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To
President of the Republic of Poland
Marshal of the Sejm of the Republic of Poland
Marshal of the Senate of the Republic of Poland
President of the Council of Ministers
Head of the State Election Commission
Commissioner for Civil Rights Protection
President of the Constitutional Tribunal

In connection with the Ombudsman's approach to the President of the Council of Ministers, which was presented in a letter of 13 July 2007, RPO-563290-I/07/MW, and the Ombudsman's statement of 16 July 2007 regarding the legal status of lustration following the announcement of the justification to the Constitutional Tribunal verdict, the Helsinki Foundation for Human Rights wishes to draw attention to the issues that are significant with respect to the protection of fundamental civil rights.

The Constitutional Tribunal, in its verdict of 11 May 2007, file signature K 2/07¹, quashed Article 10 and appendixes 1 and 2 to the Act of 18 October 2006 on revealing information about documents of State security organs from the period of 1944-1990 and the contents of these documents² – hereafter referred to as the lustration law, considering it as contrary to Article 2 of the Constitution³. In the justification to the verdict, the Tribunal indicated the need for a statutory regulation of the specimen for the declaration form regarding work or service in national security forces or collaboration with these forces in the period between 22 July 1944 and 31 July 1990 (the so called lustration declaration) in order to implement the provisions of the lustration law in the future⁴. However, in the situation at hand we cannot consent to the thesis regarding the inability to hold pre-term parliamentary elections or to appoint a person born before 1 August 1972 to any position filled by means of general elections. If it is necessary to carry out such election procedure, it would be good to select a "lesser-evil" solution, i.e. to perform an interpretation of the binding legal norms, ensuring far-reaching consistency with Article 2 of the Constitution and respect for constitutionally guaranteed civil rights.

Under the current legal status, considering the quashing of Article 10 of the lustration law and appendixes 1 and 2 to this act by the Constitutional Tribunal, there is no legal regulation obliging individuals to file out a lustration declaration on the form specified by the act. Only the justification to the Constitutional Tribunal verdict of 11 May 2007 mentions the need to once again specify the contents and form of the declaration specimen through an act.

¹ published in the Journal of Laws "Dziennik Ustaw" of 15 May 2007, No. 85, item 571;

² The Journal of Laws "Dziennik Ustaw" of 2007, No. 63, item 425 with further amendments;

³ point 21 of the verdict;

⁴ page 200, point 22.2.3 of the verdict justification, presenting the detailed consequences of the verdict;

In a situation where there is a threat that the Supreme Court may consider the possible parliamentary elections as invalid in case the candidates for members of the Sejm and Senate are not required to file lustration declarations, we fully consent to the viewpoint expressed by Prof. Andrzej Zoll that the form specimen, designed for exceptional and transitory situations, could be specified by the State Election Commission (PKW)⁵. This would require the Commission's judges to consider the existing legal status following the Constitutional Tribunal verdict in the case K 2/07, particularly in the scope of defining cooperation with national security forces and specifying the list of these organs.

As the legal grounds for such actions we could even consider Article 39 par. 1 point 5 *in principio* following Article 39 par. 1 point 1 and Article 36 par. 1 of the Act of 12 April 2001 – Election Ordinance to the Sejm of the Republic of Poland and the Senate of the Republic of Poland⁶. In line with these regulations, the State Election Commission is the highest, standing electoral body competent for holding elections, which supervises the observance of electoral law, specifying inter alia statutory templates for official forms and electoral forms. It should be emphasized that the regulation of Article 144 par. 5 point 3 of the Election Ordinance indicates which documents the election commission should include in the entry list of the regional candidates for the Sejm and the Senate and makes reference only to Article 7 of the lustration law, and not to Article 10 of this act, which enacts the obligation to file a lustration declaration on the appropriate form. Referring however to the contents of Article 152 par. 1 of the Election Ordinance, for the needs of parliamentary elections, the State Election Commission could issue guidelines defining what information, corresponding to those included in part A of the annulled lustration declaration specimen, shall be announced in the election notice of the regional elections commission.

We believe that such a solution would enable citizens to exercise their active and passive elections rights, as well as the right to information about the candidates for specific positions, and furthermore it would allow us to avoid a dangerous precedence for democracy and parliamentarism consisting of blocking. for purely formal reasons, the appointment of positions by means of general elections. Thus, we fully agree with the position presented by Prof. Piotr Winczorek⁷ and moreover with the statement of the Ombudsman that the essence of the democratic system is expressed to its fullest extent during elections⁸.

The Helsinki Foundation for Human Rights is of the opinion that the situation at hand requires prompt legislative intervention in an aim to at least establish a statutory lustration declaration specimen in order to remove any legal doubts in this extent.

On behalf of the Helsinki Foundation for Human Rights,

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Marek Antoni Nowicki
President of the Foundation Board

⁵ *The Tribunal has blocked elections?*, the daily "Rzeczpospolita" of 16 July 2007,

⁶ The Official Journal "Dziennik Ustaw", No. 46, item 499 with further amendments;

⁷ *Election blocked?*, the daily "Rzeczpospolita" of 16 July 2007;

⁸ page 3 of the approach to the President of the Council of Ministers;