletin* 2003/3 [POL-2003-3-024];

- Judgment SK 53/03 of 02.03.2004, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004, no. 3, item 16;

- Procedural decision SK 32/01 of 14.04.2004, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004, no. 4, item 35;

- Judgment K 20/03 of 13.07.2004, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004, no. 7, item 63;

- Judgment SK 1/04 of 27.10.2004, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2004, no. 9, item 96;

- Judgment K 31/04 of 26.10.2005, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2005, no. 9, item 103; *Bulletin* 2005/3 [POL-2005-3-010];

- Judgment K 17/05 of 20.03.2006, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2006, no. 3, item 30; *Bulletin* 2006/3 [POL-2006-3-011];

- Judgment SK 21/04 of 26.07.2006, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2006, no. 7, item 88;

- Judgment U 5/06 of 16.01.2007, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2007, no. 1, item 3;

- Judgment K 8/07 of 13.03.2007, *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2007, no. 3, item 26.

Decisions of the European Court of Human Rights:

- Decision 38184/03 of 30.05.2006 *(Matyjek v. Poland)*.

Languages:

Polish, English, German (summary).

5. LAT-2006-2-003

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 15-06-2006 / **e)** 2005-13-0106 / **f)** On the Compliance of Section 5 (Items 5 and 6) of the *Saeima* (Parliament) Election Law and Section 9 (Items 5 and 6 of the first paragraph) of the City Dome, District Council and Rural District Council Election Law with Sections 1, 9, 91 and 101 of the Republic of Latvia *Satversme* (Constitution) as well as with Sections 25 and 26 of the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), no. 95(3463), 20.06.2006 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

1.3.1. Constitutional Justice - Jurisdiction - **Scope of review.**
1.6.3.1. Constitutional Justice - Effects - Effect erga omnes - ***Stare decisis*.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
(Lustration, secret service)
5.2.1.4. Fundamental Rights - Equality - Scope of application - **Elections.**
5.2.2. Fundamental Rights - Equality - **Criteria of distinction.**
5.3.41.2. Fundamental Rights - Civil and political rights - Electoral rights - **Right to stand for election.**

Keywords of the alphabetical index:

State security, organ / Secret service, member, right to be elected / Loyalty, to democratic state.

Headnotes:

Restrictions on the passive electoral rights of members or former members of the regular staff of the USSR or the Latvian SSR, foreign state security, intelligence or counter-intelligence services, as well as those who, after 13 January 1991, had been active in CPSU (CP of Latvia), Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees comply with the Latvian Constitution and the International Covenant on Civil and Political Rights.

The principle of legal equality accommodates and sometimes even demands differing attitudes for people in differing circumstances. Such a differentiated attitude is necessary for those who decided to support Latvia in becoming an independent and democratic state. When the parliamentary draftsmen imposed restrictions on election rights for all former State Security Committee employees and did not allow for the possibility of different treatment for those who helped to bring about Latvia's independence, they brought about equal treatment for persons in fundamentally different circumstances. There are no reasonable and objective grounds for such equal treatment.

Summary:

I. Under the Parliamentary Election Law and the City Council, District Council and Rural District Council Election Law, persons cannot be included in candidate lists and cannot stand as parliamentary candidates or in local elections if they:

1. belong or have belonged to the regular staff of the USSR, Latvian SSR or foreign state security, intelligence or counter-intelligence services;

2. played an active role after 13 January 1991 in the CPSU (Latvian Communist Party), Working People's International Front of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees.

Two cases were joined for the purpose of these constitutional proceedings. Twenty members of parliament asked the Constitutional Court to decide whether the above-mentioned provisions were in accordance with various norms of higher legal force. Juris Bojars submitted a constitutional complaint on the conformity of restrictions in the parliamentary election law upon former regular staff of the USSR state security service.

This is the second time the compliance of these provisions has been challenged in the Constitutional Court. On 30 August 2000, the Constitutional Court handed down Judgment no. 2000-03-01 [LAT-2000-3-004], which held that the norms complied with Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR and Article 25 of the International Covenant on Civil and Political Rights.

II. The Court began by settling various procedural points, emphasising that it carries out its reviews by assessing the circumstances which exist at the time the matter is adjudicated. At this point and under certain defined circumstances, the claim is deemed to be "already adjudicated". New proceedings can only be launched if there is a fundamental change to the circumstances. Major changes resulted from the Law of 27 May 2004 "Amendments to the Law on Maintenance and Use of Documents of the Former State Security Committee and on the Stating of Facts about Persons' Collaboration with the State Security Committee". When the Constitutional Court handed down its judgment on 30 August 2000, the applicable law was Section 17 of the KGB Documentation Law. It stated that "once ten years have elapsed from the entry into force of this legislation, statements of the fact of collaboration with the KGB under the procedure established by Articles 14 and 15 of this law shall not be permitted and the possibility that someone may have collaborated with the KGB will not be used in legal proceedings involving this person". The amendments to the KGB Documentation Law extended the above term to twenty years.

Reference was made to the decision of the European Court of Human Rights Grand Chamber in "*Zdanoka v. Latvia*". The Constitutional Court established that restrictions on those who had played an active role after 13 January 1991 in CPSU (the Latvian Communist Party), the Working People's International Front of the Latvian SSR, the United Council of Labour

Collectives, the Organisation of War and Labour Veterans and the All-Latvia Salvation Committee or its regional committees were in line with the norms of higher judicial force. However, the Constitutional Court pointed out to the parliament several times that the necessity for such restrictions should be reviewed as a matter of urgency.

The Court went on to examine restrictions upon members or former members of the regular staff of the USSR, the Latvian SSR or the state security, intelligence or counter-intelligence services. It also looked at restrictions on former or existing employees of the current foreign state security, intelligence or counter-intelligence services. It held that restrictions on these categories of citizens were not at variance with norms of higher legal force.

Nonetheless, the Court emphasised to parliament that these restrictions needed to be reviewed as soon as possible. If they cannot be repealed, a procedure should be put in place which allows for exceptions for certain persons. Such a procedure must not jeopardise democratic values.

The Court also explained the significance of January 1991 as "decision time", when the people of Latvia chose where their respective allegiances lay. The point was made that those who fought for Latvia as an independent and democratic state, and those who opposed this could not be regarded as posing an equal danger to state security, territorial integrity and democracy.

The Court recognised that Mr J. Bojars, who had submitted the constitutional complaint, had contributed significantly to the renewal of democratic values in Latvia. In presenting Mr Bojars with the high State Order, the State acknowledged his proven loyalty to Latvia as an independent and democratic state. He is in a different situation from somebody who opposed Latvia's independence and should accordingly be treated differently.

The Court held that Section 5.5 and 5.6 of the Parliamentary Election Law and Section 9.1.5 and 9.1.6 of the City Council, Regional Council and Rural District Council Election Law complied with Articles 1, 9, 91 and 101 of the Constitution and with Articles 25 and 26 of the International Covenant on Civil and Political Rights.

It also held that with regard to the plaintiff in these proceedings, Juris Bojars, Section 5.5 of the Parliamentary Election Law and Section 9.1.6 of the City Council, Regional Council and Rural District Council Election Law are incompatible with Articles 1, 9, 91 and 101 of the Constitution and with Articles 25 and 26 of the International Covenant on Civil and Political Rights. They will lose their validity immediately the judgment is published.

Cross-references:

Previous decisions of the Constitutional Court in the following cases:

- Judgment no. 2000-03-01 of 30.08.2000, *Bulletin* 2000/3 [LAT-2000-3-004];

- Judgment no. 2004-18-0106 of 13.05.2005, *Bulletin* 2005/2 [LAT-2005-2-005];

- Judgment no. 3-4-1-7-02 of the Constitutional Review Chamber of the Supreme Court of Estonia, *Bulletin* 2002/2 [EST-2002-2-006];

- Judgment no. Pl. US 1/92, 26.11.1992, Czechoslovakia Constitutional Court, *Special Bulletin Leading Cases 1* [CZE-1992-S-002].

European Court of Human Rights:

- *Zdanoka v. Latvia* [GC, 2006];

- *Sidabras and Dziautas v. Lithuania*; [2004] ECHR 395, *Reports of Judgments and Decisions* 2004-VIII;

- *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, *Reports of Judgments and Decisions* 2002-VI.

Languages:

Latvian, English (translation by the Court).

6. CZE-2001-3-017

a) Czech Republic / **b)** Constitutional Court / **c)** Plenary / **d)** 05-12-2001 / **e)** Pl. US 9/01 / **f)** Lustration laws / **g)** / **h)** CODICES (Czech).

Keywords of the Systematic Thesaurus:

1.3.1. Constitutional Justice - Jurisdiction - **Scope of review.**
1.3.5.5.1. Constitutional Justice - Jurisdiction - The subject of review - Laws and other rules having the force of law - **Laws and other rules in force before the entry into force of the Constitution.**
2.1.1.4. Sources - Categories - Written rules - **International instruments.**
2.1.3. Sources - Categories - **Case-law.**
3.3. General Principles - **Democracy.** (Democracy, defence)
3.18. General Principles - **General interest.**
3.21. General Principles - **Equality.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.** (Lustration, law)
4.7.1. Institutions - Judicial bodies - **Jurisdiction.**
5.4.9. Fundamental Rights - Economic, social and cultural rights - **Right of access to the public service.**

Keywords of the alphabetical index:

Civil service, loyalty, political / Civil servant, recruitment / Civil servant, duty of loyalty / Loyalty, public / Constitutional Court, predecessor state, decision, *res judicata* / Council of Europe, Recommendation.

Headnotes:

A democratic state can condition an individual's entry into civil service, and subsequent holding of a civil servant position, to meeting certain prerequisites and in particular, the political loyalty.

The concept of loyalty covers, on the one hand, the level of loyalty of every individual in public services, and, on the other hand, the level of loyalty of public services as a whole. In addition, it is not only relevant whether the public services are actually loyal, but also whether they appear loyal to the public.

Certain lustration laws still protect an existing public interest, or pursue a legitimate aim, which is the active protection of a democratic state from the dangers, which could be brought to it by insufficiently loyal and trustworthy public services. Thus lustration laws setting specific

prerequisites for being a civil servant supplement the absence of a key law on civil service required by the Constitution. Their existence is therefore still necessary.

Summary:

The Constitutional Court received a petition from a group of 44 deputies in which the petitioners sought the annulment of some provisions of so-called lustration laws because of their conflict with the Constitution The Chamber of Deputies stated that a right to any position of power does not exist in a democratic state, as it is up to the state to decide the criteria by which it will fill such positions. The Senate stated that each state has the right to set by statute conditions for holding positions in the civil service. The Ministry of the Interior stated its position on the Court disputes on protection of fundamental rights. From all issued lustration certificates, only 3.45% were positive. Until 5 September 2001 the ministry's records show a total of 692 petitions for protection of personal rights of an individual.

When deciding on the annulment of acts and other legal regulations the Constitutional Court assesses the content of these regulations from the point of view of their compatibility with the constitutional laws and with international treaties pursuant to Article 10 of the Constitution; it also establishes whether they were adopted and issued within the competence given by the Constitution and in a constitutionally prescribed way.

Wherever legal regulations were issued before the Constitution of the Czech Republic became effective, the Court examines the compliance of their content with the present constitutional order. The Constitutional Court of the former Czechoslovakia had already evaluated the main lustration law in terms of its constitutionality. Therefore, the Constitutional Court had first to decide on the admissibility of the petition.

The jurisdiction of the Constitutional Court of the former Czechoslovakia was transferred to the Supreme Courts of the Czech and Slovak Republics. The existence of both Constitutional Courts is mutually independent. The Constitutional Act functions in a system of judicial protection of constitutionality established by the Constitution of the Czech Republic. Significant changes had occurred in the society during the course of more than eight years and the amendment is now to be evaluated in the light of new instruments.

The decision by the Constitutional Court of the former Czechoslovakia does not establish a *res judicata* obstacle. The Constitutional Court, like the European Court of Human Rights right from its first decisions, relies on the cases of its predecessor. In this sense, the Court noted that the continuity of protection provided permits the new Court, on the one hand, to diverge from the legal opinion of the preceding Court if there has been a change in the circumstances under which the previous Court made its decision, and on the other hand, not to cast doubt on the decisions of the previous Court if no such change in circumstances has occurred. The Constitutional Court of the former Czechoslovakia reviewed the constitutionality of the main lustration law from the point of view of the then Constitution and did not find conflict with it. The other, smaller lustration law was not reviewed in terms of its constitutionality.

The Constitutional Court of the former Czechoslovakia recognised the public interest consisting of the need of society and the state to have persons in certain publicly significant positions replaced. It also stressed the restricted validity in time of the law. In democratic states among requirements for persons seeking employment in the civil service is fulfilment of certain civic prerequisites (i.e. loyalty to the state). The state cannot be denied the ability to set prerequisites in which it takes into consideration its own security. The determination of the degree of development of democracy in a particular state is a social and political question. Thus, the Court is not able to review the claim of "completion" or, on the contrary "non-completion" of the democratic process. Loyalty cannot be expected "without anything further and without

reservation" from members of previous power structures. A democratic state has an obligation to defend actively its democratic establishment, i.e. not only in a phase where it is being built but also in a phase where democracy has been brought to completion. Indeed, the European Court of Human Rights has also repeatedly recognised in its decisions the justification of the idea of a democracy able to defend itself *(Glasenapp v. Germany, Vogt v. Germany, Pellegrin v. France).*

Meeting the requirement of political loyalty on the individual's entry into state administration is proved also by judicial practice in the USA *(Adler v. Board of Education of City of New York).*

The Constitutional Court also recorded that an untrustworthy civil service and state administration result in a danger to democracy. The Act on the Lawlessness of the Communist Regime and Resistance to it enumerates crimes and other comparable events, which occurred in the territory of the present-day Czech Republic during 1948-1989. It assigns full responsibility for them to those who promoted the communist regime as officers, organisers and instigators in the political and ideological arena. It states the special responsibility of the pre-November Communist Party. The lustration legislation only takes a position on it and draws certain conclusions only from classified forms of involvement in it. In its judgment the Constitutional Court of the former Czechoslovakia pointed out that other European states also apply lustration legislation. Their common feature is the fact that they concentrate on an individual's position and/or behaviour under totalitarianism, which may have negative consequences for him in terms of his involvement in public life in the present democratic state. Similar Acts were passed in Germany and other countries in Central and Eastern Europe.

The Parliamentary Assembly of the Council of Europe admits the compatibility of lustration laws with the attributes of a democratic legal state, with the presumption that their purpose is not to punish the affected persons, but to protect the nascent democratic regime. In light of the foregoing facts, the Court had grounds to state that certain behaviour or a certain position of an individual in a totalitarian state is generally considered, from the viewpoint of the interests of a democratic state, to be a risk to the impartiality and trustworthiness of its public services, and therefore has a restrictive influence on the possibility and the manner of including "positively lustrated" persons in them. With the passing of time the relative significance of attitudes and the position of persons in the totalitarian state certainly does not disappear, but it decreases.

The time of application of individual lustration laws or individual provisions based on them differ. In the great majority of other European states lustration laws are still valid and effective. Both acts pursue their legitimate aim by setting certain prerequisites for the performance of certain positions in state bodies and organisations, in the police of the Czech Republic and in the Correction Corps of the Czech Republic. The Recommendation no. R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe of 24 February 2000 regulates the position of representatives of public power. Public administration plays a substantial role in democratic societies and those persons in it are subject to special obligations and commitments because they serve the state.

Law may provide for both general and specific prerequisites for access to public positions. Both lustration laws set special prerequisites only for access to managerial or significant positions in civil and public services.

The specific presumptions reflect the position of an individual in the period of totalitarianism of 1948-1989. While this position meets the elements provided in the lustration laws, it makes it impossible for a lustrated individual to access public positions listed in them. The Constitutional Court, in agreement with its Czechoslovak predecessor, considered the close connection of persons with the totalitarian regime and its repressive components to be a relevant

circumstance that can cast doubt on political loyalty and damage trustworthiness of public services of a democratic state and thus threaten such state and its establishment.

At present other new democratic European states view this aspect of the past of their public representatives and officials in a similar way. The Constitutional Court considered it very clear that the relevance of the stated presumption decreases with the passage of time from the fall of the totalitarian regime, and therefore considers lustration legislation to be temporary. The Constitutional Court takes as a starting point the fact that lustration prerequisites apply only to a restricted circle of fundamentally important positions. It also takes into account the declining tendency to apply the lustration laws in practice. The parliament has not yet regulated by law the legal relations of state employees in ministries and other administrative authorities (The Act on Civil Service). Thus, by setting specific prerequisites for working in civil service, both lustration laws substitute, to a certain extent, the absence of a key law required by the Constitution. Their existence is therefore still necessary.

With the exception of certain acts, (among others the Act on Courts and Judges), access to elected, appointed and designated positions specified in the lustration laws is regulated only by these laws. However, the Constitutional Court did not consider this situation to be optimal. It therefore noted that the legislator should speedily regulate the prerequisites for access to public offices in the full extent. According to the background report to the amendment of the main lustration act, its validity should be terminated upon the adoption of the Act on Civil Service.

For all the foregoing reasons, the Court granted part of the petition and denied the remaining part.

The dissenting opinion stated that the Court has annulled the prerequisite demanding the persons recruited into the Police and Corrections Corps not to be conscious collaborators of the former State Security Service (StB). Nowadays elements protecting and approving legal procedures during the totalitarian period are emerging more and more often. These pressures appear to be in contradiction with democratic postulates. Therefore the two lustration judgments can be connected neither from the point of view of time nor from the point of view of public interest. From the moral point of view conscious collaborators of the StB are one of the groups of persons most heavily subjected to the shorter lustration law. While other agents or StB employees only built the totalitarian system and infringed the citizens' rights in general, conscious StB collaborators directly participated in persecuting people. Such persons are most easily influenced, as in their case there is no guarantee of resistance against the pressure when they did not pass the test in the past. The qualification of conscious collaboration was precisely defined in the law and the courts guarantee the protection of applicants against unjust decisions. Therefore the protection of democracy has to be put above the protection of an individual's right.

Supplementary information:

In Judgment Pl. US 25/2000, the Constitutional Court rejected a petition of a group of deputies to annul provisions of the amending act, which has no independent legal existence and has become part of the amended act.

Cross-references:

Supreme Court of the United States:

-Adler v. Board of Education of City of New York, 03.03.1952;

European Court of Human Rights:

Glasenapp v. Germany, 28.08.1986, Series A, no. 104;

Vogt v. Germany, 26.09.1995, Series A, no. 323; *Bulletin* 1995/3 [ECH-1995-3-014];

Pellegrin v. France, 08.12.1999, no. 28541/95, §§ 60, 66 and 67, ECHR 1999-VIII; *Bulletin* 1999/3 [ECH-1999-3-009].

Languages:

Czech.

7. POL-2000-2-015

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 14-06-2000 / **e)** P 3/2000 / **f)** / **g)** *Orzecznictwo Trybunalu Kostytucyjnego Zbiór Urzedowy* (Official Digest), 2000, no. 5, item 138 / **h)** CODICES (Polish).

Keywords of the Systematic Thesaurus:

3.10. General Principles - **Certainty of the law.**
3.22. General Principles - **Prohibition of arbitrariness.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
(Lustration, carried out after resignation from post)
5.3.38. Fundamental Rights - Civil and political rights - **Non-retrospective effect of law.**

Keywords of the alphabetical index:

Public post, resignation.

Headnotes:

Subjecting to a lustration procedure a person who, confident in the operation of law, resigned from a public service post or aspired to take such a post, expecting that the lustration procedure will not be carried out, pursuant to the laws in force at the time of resignation, is contrary to the constitutional democracy rule.

Summary:

The Tribunal examined the case as a result of a legal question introduced by the Lustration Department of a Court of Appeal.

The Tribunal emphasised that the certainty of law is one of the main rules relating to relations between the state and its citizens in a democratic country. In the Tribunal's opinion this rule enables an individual to decide how to behave in full knowledge of the conditions according to which the state authorities act and the legal consequences of such behaviour. Such values are breached if the law is changed and the new regulation may not have been foreseen by an individual. This is particularly the case where the legislator, while adopting new provisions, could have assumed that an individual would have made a different decision if he had foreseen the change in the law.

In the Tribunal's opinion, legal security may collide with other values, whose implementation requires the introduction of changes in the legal system. However, an individual has a right to expect the legal regulation will not be changed to his disadvantage in an arbitrary way.

Subjecting to lustration procedures people who on the basis of previously binding provisions, resigned from their public posts, withdrew from being a candidate to such posts or were removed from such posts infringes the rules on the certainty of law and legal security of the individual. Even though the above-mentioned persons acted according to the provisions of law, the consequences provided for in the provisions, in the form of discontinuation of the lustration procedures, have not been carried out.

Supplementary information:

Four judges delivered dissenting opinions (Zdzislaw Czeszejko-Sochacki, Andzrej Maczynski, Marek Safjan, Janusz Trzcinski).

Cross-references:

Decision of 02.03.1993 (K 9/92).

Decision of 24.05.1994 (K 1/94), *Bulletin* 1994/2 [POL-1994-2-008].

Languages:

Polish.

8. POL-2000-C-002

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 04-12-2000 / **e)** SK 10/99 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 2000, no. 8, item 300 / **h)** .

Keywords of the Systematic Thesaurus:

1.3.5.13. Constitutional Justice - Jurisdiction - The subject of review - **Administrative acts.**

Keywords of the alphabetical index:

Constitutional appeal / Admissibility, condition / Lustration.

Headnotes:

The Tribunal decides to discontinue proceedings relating to a constitutional claim concerning concordance with the Constitution of provisions of an Act on disclosure by persons holding public office of their work or services in public security institutions or their co-operation with such institutions in the years 1944-1990.

Summary:

The case was examined by the Tribunal as a result of constitutional claim.

The Act on disclosure by public servants of their work or services in public security institutions or their co-operation with such institutions in the years 1944-1990 obliges persons applying to certain public posts to file a declaration concerning their work or services in public security organisations or their co-operation with such organisations in the above-mentioned years. The Act obliges the organisations accepting such declarations to publish their content immediately in an edition of the *Monitor Polski (*a legal journal) or in an electoral notice (depending on who filed the declaration).

The Tribunal remarked that the constitutional claim could concern a normative act, on the basis of which a court or a public administrative body issued a final decision on freedoms, rights or obligations of a complainant described in the Constitution. It noted that it should be mentioned that the constitutional notion of a "decision" on freedom rights or obligations covers decisions which impose, change, abolish, grant or annul powers. Factual activities of public authorities do not constitute such decisions, since they do not have a nature of legal acts even if they enter into a sphere of rights and obligations of an individual.

In the Tribunal's opinion, acts of the public bodies connected with the publication of the above-mentioned declarations do not form a legal situation in relation to an individual and therefore cannot constitute the decision in its constitutional meaning. The foregoing acts are of an accessory nature, which cannot be referred to administrative jurisdiction.

The Tribunal noticed that the Constitution suggests the possibility that the filing of the constitutional claim is limited to cases in which enforcement of the law or of another normative act leads to the adoption of individual legal acts, which apply legal provisions to individual situations. In the Tribunal's opinion, the Act on disclosure by public servants of their work or services in public security institutions or their co-operation with such institutions in the years 1944-1990 does not provide for the possibility of issuing decisions on rights, freedoms or obligations of individuals in the case of publication of information confirming their work or services in public security institutions. The obligation to publish the declarations comes into existence by virtue of the law and its execution is not connected with issuing a decision concerning the legal situation of a person filing the declaration. As a result of the foregoing, the constitutional conditions required for admissibility of the constitutional claim were deemed not to have been met.

Supplementary information:

Five dissenting opinions have been filed against the decision (judge Zdzislaw Czeszejko-Sochacki, judge Lech Garlicki, judge Stefan J. Jaworski, judge Andrzej Maczynski, judge Janusz Trzcinski).

Cross-references:

-Decision of 05.12.1997 (Ts 14/97);

-Decision of 19.04.1999 (U 3/98);

-Decision of 10.05.2000 (K 21/99), *Bulletin* 2000/2 [POL-2000-2-013];

-Resolution of Supreme Court of 28.09.2000 (III ZP 21/2000).

Languages:

Polish.

9. LAT-2000-3-004

a) Latvia / **b)** Constitutional Court / **c)** / **d)** 30-08-2000 / **e)** 2000-03-01 / **f)** On Compliance of the *Saeima* Election Law and the City Dome, Region Dome and Rural Council Election Law with the Constitution, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the International Covenant on Civil and Political Rights / **g)** *Latvijas Vestnesis* (Official Gazette), 307/309, 01.09.2000 / **h)** CODICES (English, Latvian).

Keywords of the Systematic Thesaurus:

2.1.1.4.4. Sources - Categories - Written rules - International instruments - **European Convention on Human Rights of 1950.**
2.1.1.4.8. Sources - Categories - Written rules - International instruments - **International Covenant on Civil and Political Rights of 1966.**
2.1.3.2.2. Sources - Categories - Case-law - International case-law - **Court of Justice of the European Communities.**
2.1.3.3. Sources - Categories - Case-law - **Foreign case-law.**
2.3.3. Sources - Techniques of review - **Intention of the author of the enactment under review.**
3.3. General Principles - **Democracy.**
3.13. General Principles - **Legality.**
3.16. General Principles - **Proportionality.**
3.19. General Principles - **Margin of appreciation.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
5.1.4. Fundamental Rights - General questions - **Limits and restrictions.**
5.2.1.4. Fundamental Rights - Equality - Scope of application - **Elections.**
5.3.41.1. Fundamental Rights - Civil and political rights - Electoral rights - **Right to vote.**

Keywords of the alphabetical index:

Election, candidacy, restriction / Organisation, anti-constitutional, participation / Social need, pressing / Morality, democracy, protection.

Headnotes:

The right to be elected may be restricted for persons who have been active in organisations that tried to destroy the new democratic state and were recognised as anti-constitutional. Such restrictions are lawful where their aim is to protect the democratic state system, national security and the territorial unity of the state.

However, the legislator should determine the term of the restrictions; such restrictions may last only for a certain period of time.

Summary:

The case was initiated by twenty-three members of Parliament who claimed that provisions of the Parliament (*Saeima*) Election Law and of the City Dome, Regional Dome and Rural Council Election Law establishing various restrictions on the right to be elected contradicted Articles 89 and 101 of the Constitution, Article 14 ECHR, Article 3 Protocol 1 ECHR, and Article 25 of the International Covenant on Civil and Political Rights.

The laws established restrictions on the right of the following to be elected as deputies in Parliament and in the municipalities: those who after 13 January 1991 have been active in the Communist Party of the Soviet Union, the Working People's International Front of the Latvian S.S.R., the United Board of Working Bodies, the Organisation of War and Labour Veterans, the All-Latvia Salvation Committee or its regional committees; those who belong or have belonged to the regular staff of the U.S.S.R., the Latvian S.S.R. or foreign state security, intelligence or counterintelligence services.

Article 101 of the Constitution establishes the right of every citizen of Latvia, prescribed by law, to participate in the activity of the state and local authorities. This right guarantees the democracy and legitimacy of the democratic state system.

However the right is not absolute; Article 101 includes the condition "in the manner prescribed by law". The constitution leaves it for the legislature to make decisions limiting the right. By including the words "in the manner prescribed by the law" the legislature determined that in every case one should interpret the words "every citizen of Latvia" as including the limitations established by law. Article 101 of the Constitution shall be interpreted together with Article 9 of the Constitution: "Any citizen of Latvia, who enjoys full rights of citizenship and, who is more than twenty-one years of age on the first day of elections may be elected to the parliament." Article 9 of the Constitution authorises Parliament to specify the content of the notion of "a citizen of Latvia, who enjoys full rights of citizenship"; and this is done in the *Saeima* Election Law. The limitations of this right are permissible only if they do not contradict the notion of democracy, mentioned in Article 1 of the Constitution, other and general principles relating to fair elections. Thus the legislature, in passing the disputed norms creating a necessary legal norm to be realised for the right to be elected, implemented the task of Article 101 of the Constitution.

Reasonable restrictions on the right to vote and to be elected at genuine periodic elections, established in Article 25 of the International Covenant on Civil and Political Rights, are permitted. Not all types of different treatment constitute prohibited discrimination. Reasonable and objective prohibitions with an aim that is considered as legitimate by the Covenant cannot be regarded as discrimination.

The restrictions to the election rights established in Article 3 Protocol 1 ECHR shall be established according to the universal procedure: although the states have "a wide margin of appreciation in this sphere", any restrictions must have a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Rights may be restricted only to the extent the restrictions do not deprive the right of its essence and/or diminish its efficiency. The principle of equality of treatment shall be respected and arbitrary restrictions must not be applied. Article 14 ECHR does not establish a prohibition of all difference in treatment with regard to the realisation of the rights and freedoms provided by the Convention. The principle of equal treatment is considered violated only if the difference of treatment does not have a reasonable and objective justification.

The Court found that the statement of the applicants that the disputed norms discriminated against the citizens just because of their political membership was groundless. The disputed norms do not establish difference in treatment just because of the political opinion of the person, they establish a restriction for activities against the renewed democratic system. The words "to be active", used in the disputed norms mean to continuously perform something, to take an active part, to act, to be engaged in. Thus the legislature has connected the restrictions with the degree of individual responsibility of every person in the realisation of the aims and programme of the organisations mentioned in the disputed norms. Formal membership of any of the mentioned organisations cannot alone serve as the reason for forbidding a person from being included in the candidate list and being elected. Thus the disputed norms are directed only against those persons who, with their activities after 13 January 1991 and in the presence of the occupation army, tried to renew the former regime, and are not applied just to those with different political opinions.

The norms of human rights included in the Constitution should be interpreted in compliance with the practice of application of international norms of human rights. To establish whether the disputed restrictions comply with Articles 89 and 101 of the Constitution, one has to evaluate whether the restrictions included in the disputed norms are determined by law, adopted under due procedure; justified by a legitimate aim, and necessary in a democratic society. As this case does not contain any dispute on whether the restrictions were determined by law or adopted under the due procedure, the two last issues have to be evaluated.

In 1990, although the democratic state and the first of 1922 were renewed, the Latvian Communist Party was not going to give up the role of the "leading and ruling force". It started anti-state activities. With the efforts of the Latvian Communist Party and its satellite organisations the All-Latvia Salvation Committee was established. The aims of the activities of these organisations were connected with the destruction of the existing state power, and were therefore anti-constitutional. In August 1991 the legislature prohibited these organisations, evaluating them as anti-constitutional. Thus the aim of the restrictions of the election rights is to protect the democratic state system, national security and the territorial unity of Latvia. The disputable norms are not directed against a pluralism of ideas in Latvia or the political opinions of a person, but against persons, who with their activities have tried to destroy the democratic state system. Enjoyment of human rights must not be turned against democracy as such.

The essence and efficiency of rights lies also in morality. To demand loyalty to democracy from its political representatives is within the legitimate interests of a democratic society. The democratic state system has to be protected from persons who are not ethically qualified to become the representatives of a democratic state on the political or administrative level. The state should be protected from persons who have worked in the former apparatus, implementing occupation and repression, and from persons who after the renewal of independence to the Republic of Latvia tried to renew the anti-democratic totalitarian regime and resisted the legitimate state power. The restrictions to the election right do not refer to all members of the mentioned organisations, but only to those who had been active in the organisations after 13 January 1991. Excluding a person from the candidates list if he has been active in the mentioned organisations is not administrative arbitrariness; it is based on an individual court decision. Thus the principle, requiring an equal attitude to every citizen has not been violated, the protection by a court is guaranteed, and the restrictions are not arbitrary. Consequently the aim of the restrictions is legitimate.

To establish whether the restrictions of the election right is proportional to the aims of protecting the democratic state system, national security and the territorial unity of Latvia, the legislature has repeatedly evaluated the political and historical conditions of the development of democracy in connection with the issues of the election right, adopting or amending the election law just before elections. The Court held that at the present moment there did not exist the necessity to doubt the proportionality of the applied restrictions. However, the legislature, in periodically evaluating the political situation in the state as well as the necessity of the restrictions, should decide on determining the term of the restrictions. Such restrictions to the election rights may last only for a certain period of time.

The Constitutional Court decided by a majority of four votes to three. The dissenting judges disagreed with the majority on several grounds. According to the dissenting opinion, restrictions to human rights in a democratic society were necessary not only if they had a legitimate aim, but also if there was a pressing social need to establish the restrictions and the restrictions were proportionate. Today, ten years after the re-establishment of independence, the election of the persons mentioned in the disputed norms would not threaten democracy in Latvia, and therefore the pressing social need to establish the restrictions does not exist. Restrictions of fundamental rights are proportionate only if there are no other means that are as effective but are less restrictive of the fundamental rights. The election rights are restricted so far that in fact the persons do not enjoy the right at all; the legislature has the possibility of using other "softer" forms, therefore the measure is not proportionate.

Cross-references:

- In the decision the Constitutional Court referred to the following Judgments of the European Court of Human Rights: *Mathieu-Mohin and Clerfayt*, 02.03.1987; *Belgian Linguistic Case*, 23.07.1968; *Karlheinz Schmidt v. Germany*, 18.07.1994; as well as to the decision of the

Federal Constitutional Court of Germany in Case 2 BvE 1/95, 21.05.1996, *Bulletin* 1996/2 [GER-1996-2-017].

- In the dissenting opinion, the judges referred to the following Judgments of the European Court of Human Rights: *Dudgeon Case*, 22.10.1981; *Handyside Case*, 07.12.1976; *Barthold Case*, 25.03.1985; *Vogt v. Germany*, 26.09.1995; *Rekvenyi v. Hungary*, 20.05.1999; as well as to the decision of the Constitutional Tribunal of Poland in Case no. K 39/97, 10.11.1998; *Bulletin* 1998/3 [POL-1998-3-018].

Languages:

Latvian, English (translation by the Court).

10. BUL-1999-1-002

a) Bulgaria / **b)** Constitutional Court / **c)** / **d)** 21-01-1999 / **e)** 02/99 / **f)** / **g)** *Darzhaven vestnik* (Official Gazette), 8, 29.01.1999 / **h)** CODICES (French).

Keywords of the Systematic Thesaurus:

2.1.1.4. Sources - Categories - Written rules - **International instruments.**
3.9. General Principles - **Rule of law.**
4.6.5. Institutions - Executive bodies - **Organisation.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
4.8.4. Institutions - Federalism, regionalism and local self-government - **Basic principles.**
5.2.1. Fundamental Rights - Equality - **Scope of application.**

Keywords of the alphabetical index:

Council of Ministers, powers / Responsibility, individual.

Headnotes:

Ministers' actions may be declared void on a proposal from the Council of Ministers and not just one from the Prime Minister.

Regional governors and their deputies are appointed, and their activities supervised, by the Cabinet and not just the Prime Minister.

Guilt and responsibility in connection with former actions of candidates for posts of responsibility within the administration are individual, not collective, and must be proved in respect of each individual.

Summary:

Proceedings were initiated at the request of 58 members of the National Assembly, who requested that provisions of the Administration Act be declared unconstitutional and incompatible with international agreements to which the Republic of Bulgaria was a party. Among the provisions challenged were:

-Article 20.6, under which unconstitutional and irregular actions by ministers were declared void by the Cabinet on a proposal from the Prime Minister;

-Article 29.4, under which regional governors and their deputies were appointed by the Prime Minister, who also supervised their activities;

-paragraph 1 of the transitional and final provisions of the same act, under which persons who had held posts of responsibility within the political and administrative apparatus of the Bulgarian communist party or had collaborated with the former *Darjavna sigournonst* (Bulgarian secret service) were barred from holding posts of responsibility within the administration for a five-year period. The applicants argued that this provision was at variance with Article 14 ECHR, Articles 2.1 and 23 of the International Covenant on Civil and Political Rights, Article 2.2 of the International Covenant on Economic, Social and Cultural Rights and Article 1 of the 1958 Discrimination (Employment and Occupation) Convention (no. 111).

The Constitutional Court found that these provisions were unconstitutional and issued the following decisions:

-Ministers' actions could be declared void on a proposal from the Cabinet and not just one from the Prime Minister.

-Regional governors and their deputies were appointed, and their activities supervised, by the Cabinet and not the Prime Minister.

-Paragraph 1 was unconstitutional because it infringed the principle of the rule of law (Articles 4, 6.2 and 38 of the Constitution) and because guilt and responsibility were purely individual and not collective and must be proved in respect of the individual, as a Council of Europe Parliamentary Assembly resolution advocated. This provision on "lustration" was at variance with the above-mentioned international agreements and instruments to which Bulgaria was a party. The request that other provisions of the act be declared unconstitutional was rejected.

Languages:

Bulgarian.

11. LTU-1999-2-006

a) Lithuania / **b)** Constitutional Court / **c)** / **d)** 04-03-1999 / **e)** 24/98 / **f)** On social rights / **g)** *Valstybes Zinios* (Official Gazette), 23-666, 10.03.1999 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

4.6.9.1. Institutions - Executive bodies - The civil service - **Conditions of access.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
5.1.4. Fundamental Rights - General questions - **Limits and restrictions.**
5.2.1.2.2. Fundamental Rights - Equality - Scope of application - Employment - **In public law.**
5.3.13.3. Fundamental Rights - Civil and political rights - Procedural safeguards, rights of the defence and fair trial - **Access to courts.**
5.4.3. Fundamental Rights - Economic, social and cultural rights - **Right to work.**
5.4.9. Fundamental Rights - Economic, social and cultural rights - **Right of access to the public service.**

Keywords of the alphabetical index:

State office, nature / Responsibility, collective.

Headnotes:

The basis of the protection of labour rights is embodied in the Constitution.

Article 33.1 of the Constitution establishes that "citizens (...) shall have an equal opportunity to serve in a State office of the Republic of Lithuania". However, this is not absolute. The State cannot and does not burden itself with the obligation to admit every person to serve in a State office. Taking account of the nature of a State office and its importance in the life of every individual, of society and of the State, as well as in an attempt to ensure that institutions of State power, government and other institutions function effectively and well, requirements are established for State officers and officials. The mentioned provision does not prevent the establishment of certain prohibitions on the occupation of these posts. Such prohibitions cannot be treated as criminal punishment because they are of general character, and any criminal penalty is applied individually.

Any person whose constitutional rights or freedoms are violated has a possibility to protect his rights and interests directly by applying to the court (the first Part of Article 30 of the Constitution).

Summary:

On 16 July 1998 the *Seimas* passed the Law on the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of Regular Employees of this Organisation (the Law). The Law provides for restrictions upon present activities of employees of the CSS. The Law also provides for cases when the restrictions are not applied to former employees of the CSS. The procedure for the enforcement of provisions of the Law was established by the Law on the Enforcement of the Law on the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of Regular Employees of this Organisation, which was adopted on the same day.

After 1990 in the states of central and eastern Europe, a start was made to clarify through legal proceedings whether persons holding influential positions in the economy or in politics or attempting to hold such positions (had) had any ties with secret services of former communist regimes. An attempt was also made to ascertain the loyalty of regular employees of security services (including secret services) to the State and to establish their ability to hold important and responsible positions from the standpoint of the security of each State. When the character and degree of collaboration of present or future State officials or employees with the said secret services had been established the right freely to choose an occupation, as a rule in State services, was either restricted for a certain time or this right was deprived. Quite often this process is referred to as lustration (from Latin lustratio - purification, sacrifice of something for atonement), the laws regulating it being lustration laws.

Article 1 of the Law provides: the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) is recognised as a criminal organisation, which committed war crimes, carried out genocide, repression, terror and political persecution in the Republic of Lithuania which was occupied by the USSR.

The petitioner noted that the *Seimas*, having declared the CSS a criminal organisation in Article 1 of the Law, states in the other Articles of the Law that persons who worked at the CSS are guilty and allocates punishment. Thus by means of this Law, the *Seimas* is implementing justice, a function which it has not been given by the Constitution. In addition, the petitioner questioned whether the provision of Article 2 of the Law, which prohibits former regular employees of the CSS from working as officers or officials in State institutions and government,

courts and other areas for 10 years, provides for a responsibility of these persons and establishes a criminal punishment for them, is in compliance with the Constitution.

The Constitutional Court emphasised that the Law makes a statement of historical fact but does not set out the grounds formulated by the legislator for criminal responsibility of all employees of the CSS. Article 1 of the Law does not presuppose any collective responsibility for the criminal deeds carried out by the CSS, nor is it linked with the questions of criminal law or those of criminal procedure law. Such a content indicates that the restrictions established by Article 2 of the same Law are not criminal sanctions. These restrictions do not constitute any responsibility (i.e. neither criminal, nor civil nor any other form of responsibility, and the persons to whom these restrictions are applied are not held responsible). They are restrictions of the right freely to choose an occupation which are determined by the area, nature or specific character of the occupation.

The petitioner questioned whether Article 2 of the Law and Article 1.2 of the Law on the Enforcement of the Law, whereby former regular employees may not be admitted to work as officers or officials in a State office and those who already serve as officers or officials in a State office must be dismissed, contradict Article 33.1 of the Constitution whereby citizens "shall have an equal opportunity to serve in a State office of the Republic of Lithuania". Moreover, the petitioner challenged the stipulation established by Article 2 of the Law, whereby former regular employees of the CSS are prohibited from working not only in State institutions but also in private enterprises-banks, credit unions, security services, communications, etc., practising as private lawyers or notaries or engaging in the other private occupations enumerated in Article 2 of the Law, and its compliance with Articles 48.1, 46.1 and 23 of the Constitution.

The Constitutional Court indicated that Article 33.1 of the Constitution, which provides for the right of citizens to have an equal opportunity to serve in a State office of the Republic of Lithuania, is not absolute. Taking account of the purpose and activities of the USSR CSS in the occupied Republic of Lithuania, the requirements determining the loyalty and credibility of former regular employees of the CSS who work or wish to work in a State service are urgent. These persons consciously and of their own free will went to work as regular employees of the CSS. By their activities, these persons carried out political persecution of persons and organisations promoting the ideas and aspirations of Lithuanian independence, or contributed to such persecution. The Republic of Lithuania has reason to doubt the former regular employees of the CSS and must make sure that they are loyal and can be trusted. Therefore the effort of the State to restrict the opportunities for the former regular employees of the CSS to serve in a State service is understandable and justified. The restrictions established by Article 2 of the Law do not negate the right freely to choose an occupation or business which is established by Article 48.1. The Law indicates only certain positions or enterprises, institutions, organisations and particular areas of business which, in the opinion of the legislator, are particularly important to society, the State and their security, and there must be no doubts concerning the credibility and loyalty of people working there.

The petitioner challenged whether the provision of Article 3.2 of the Law, whereby a decision concerning non-application of the activity restrictions to the former regular employees of the CSS is adopted by a 3-person commission formed by the President of the Republic and regulation of which is confirmed by the latter, are in compliance with the Constitution.

The Constitutional Court held that the Constitution does not allow the President of the Republic to decide questions restricting human rights and freedoms and that therefore there exist no constitutional pre-conditions for a law permitting the President of the Republic to form a commission which could decide questions of this nature. The Constitutional Court noted that even though the restrictions established by Article 2 of the Law are not any type of punishment, they do restrict certain human rights and freedoms. However, it is only possible to restrict rights

and freedoms by law and by necessarily providing a guarantee for an opportunity to appeal to court on the grounds of the violated rights.

The Constitutional Court ruled that the norms of the Law that establish prohibitions and/or restrictions were in compliance with the Constitution. The provisions of Article 3.2 of the Law, whereby decisions concerning non-application of the restrictions to former regular employees of the CSS shall be adopted by a 3-person commission which is formed by and the regulations on the activity of which are confirmed by the President of the Republic and that in reality does not guarantee an opportunity for an individual to appeal to a court against decisions which concern him, and that are adopted by the Centre for Research into People's Genocide and Resistance of Lithuania and the State Security Department as well as by the commission formed by the President of the Republic, were contrary to the Constitution.

Languages:

Lithuanian, English (translation by the Court).

12. POL-1998-3-018

a) Poland / **b)** Constitutional Tribunal / **c)** / **d)** 10-11-1998 / **e)** K 39/97 / **f)** / **g)** *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy* (Official Digest), 1998, no. 6, item 99 / **h)** CODICES (English, Polish).

Keywords of the Systematic Thesaurus:

3.9. General Principles - **Rule of law.**
3.22. General Principles - **Prohibition of arbitrariness.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
4.11.3. Institutions - Armed forces, police forces and secret services - **Secret services.**
5.1.4. Fundamental Rights - General questions - **Limits and restrictions.**
5.2.1.2.2. Fundamental Rights - Equality - Scope of application - Employment - **In public law.**
5.3.5. Fundamental Rights - Civil and political rights - **Individual liberty.**
5.3.29.1. Fundamental Rights - Civil and political rights - Right to participate in public affairs - **Right to participate in political activity.**

Keywords of the alphabetical index:

Security check / Secret service, past co-operation / Right, essence, guarantee.

Headnotes:

The vetting procedure, understood as a legally determined mechanism of examining links and connections of persons in the highest State and public positions (for whom a particularly high level of responsibility arises), may not, as a rule, be called into question. Generally, it shall be treated as concordant both with the Constitution and with international standards.

An issue connected with the vetting procedure which does need to be examined is the question whether the choice of constitutional values has an arbitrary character. It should be determined whether this procedure observes the constitutional values and the rights of individuals and whether the procedure provided in the act is concordant with the requirements of a democratic State ruled by law.

The purpose of the Act on Vetting was to «prevent use of political past» and fact of co-operation with secret services for the purposes of blackmail. In consequence, certain restrictions of the constitutional right to privacy and a determination of each person's private life must be introduced. In a democratic State, such restrictions may only be introduced if they are necessary for the protection of the environment, health, public morality, freedom or rights of third persons. The restrictions may not, however, infringe the essence of freedoms and rights. That means that persons applying for important State or public positions must calculate certain restrictions therewith.

Supplementary information:

Four judges (Z. Czeszejko-Sochacki, W. Johann, F. Rymarz, M. Zdyb) delivered dissenting opinions.

Cross-references:

Resolution of June 24, 1998 (K 3/98), *Bulletin* 1998/2 [POL-1998-2-014]; resolution of November 21, 1995 (K 12/95), *Bulletin* 1995/3 [POL-1995-3-016]; resolution of June 19, 1992 (U 6/92).

Languages:

Polish; substantial parts of the resolution are also available in English.

13. ALB-1996-2-001

a) Albania / **b)** Constitutional Court / **c)** / **d)** 31-01-1996 / **e)** 1 / **f)** / **g)** *Fletorja Zyrtare* (Official Gazette), 1/1996, 20-27 / **h)** CODICES (English).

Keywords of the Systematic Thesaurus:

2.1.1.4.8. Sources - Categories - Written rules - International instruments - **International Covenant on Civil and Political Rights of 1966.**
3.3. General Principles - **Democracy.**
4.5.10. Institutions - Legislative bodies - **Political parties.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
5.3.41.2. Fundamental Rights - Civil and political rights - Electoral rights - **Right to stand for election.**

Keywords of the alphabetical index:

Crime against humanity.

Headnotes:

The temporary exclusion of the perpetrators, conceptualisers and implementers of that fierce, inhuman dictatorship which the constitutional law denounces in its preamble from the right to be elected is constitutional.

The Constitutional Court is entitled to review requests, by Parliamentary Groups to have declared unconstitutional laws that conflict with the main Constitutional Provisions concerning the right to vote as well as additional fundamental rights.

Summary:

In the present case, the Constitutional Court reviewed requests made by the Albanian Socialist Party's Parliamentary Group and the Albanian Social Democratic Party's Parliamentary Group to have annulled certain legal provisions concerning limitations on the right to be elected of a certain category of persons that worked in certain positions during the period of the communist regime.

The Parliamentary Group of the Social Democratic Party of Albania and the Parliamentary Group of the Socialist Party of Albania argued that the restriction set out in Article 3 of Law no. 8001 dated 22 September 1995 "On genocide and crimes against humanity committed in Albania during the Communist regime for political, ideological and religious reasons", was unconstitutional. This restriction concerned the right to be elected to the central and local organs of power and to be nominated to the high State administration, the judicial system and the mass media until 31 December 2001, for persons who before 31 March 1991 were members of the Political Bureau and the Central Committee of the Party of Labour of Albania (and the Communist Party), Ministers, Deputies of the People's Assembly, members of the Presidential Council, Chairmen of the Supreme Court, General Prosecutors, First Secretaries of the Districts, employees of State security and collaborators with State Security and witnesses who denounced defendants in political trials.

In support of the complaint, they cited Articles 2, 4 and 8 of Law no. 7491 dated 29 April 1991 "On the major Constitutional provisions" and Articles 19, 25 and 41 of Law no. 7692 dated 31 March 1993 "On fundamental human rights and freedoms". These provisions provide for equality before the law, the guarantee of fundamental human rights and freedoms generally recognised in international documents, and the respect by the legislation of the Republic of Albania of the principles and norms generally accepted in international law, as well as for the right of election and the temporary limitation of particular rights.

Having regard to the above constitutional norms in the general context of Albanian constitutional legislation generally accepted international acts and norms, the unparalleled violation and denial of fundamental human rights and freedoms during the Communist regime as well as to the conditions of the transition, the Court considered the complaint of the parliamentary groups to be groundless, with respect to the limitation for a set time period of the right to be elected as well as of the exercise of several employment functions for the category of persons in question.

In its preamble, the Constitutional Law "On fundamental human rights and freedoms", in stating its purpose, stresses "... during the fierce and extremely inhuman 46 year dictatorship of the party state in Albania, civil and political, economic, social and cultural rights, as well as basic human freedoms, were violated and denied through state terror", and that "...the general respect for, the enjoyment of, these rights and freedoms constitutes one of the highest aspirations of the Albanian people and one of the necessary preconditions for guaranteeing the freedom of our society and social justice and democratic progress in it".

It is precisely the subjects specified in Article 3 of Law no. 8001 dated 22 September 1995 and Article 2 of Law no. 8043 dated 30 November 1995 who were the perpetrators, conceptualisers and implementers of that fierce, inhuman dictatorship which the constitutional law denounces in its preamble. Consequently, the temporary limitation of the rights of these subjects to be elected and nominated to specified State duties constitutes a guarantee for the implementation of all the constitutional provisions and international acts that have to do with fundamental human rights and freedoms.

It is true, as the Parliamentary Group of the Socialist Party propounds, that in Article 25 of the International Covenant on Civil and Political Rights it is contemplated that every citizen has the right to vote and be elected and also to take part in the management of public affairs. But, as is specified in the first paragraph of the same Article, only "unreasonable limitations" may not be made to these rights.

In addition to the above, the Court notes that the second paragraph of Article 29 of the Universal Declaration of Human Rights provides that : "in the exercise of his rights, every person is subject only to the limitations set by law and only with the purpose ... of responding to the demands of morality and general well-being in a democratic society".

Basing itself also on these provisions, the Court reaches the conclusions that the laws that are the object of investigation set out reasonable limitations that respond to the demands of the moral law of the democratic society of Albania.

The Court finds well-grounded the complaint of the Albanian Socialist Party's Parliamentary Group to repeal the point "j" of article 1 (this article provides for restrictions on the profession of mass-media employees) of Law no. 8043 "On the verification of the moral character of officials and other persons connected with the defense of the democratic State". Article 1 of this law provides for the positions where the subjects defined by Article 3 of Law no. 8001 "On genocide and crimes against humanity committed in Albania during the communist regime for political, ideological and religious reasons" cannot be placed.

By Article 2 of the Law "On fundamental human rights and freedoms" and Article 1 of Law no. 7755 "On the press", the right of the press is guaranteed. The profession of journalist is a free profession, based on initiative and personal activity, and has no connection to State duties.

The Court finds well-founded the complaint of the Albanian Socialist Party's Parliamentary Group to repeal Article 12 of Law no. 8043, dated 30 November 1995, which provides for the right of the Minister of Justice to make a request for the verification of the leadership of political parties and associations. Giving this right to the Minister of Justice is in conflict with the second paragraph of Article 6 of the Law "On the major constitutional provisions". According to this provision, political parties and other organisations are completely separate from the State. For this reason, the words "by the Minister of Justice or" shall be struck from Article 12.

Languages:

Albanian.

14. HUN-1994-3-019

a) Hungary / **b)** Constitutional Court / **c)** / **d)** 22-12-1994 / **e)** 60/1994 / **f)** / **g)** *Magyar Közlöny* (Official Gazette), 124/1994 / **h)** *East European Case Reporter of Constitutional Law*, 1995, vol. 2, n° 2, 159.

Keywords of the Systematic Thesaurus:

3.9. General Principles - **Rule of law.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.**
5.3.24. Fundamental Rights - Civil and political rights - **Right to information.**
5.3.25. Fundamental Rights - Civil and political rights - **Right to administrative transparency.**
5.3.25.1. Fundamental Rights - Civil and political rights - Right to administrative transparency -

Right of access to administrative documents.

Keywords of the alphabetical index:

Secret agent / Political crime.

Headnotes:

Data and records on individuals in positions of public authority and on those who partake in political life which reveal that they at one time carried out activities contrary to the principles of a constitutional State, or belonged to State organs that pursued activities contrary to same, count as information of public interest. But even the secrecy of the records established by political police in a system that did not adhere to the principles of a constitutional State may limit the right to information of affected persons.

Summary:

On 8 March 1994, Parliament passed a law on mandating background checks on individuals holding certain key offices. The Constitutional Court subsequently received a number of petitions contending that particular provisions of the Act were unconstitutional.

The law requires screening of certain public officials and others occupying key positions in public life. The screening aims to determine whether these individuals carried out activities on behalf of State security organs, or obtained data from State security agencies to assist them in making decisions, or whether they were members of the Nazi Arrow Cross Party. If, in the course of the screening, an individual is found to fall under one of these categories, the results are to be published unless the given individual first resigns from his post. The screening is carried out by a special committee whose members are judges. The individual under scrutiny may file a claim with the Municipal Court. The court reviews the committee decision. Both proceedings are conducted behind closed doors.

The Hungarian Act is different from earlier «lustration» laws. It does not declare incompatibility between personnel in past and present offices, nor does it propose to unveil the whole of the previous system of political informing. The Court therefore examined the case in view of the fact that in a constitutional State, the fundamental right to freedom of information presumes that the functioning of the State is «transparent» to its citizens.

The Court found that the petitions are in part justified, and declared unconstitutional several provisions of the law. The justification for the annulment was that the violations of the right to information require clarification of who may gain access to secret service files which concern themselves, so that they may understand the true extent to which the past regime influenced their personal fate. This can be resolved only if the secrecy of one-time secret service records is not further maintained. The unconditional secrecy of the data in the records listed in the law was declared unconstitutional.

The other reason for the unconstitutionality was the range of information and of the persons affected by the law. The Act in this respect went beyond the legislature's jurisdiction, and failed even within those limits to apply consistently the same criterion for distinguishing between information of private and public interest.

One judge wrote a concurring opinion.

Supplementary information:

Settled case-law on the right to information.

Languages:

Hungarian.

---

15. CZE-1992-S-002

a) Czech Republic / **b)** Constitutional Court / **c)** / **d)** 26-11-1992 / **e)** Pl. US 1/92 / **f)** On the Lustration Statute / **g)** *Sbírka usnesení a nálezu Ústavního soud CSFR* (Official Digest), 14, 56 / **h)** .

Keywords of the Systematic Thesaurus:

2.1.1.4.8. Sources - Categories - Written rules - International instruments - **International Covenant on Civil and Political Rights of 1966.**
2.1.1.4.9. Sources - Categories - Written rules - International instruments - **International Covenant on Economic, Social and Cultural Rights of 1966.**
3.3. General Principles - **Democracy.**
3.9. General Principles - **Rule of law.**
3.10. General Principles - **Certainty of the law.**
3.23. General Principles - **Equity.**
4.6.9.2. Institutions - Executive bodies - The civil service - **Reasons for exclusion.**
4.6.9.2.1. Institutions - Executive bodies - The civil service - Reasons for exclusion - **Lustration.** (Lustration)
5.1.4. Fundamental Rights - General questions - **Limits and restrictions.**
5.2. Fundamental Rights - **Equality.**

Keywords of the alphabetical index:

Totalitarian regime, values / Party, membership, privilege / State, loyalty / Secret service, records / Value system.

Headnotes:

In contrast to totalitarian systems, which were founded on the basis of the goals of the moment and were never bound by legal principles, particularly principles of constitutional law, a democratic state proceeds on the basis of entirely different values and criteria.

Every state, particularly one which was compelled for a period of more than 40 years to suffer the violation of fundamental rights and basic freedoms by a totalitarian regime, has the right to enthrone a democratic order and to apply such legal measures as are calculated to avert the risk of subversion or of a possible relapse into totalitarianism, or at least to limit those risks.

As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values. Thus, the contemporary construction of a law-based state, which has for its starting point a discontinuity with the totalitarian regime as regards values, may not adopt a criteria which is based on that differing value system. Respect for continuity with the old value system from the preceding legal order would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the new system, legal certainty would be threatened, and citizens' faith in the credibility of the democratic system would be shaken.

A democratic state has not only the right but also the duty to assert and protect the principles upon which it is founded. Thus, it must not be inactive in respect of a situation in which the top positions at all levels of state administration, economic management, and so on, were filled in accordance with the now unacceptable criteria of a totalitarian system. A democratic state is entitled to make all efforts to eliminate an unjustified preference enjoyed in the past by a favoured group of citizens in relation to the vast majority of other citizens which was accorded exclusively on the basis of membership of a totalitarian political party and where, as was already inferred earlier, it represented a form of oppression and discrimination in regard to these other citizens.

In a democratic society, it is necessary for employees of state and public bodies (but also workplaces which have some relation to the security of the state) to meet certain criteria of a civic nature, which we can characterise as loyalty to the democratic principles upon which the state is built. Such restrictions may also concern specific groups of persons without those persons being individually judged.

Summary:

Act no. 451/1991, which sets down some additional preconditions to holding certain offices in governmental bodies and organisations of the Czech and Slovak Federal Republic, the Czech Republic, and the Slovak Republic, disqualifies for five years (extended by an additional five in 1996) from certain key positions in the state apparatus (both by election and appointment) any persons who, during the communist regime, held or engaged in certain categories of functions or activities. The currently restricted state positions include all elective or appointed positions in state administrative bodies, the office of judge, the administrative office of various supreme state bodies, high ranking positions in the army or in universities, and positions in state radio, television, and press. The activities or positions held during the communist regime that disqualify persons include the following: higher Communist Party officials, an officer of the State Security Services or a student training for such a position at Soviet universities, and various types of secret police informants. The police informants included the category of "conscious collaborators", which meant a person registered in the files, who knew he was in contact with the secret police and supplied them information or performed some task for them. Persons elected or nominated to one of the restricted positions are required to submit a certificate from the Ministry of the Interior that they do not fall into any of the enumerated categories. The submission of this certificate is an absolute requirement to the holding of the office, and those who do not or cannot submit one are disqualified from holding the office. Ninety-nine deputies of the Federal Assembly submitted a petition contesting this statute as unconstitutional.

The Court first reviewed the massive purges undertaken during the communist regime and the general personnel policies, pointing out the extent to which they resulted in the state apparatus being thoroughly compromised. The communist hold on power was further buttressed by the activities of state security and secret policy, which had an extensive network of collaborators and which, following November 1989, was preparing to carry on and destabilise democratic developments. Accordingly, much compromising file material was disposed of or hidden. On the basis of these facts, it came to the conclusion that "this calculated and malicious conduct created a real and potentially very perilous source of destabilisation and danger, which could easily threaten the developing constitutional order."

The Court drew a general conclusion about the challenged law to the effect that "it cannot deny the state's right... to lay down in its domestic law conditions or prerequisites crucial for the performance of leadership or other decisive positions if... its own safety, the safety of its citizens and, most of all, further democratic developments are taken into consideration".

The Court then determined that the challenged law did not violate any of the Czech and Slovak Federal Republic's international legal obligations. Article 26 of the International Covenant on Civil and Political Rights permits restrictions to be placed on the right of access to jobs in the public service if such are justifiable. In addition, Article 4 of the International Covenant on Economic, Social, and Cultural Rights allows conditions to be placed on the Covenant rights for the common good in a democratic society. The Court determined that the Lustration law satisfied these and other treaty provisions with reference to the fact that, in a democratic society, state positions that might involve a risk to the democratic constitutional system or the security and stability of the state may be made subject to criteria of a civic nature, such as loyalty to the state.

The Court further accepted the argument that the statute does not respect the principle of equality in that exemptions may be made at the request of the Minister of Defence or Interior, hence these exemptions were annulled. The Court also considered, but rejected, the objection that the Lustration law is retroactive.

The Court considered in detail the problem of secret police informants, and it drew a distinction between those that agreed to collaborate and those whom the secret police attempted to recruit, both of whom were affected by the Lustration law. The Court considered that it was justified to apply the prohibition to those who agreed to collaborate but not to those who were merely recruited. The records of the secret police concerning the first group were judged to be accurate and trustworthy evidence of actual collaboration in individual cases so that the reliance on secret police records was considered acceptable. In any case, the possibility of separately proving acts of collaboration was foreclosed when the secret police destroyed the files. On the other hand, the records concerning the second group were not considered reliable, however, because records were kept on such persons without their written commitment (even without their knowledge); hence, the Court annulled the provision concerning them.

Languages:

Czech.