

Procedural decision of 4th December 2000, [SK 10/99](#)
**LEGAL NATURE OF A DECISION TO PUBLISH A LUSTRATION
DECLARATION AND THE RIGHT TO THE CONSTITUTIONAL COMPLAINT**

Type of proceedings: Constitutional complaint Initiators: Natural persons	Composition of Tribunal: Plenary session	Dissenting opinions: 5
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The Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Act 1997, commonly known as the “Lustration Act”, anticipates that persons currently holding or aspiring to hold important public offices shall disclose the fact of their former service or employment within the communist security agencies or any confidential co-operation with such agencies (“lustration”). Such persons shall submit an appropriate declaration (“lustration declaration”) in which they declare whether, or not, they performed services for, or were employed in, such security agencies. A person who admits to having undertaken such services, employment or co-operation is not deprived of the right to perform functions in respect of which the legislator imposed a lustration obligation; the Lustration Act states that such an admission shall be made known to the public by way of a publication, in the form of an announcement, in the Official Gazette of the Republic of Poland *Monitor Polski*. Where, however, a person submits a declaration containing untrue information (a “lustration lie”), it is for a court to decide, within separate proceedings, as to whether a lustration lie has occurred and, if so, to impose an appropriate sanction.

The competent court in matters regulated by the Lustration Act (the “lustration court”) is the Warsaw Court of Appeal within whose auspices a Lustration Division was created.

A declaration admitting to former service, employment or co-operation within the security agencies (sometimes referred to as a “positive” or “affirmative” lustration declaration), is composed of two parts. Part A contains the personal data of the lustrated person and a general statement of fact regarding their service, employment or co-operation. Part B contains a description by the lustrated person of the circumstances justifying the aforementioned statement of fact. In accordance with the legal provisions reviewed by the Constitutional Tribunal in the present case, only the contents of Part A were made known to the public by publication in *Monitor Polski*.

When, against their will, the admissions of Janusz G. and Mieczysław K. concerning their service with the security agencies were published in *Monitor Polski*, in the form prescribed by the legal provisions in force, this prompted them to lodge constitutional complaints, which were joined by the Constitutional Tribunal for concurrent examination. The subject of these challenges was several provisions of the Lustration Act which, according to the complainants, infringed their rights as guaranteed by the Constitution. One of these provisions is Article 40(3) of the Act, pursuant to which the Lustration Court makes known to the public, in *Monitor Polski*, the contents of Part A of a positive lustration declaration submitted by a person currently performing public functions.

The factual backgrounds of constitutional complaints were as follows:

The first complainant, Janusz G., submitted a lustration declaration stating that, in 1972, he provided military services for the Border Guards Detachment (*Zwiad Wojsk Ochrony Pogranicza*). As an investigating officer, he only performed inquiry-investigation activities in cases regarding common offences (as opposed to politically motivated offences). In his opinion, there was no rational justification for requiring a lustration declaration to be submitted by a person fulfilling inquiry-investigation activities in cases regarding common offences when no such obligation existed in respect of persons who, during the same period, performed analogous activities within structures of the Civil Militia (*Milicja Obywatelska*; the name of the Police at that time).

Nevertheless, the announcement published in *Monitor Polski* by the President of the Court of Appeal contained, amidst a list of persons having admitted to the provision of services for State security agencies, the complainant's full name and certain personal data. The contents of the announcement made it impossible to ascertain the type of services provided by Janusz G.

The complainant attempted to obtain, in written form, the decision to publish the announcement, in order to challenge it. He was informed, however, that no procedural provisions in force envisaged the delivery of, or possibility of appealing against, such a decision.

The second complainant, Mieczysław K., submitted a declaration admitting that he provided services for the Civil Militia in 1944 and 1945 (at that time, the Civil Militia performed traditional policing functions as well as functions of a security agency). Concomitantly, the complainant requested that the Lustration Court acknowledge that he was instructed by the Polish Underground State authorities to perform such services; whilst fulfilling the duties of a District Commander in a particular city, he performed tasks assigned to him by the Polish Underground State authorities.

As was also the case with the first complainant, the announcement in *Monitor Polski* concerning Mieczysław K. merely stated the fact of him having provided services for the State security agencies. Similar procedural obstacles were encountered when he attempted to initiate appellate review of the decision to publish the announcement which was, in the complainant's opinion, incompatible with what was stated in his lustration declaration and which caused him harm.

In challenging the provisions of the Lustration Act, which lead to the results challenged by the authors of constitutional complaints, they referred to the constitutional principles of social justice (Article 2), equality and non-discrimination (Article 32), and to constitutional guarantees of honour and good reputation (Article 47), fair trial and the principle of the two-instance system of judicial proceedings (Articles 45, 78 and 176 (1)).

Mieczysław K.'s constitutional complaint was supported by the Commissioner for Citizens' Rights, who gave notice of his participation in the proceedings (Article 51 of the Constitutional Tribunal Act).

The Tribunal, by a majority decision, decided to discontinue the proceedings, given non-fulfilment of the prerequisites for lodging a constitutional complaint, as contained in Article 79(1) of the Constitution. Five judges, disagreeing with both the decision and the reasoning thereof, presented dissenting opinions.

RULING

The Tribunal discontinued the proceedings, pursuant to Article 39(1) point 1 of the Constitutional Tribunal Act.

PRINCIPAL REASONS FOR THE RULING

1. Only those judicial or administrative decisions which are imperative in nature and which define the legal situation of an individually-identified entity (i.e. impose, modify or annul obligations; grant, modify or annul rights; or authoritatively ascertain the existence of an obligation or right) constitute decisions on the freedoms, rights or obligations of an individual, within the meaning of Article 79(1) of the Constitution (determining the prerequisites for the right to lodge a constitutional complaint) – provided that such decisions are significant for realisation of certain individual rights or obligations; that notion also encompasses a refusal to issue one of the aforementioned decisions. The factual activities of public authority organs (i.e. activities which are not legal acts) do not constitute decisions on an individual’s freedoms, rights and obligations since, firstly, they neither vest nor declare rights and, secondly, they neither impose nor declare obligations.
2. It stems from an analysis of the provisions of the Disclosure by Persons Holding Public Office of Work, Service or Co-operation with State Security Services During the Years 1944-1990 Act 1997 (particularly Articles 3, 7, 8, 11, 22 and 40 thereof) that, within the meaning of Article 79(1) of the Constitution (cf. point 1 above), the following acts shall not constitute final decisions on an individual’s freedoms, rights and obligations: an order of the President of the Lustration Division of the Warsaw Court of Appeal submitting for signature, by the President of that Court, a list of persons whose lustration declarations admitted to their former service, employment or co-operation with the State security agencies; the signature, by the President of the Warsaw Court of Appeal, of such an announcement and referral for publication in *Monitor Polski*; and the publication of that announcement.
3. Article 40(3) and (4) of the Lustration Act 1997 concern completely different issues. Whilst Article 40(3) requires the publication of declarations confirming the fact of a person’s service, employment or co-operation with the security agencies, Article 40(4) lays down the procedure for verifying the veracity of submitted lustration declarations. Accordingly, Article 40(4) has no application insofar as concerns the publication of declarations confirming such facts.
4. Mere use of the notion “court” within the Lustration Act does not lead to the conclusion that the legislator had in mind the basic functions of courts, concerning the administration of justice. The constitutional notion of a court – as the only organ authorised, pursuant to Article 175 of the Constitution, to implement the administration of justice – does not preclude the possibility of entrusting courts with functions beyond the sphere of the administration of justice (e.g. judicial administration); such functions are not directly related to the constitutional right to court, as expressed in Article 45.
5. A court’s technical and administrative activities are carried out by court organs defined in the Organisation of Common Courts Act, i.e. the Presidents of courts. In particular, this concerns any activities related to making available to the public the con-

tents of lustration declarations, within the procedure provided for by Article 40(3) of the challenged Act.

6. The right to an appeal, as guaranteed by Article 176(1) of the Constitution, refers only to court rulings (decisions), as opposed to technical activities which are in no way connected with a court implementing the administration of justice.
7. The absence of separate procedural regulations governing making available lustration declarations to the public does not signify that an individual is deprived of means for asserting their rights before a court. The protection of honour and good reputation may be based, in particular, on Articles 23 and 24 of the Civil Code (civil-legal protection of personal interests).
8. In reviewing the constitutionality of a normative act, the Constitutional Tribunal takes into account the manner in which the legal provisions are understood in practice and within legal doctrine. If a uniform and consistent practice of applying the law unambiguously determined the interpretation of a given provision and, concomitantly, the representatives of legal doctrine do not question such an interpretation, the legal norm derived from a given provision by such established practice constitutes the subject of constitutional review.

MAIN ARGUMENTS OF THE DISSENTING OPINIONS

- judge *Zdzisław Czeszejko-Sochacki*:

- Whenever interpretational doubts arise they must be resolved in a manner which strengthens the protection of an individual's constitutional freedoms and rights, and not otherwise.
- A narrow understanding of the notion "made a final decision", within Article 79(1) of the Constitution, does not correspond with the intentions of the constitutional legislator. The new and general notion of "final decision" was intended to encompass all types of final rulings issued in all types of proceedings before courts and organs of public administration.
- It is indisputable that a constitutional complaint is a means for protecting individuals vis-à-vis State organs endowed with certain power (*imperium*). Yet, a question may be posed: whether the behaviour of such an organ, constituting an infringement of constitutional rights or freedoms, must always possess the form of an imperative act. Such an unambiguous conclusion may not be derived from the constitutional notion "made a final decision". A final character, in this context, refers to the subsidiary character of a constitutional complaint, i.e. to the need to exhaust all legal remedies vested in the complainant within the frameworks of a defined procedure. There are, however, no grounds for categorically concluding that the constitutional legislator intended to include only imperative acts within this definition.
- It is erroneous for the Constitutional Tribunal to conclude that publication of an announcement entails no legal consequences for persons having admitted to previous service, employment or co-operation with security agencies. It is precisely these acts (i.e. announcements and orders) which may lead to infringement of the complainants' constitutionally-protected rights and freedoms.
- Pursuant to Article 40(3) of the Lustration Act, it is the duty of a "court" to make available to the public the contents of declarations. Whilst, in such a case, the Lustration Court is carrying out the legislator's decision, it nevertheless remains the final decision-making link.

- judge *Lech Garlicki*:

- According to the Constitutional Tribunal's fixed jurisprudential line, if, as a result of a uniform and repeated practice of applying a legal provision, that provision has acquired a meaning other than that which would stem from its literal wording, it is the new, practical, meaning of such a provision that shall constitute the Tribunal's subject of review. It stems from the essence of the concept of "living law" that the contents of a legal norm should be assessed against the background of its application in practice.

- If the application of Article 40(3) of the Lustration Act in practice led, in accordance with the legislator's intentions, to the Court acting automatically, referring for publication all declarations containing admissions of service, employment or co-operation without any substantive verification thereof, this may justify the thesis that orders referring declarations for publication have a purely technical character and may not be perceived as an imperative concretisation of an entity's legal position, nor as a decision shaping their legal position. Nevertheless, practical application of the Lustration Act has proved to be otherwise. The lack of clarity within many fundamental provisions of that Act resulted in Article 40(3) acquiring, via the practical application thereof, a new legal shape, making publication of lustration declarations conditional upon prior assessment of whether such publication was justified. Decisions on referring "positive declarations" for publication lost their automatic character and became conditional upon prior evaluation of such declarations and recognition that they really contain an admission of service, employment or co-operation whose disclosure is required by the Lustration Act. The aforementioned nature of activities performed by the President of the Lustration Division may not be considered as activities of a purely factual (technical) character, nor may they be denied the attribute of an "imperative concretisation of the legal position of the interested party", as is implicit in the reasoning of the present procedural decision. Such activities have the characteristics of "decisions", within the meaning of Article 79(1) of the Constitution, for the following reasons: they involve comparing an individual factual state with a standard arising from a legal provision; they are conducted following a judicial, multiple-stage, procedure; they involve the issuing of one of two – materially alternative – decisions (i.e. regarding publication or non-publication); the issuing of such a decision is accompanied by a significant "discretionary freedom".

- judge Stefan J. Jaworski:

- Article 40(3) of the Lustration Act should be interpreted in conjunction with Article 1 of that Act, pursuant to which the Warsaw Court of Appeal is the competent court to adjudicate upon the veracity of lustration declarations. Without doubt, one of court's typical activities concerning lustration declarations is the obligation to register all such declarations presented to the court. The following activities, involving review, assessment and ruling, are also included: determining whether a declaration was submitted by a person subject to lustration, whether it concerns facts encompassed by the lustration duty, whether it is original, whether it was prepared in an appropriate form (as specified in the appendix to the Act), whether the contents and form of a declaration comply with requirements laid down by the Act, and whether it is complete (i.e. whether the defined contents of appendix in Part A are accompanied by the defined contents of appendix in Part B); assessing which of the contents of the declaration fulfil the statutory requirements permitting publication of a declaration in *Monitor Polski*; depositing a lustration declaration at the court; deciding whether or not to make a lustration declaration known to the public by publication in *Monitor Polski*; preparing an appropriate announcement. Even this cursory catalogue of the Lustration Court's activities shows that they are in no way purely technical but, rather, also contain typical elements of judicial decisions ruling on the merits of the case; in this case, on the rights of persons subject to lustration.
- The actions of the court defined in Article 40(3) of the Lustration Act, undertaken by one person (the President of the Lustration Division or the President of the Court of Appeal), constitute procedural actions of a court within the meaning of the Criminal Procedure Code. Despite the Constitutional Tribunal's contrary opinion, such actions have the character of definitive rulings on the complainants' rights and freedoms, as regulated by the Lustration Act. Since the Lustration Act concerns the complainants' fundamental, constitutionally-protected, rights and freedoms, the court rulings referred to in Article 40(3) are judicial in character, i.e. they constitute decisions on constitutional rights and freedoms, within the meaning of Article 79(1) of the Constitution.
- Within legal doctrine and the Constitutional Tribunal's jurisprudence, it is unanimously accepted that the notion of a "final decision", used in Article 79 of the Constitution, is autonomous and may not be directly associated with any known statutory procedure. This term was introduced intentionally by the constitutional legislator, having in mind its significance in assessing the legal grounds for lodging a constitutional complaint. Accordingly, since both complainants expressly indicated, within their complaints, decisions in which the Lustration Court, at this stage of lustration proceedings, ruled finally upon their rights and obligations, they fulfilled the requirements specified in Article 79(1) of the Constitution and Article 46 of the Constitutional Tribunal Act, permitting the constitutional complaint to be reviewed on its merits and for judgment to be delivered on the constitutionality of the challenged provisions of the Lustration Act.

- judge Andrzej Mączyński:

- Pursuant to Article 79 of the Constitution, one of the conditions for permitting review of a constitutional complaint on its merits is the application of the challenged provision by a court or an organ of public ad-

ministration which adjudicated finally on the complainant's constitutional rights and freedoms. In the light of the Constitutional Tribunal's hitherto jurisprudence, the notion of a "final decision", within the meaning of Article 79 of the Constitution (as well as other corresponding notions, used in Article 46(1) of the Constitutional Tribunal Act, i.e. "legally-valid decision, final decision or other final judgment"), indicates the constitutional legislator's creation of a collective concept, encompassing any final ruling issued in any type of proceedings. Accordingly, that collective concept shall be of the most general character as possible.

- From the perspective of Article 79 of the Constitution, it is sufficient to ascertain that, in a particular case, a State organ applying legal provisions expressed its position, during the litigation, regarding circumstances which, in light of these provisions, have legal significance. The interpretation of Article 79 of the Constitution assumed by the Constitutional Tribunal narrows the scope of the legal norm stemming from that provision.
- In the present case, both complainants submitted lustration declarations which, given their contents – insofar as regards Part A of the sample constituting an appendix to the 1997 Act – may have been published. Nevertheless, the complainants indicated circumstances which, in their opinion, should preclude publication of their declarations. The Lustration Court considered otherwise, however, and the complainants' declarations were published. The President of the Lustration Division of the Warsaw Court of Appeal stated in writing that the declarations were "analysed" by judges of the Lustration Division and, as a result of their "assessment", a "decision" on their publication was made. This range of activities, defined by the organ performing them as "analysis", "assessment" and "decision", possesses features justifying its qualification as a "decision" within the meaning of Article 79(1) of the Constitution and Article 46(1) of the Constitutional Tribunal Act. Since existing law in force envisages no appellate measures in such circumstances, any such decision may also be considered as "final" within the meaning of these provisions.

- judge Janusz Trzcíński:

- Statutory notions should be interpreted primarily with reference to analogous notions used in the Constitution. The notion of a court is well-known in the Constitution and its contents do not give rise to doubts. The Constitution uses this notion in chapter VIII entitled "Courts and Tribunals" as well as in other provisions (e.g. Articles 10(1), 45(1), 79(1)). Analysis of these provisions leads to the conclusion that Constitution uses the notion of a "court" to signify a constitutional State organ, functioning within the field of the judicial power and exercising competences vested therein by the law – particularly those concerning the administration of justice.
- Given the existence of doubts as to how to understand the notion of a "court", within the meaning of Article 40(3) of the challenged Act, it is necessary to refer to the whole text of the Act and to determine the meaning of that notion within other provisions therein. Such an analysis leads to the conclusion that: in all legal provisions of the Act the term "court" signifies a constitutional State organ enjoying certain competences; the legislator made a distinction between "court" and "President of a court" and, where the legislator wished to endow the President of the Lustration Court with certain competencies, this was done so explicitly (cf. Articles 21(1), 21(3), 27(3), 32). As regards Article 40(3), the legislator used the term "court", as opposed to "the President of the Court".

Provisions of the Constitution and the Constitutional Tribunal Act

Constitution

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

Art. 10. [...] 2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

2. Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly.

Art. 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

Art. 78. Each party shall have the right to appeal against judgments and decisions made at first instance. Exceptions to this principle and the procedure for such appeals shall be specified by statute.

Art. 79. 1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

2. The provisions of para. 1 above shall not relate to the rights specified in Article 56.

Art. 176. 1. Court proceedings shall have at least two instances.

CT Act

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:

- 1) if the pronouncement of a judicial decision is superfluous or inadmissible;
- 2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
- 3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

2. If the circumstances referred to in paragraph 1 above shall come to light at the hearing, the Tribunal shall make a decision to discontinue the proceedings.

3. The regulation stated in item 1 point 3 is not applied if issuing a judgment on a normative act which lost its validity before issuing the judgment is necessary for protecting constitutional freedom and rights.

Art. 46. 1. Constitutional complaint, further referred to as the "complaint" can be submitted after trying all legal means, if such means is allowed, within 3 months from delivering the legally valid decision to the complainant, the final decision or other final judgment.

2. The Tribunal shall consider a complaint on the principles and in accordance with the procedure provided for the consideration of an application for the confirmation of conformity of statutes to the Constitution and of other normative acts to the Constitutions and statutes.

Art. 51. 1. The Tribunal shall inform the Commissioner for Citizens' Rights about the institution of proceedings. Provisions of Article 33 shall apply accordingly.

2. The Commissioner for Citizens' Rights may, within the period of 60 days from the receipt of information, give notice of his/her participation in the proceedings.