

Judgement of 27th June 2008, [K 51/07](#)

REORGANISATION OF INTELLIGENCE AND COUNTER-INTELLIGENCE SERVICES

(OTK ZU 2008, No. 5A, item 87)

Type of proceedings: abstract review Initiator: Group of Deputies	Composition of Tribunal: 5 judges	Dissenting opinions: 0
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Legal provisions under review	Basis of review
<p>Replacement of Military Information Services with Military Counter-intelligence Service and Military Intelligence Service</p> <p>[Provisions of the Act of 9th June 2006 – Provisions introducing the Act on Military Counter-intelligence Service and Military Intelligence Service, as well as the Act on the service of officers of Military Counter-intelligence Service and Military Intelligence Service (Journal of Laws, Dz. U. No. 104, item 711 and No. 218, item 1592 and of 2007, No. 7, item 49), and the Act of 14th December 2006 on the amendment of the Act – Provisions introducing the Act on Military Counter-intelligence Service and Military Intelligence Service, as well as the Act on the service of officers of Military Counter-intelligence Service and Military Intelligence Service (Journal of Laws, Dz. U. of 2007, No. 7, item 49)]</p>	<p>Principle of decent legislation Principle of specificity of legal provisions Principle of legality Principle of the separation of powers Human dignity Principle of equality Principle of proportionality Presumption of innocence principle Right to court Right to access official documents and data collections Right to demand the correction or deletion of information Position, tasks and competencies of the President of the Republic connected with his command of the Armed Forces</p> <p>[Constitution: Article 2, 7, 10, 30, 31 paragraph 3, 32, 42 paragraph 3, 45 paragraph 1, 51 paragraph 3 and 4, 126 paragraph 2 and 3, 134]</p>

The challenged Act of 9th June 2006 – Provisions introducing the Act on Military Counter-intelligence Service and Military Intelligence Service, as well as the Act on the service of officers of Military Counter-intelligence Service and Military Intelligence Service (hereinafter referred to as: the Act of 9th June 2006) – dissolved the Military Information Services (in Polish: *Wojskowe Służby Informacyjne*), and repealed the Act of 9th July 2003 on Military Information Services (hereinafter: the Act on Military Information Services). The Military Information Services were replaced with the Military Counter-intelligence Service (in Polish: *Służba Kontrwywiadu Wojskowego*) and the Military Intelligence Service (in Polish: *Służba Wywiadu Wojskowego*), operating by virtue of the Act on 9th June 2006 on Military Counter-intelligence Service and Military Intelligence Service.

Special organs competent in matters connected with the reorganisation of the military counter-intelligence and intelligence were established. Both present and former soldiers and employees of the Military Information Services or military organisational units competent in matters concerning military

intelligence and counter-intelligence matters, operating before the entry into force of the Act on Military Information Services, could, within a specified time frame, submit a motion requesting an appointment to a post in the Military Counter-intelligence Service or the Military Intelligence Service. Along with the said motion, persons interested were obliged to submit a declaration concerning the commitment, during the period when they performed their duties, of deeds specified in the Act, and disclose positions held in commercial companies and partnerships, cooperatives, foundations conducting economic activity, as well as possession of stock and shares or their own business activity.

The declarations in question, submitted by the said persons, were subject to scrutiny of the Verification Committee, which presented its stance concerning their veracity to the representatives or the Heads of the Military Counter-intelligence Service and the Military Intelligence Service. The challenged Act of 14th December 2006 on the amendment of the Act – Provisions introducing the Act on Military Counter-intelligence Service and Military Intelligence Service (hereinafter: the Act of 14th December 2006) introduced the obligation to draw up and publicise a report on irregularities in the functioning of the Military Information Services and other units concerned with military intelligence or counter-intelligence. The body that was competent to draw up the report was the Chairman of the Verification Committee. The report was supposed to encompass, *inter alia*, the information concerning particular acts that were to be disclosed in the aforementioned declarations. The Chairman of the Verification Committee was obliged to submit the report to the President of the Republic of Poland, the Prime Minister, and Deputy Prime Ministers. The President of the Republic, in turn, having consulted the Marshal of the Sejm and the Marshal of the Senate, was obliged to publish the report in an official gazette.

A group of Deputies applied to the Constitutional Tribunal with a motion requesting to consider non-conformity to the Constitution of both the Act of 14th December 2006, and some provisions of the Act of 9th June 2006.

In the opinion of the applicant, the Act of 14th December 2006 infringes, *inter alia*, the right to court, since it neither envisages subjecting the activities of the Verification Committee to the procedural requirements stemming from the Constitution and the Code of Penal Procedure, nor provides for measures that would allow one to appeal against the statements included in the report. Furthermore, the applicant pointed out that the Act in question infringes the presumption of innocence principle, the principle according to which no-one may be forced to accuse oneself, and the prohibition of discrimination. According to the applicant, the Act of 14th December 2006 also violates the rights of the individual in terms of official documents and data collections concerning themselves, since it does not provide the persons interested with the guarantee of access to records concerning the persons concerned, nor does it envisage any possibility to correct the data collected or delete untrue information.

Within the scope of the challenged provisions of the Act of 9th June 2006, the applicant pointed to their non-conformity to, above all, the principle of specificity of legal regulations, the principle of legality as regards the activity of public authority, as well as the principle of the separation of powers.

RULING

1. Article 62 paragraph 2a of the Act of 9th June 2006 – Provisions introducing the Act on Military Counter-intelligence Service and Military Intelligence Service, as well as the Act on the service of officers of Military Counter-intelligence Service and Military Intelligence Service, added by way of Article 1 point 1 of the Act of 14th December 2006 on the amendment of the Act – Provisions introducing the Act on Military Counter-intelligence Service and Military Intelligence Service, as well as the Act on the service of officers of Military Counter-intelligence Service and Military Intelligence Service, conforms to Article 2 and Article 7 of the Constitution.

2. Article 63 paragraph 4a of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 2 letter a of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2 and Article 7 of the Constitution.

3. Article 63 paragraph 6a of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 2 letter c of the Act of 14th December 2006 referred to in point 1 above, insofar as it ensures the members and the chairman of the Verification Committee access to all documents necessary for the verification of declarations referred to in Article 67 paragraph 1 and 3, conforms to Article 2, Article 7 and Article 31 paragraph 3 of the Constitution.

4. Article 70a of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to point 1 above:

a) insofar as it fails to guarantee the persons interested access to case records, does not conform to Article 51 paragraph 3 of the Constitution,

b) insofar as it fails to guarantee the parties the right be heard in connection with the information gathered, constituting the basis for drawing up the report of the Chairman of the Verification Committee, does not conform to Article 51 paragraph 4 of the Constitution,

c) insofar as it does not envisage any legal means that would enable judicial control of a decision concerning the publication of personal data included in the report of the Chairman of the Verification Committee, does not conform to Article 45 paragraph 1 of the Constitution.

5. Article 70a paragraph 1 of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2 of the Constitution, and is not inconsistent with Article 7 of the Constitution.

6. Article 70a paragraph 2 of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above:

a) does not conform to Article 32 of the Constitution,

b) conforms to Article 2, Article 7 and Article 30 of the Constitution.

7. Article 70b of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2 and Article 7 of the Constitution.

8. Article 70c of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 7 and Article 10 of the Constitution.

9. Article 70c paragraphs 2 and 3 of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2 and Article 10 of the Constitution.

10. Article 70c paragraph 4 of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2 as well as Article 7, read in conjunction with Article 126 paragraphs 2 and 3 and Article 134 of the Constitution.

11. Article 70d paragraphs 1 and 2 of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 4 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2 and Article 7 of the Constitution.

12. Article 79a of the Act of 9th June 2006 referred to in point 1 above, added by way of Article 1 point 5 of the Act of 14th December 2006 referred to in point 1 above, conforms to Article 2, Article 7 and Article 31 paragraph 3 of the Constitution.

13. The Act of 14th December 2006 referred to in point 1 above, conforms to Article 2, Article 7 and Article 30 of the Constitution, and is not inconsistent with Article 31 paragraph 3 and Article 42 paragraph 3 of the Constitution.

14. The Act of 14th December 2006 referred to in point 1 above, except for Article 1 point 4 thereof, insofar as it concerns Article 70a paragraph 2 of the Act of 9th June 2006 referred to in point 1 above, conforms to Article 32 of the Constitution.

Moreover the Constitutional Tribunal:

pursuant to Article 39 paragraph 1 point 1 of the Act of 1st August 1997 on the Constitutional Tribunal (Journal of Laws – Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070 as well as of 2005 No. 169, item 1417), decided to discontinue proceedings within the remaining scope, given the superfluity of adjudication.

PRINCIPAL REASONS FOR THE RULING

1. The Constitution vests the citizens with the right to access information on the activities of public authority organs, persons discharging public functions, as well as other entities performing the duties of public authorities and managing communal assets or property of the State Treasury (Article 61 paragraph 1). As a matter of principle, this also relates to information on the activities of services realising tasks connected with intelligence and counter-intelligence. The identified right is not, however, absolute in nature. It may be subject to limitations on account of the necessity to protect state security, yet with the proviso that the limitations find justification in constitutional regulations and remain within the limits of interference of public authority in the sphere of constitutional rights, as specified by Article 31 paragraph 3 of the Constitution.
2. The constitutional regulation included in Article 51 paragraphs 3 and 4 formulates the general right of access to official documents and data collections, as well as the right to demand the correction or deletion of information, irrespective of whether any proceedings, conducted by public authority organs, are pending against the person concerned. Both access to case records by parties to proceedings, and the right to demand the correction or deletion of information which is untrue, incomplete or gathered in a manner contrary to the one prescribed by statute, and which has been included in case records with view to issuing an individual decision, constitute one of the standards of a fair administrative procedure and is an important element of the constitutional principle of a democratic state ruled by law.

3. When enacting regulations concerning the relation between the right to information and the right to privacy, the legislator should carefully weight both rights, in particular taking account of the obligation to realise the rights to the fullest possible extent, and the significance of both individual and social values the rights are based upon. Whilst resolving conflicts between the rights in question, of particular significance is the connection between specific information and the sphere of privacy, as well as the realisation of tasks and public functions. As a matter of principle, in case of information directly connected with the realisation of public functions by persons discharging them, the Constitution resolves the conflict in question in favour of the right to information. In turn, as regards the information concerning natural persons, where it is directly connected with the realisation of public functions, the Constitution *prima facie* gives precedence to the right to privacy. Accordingly, as a matter of principle, the right to obtain information does not encompass information that has been gathered by organs of public authority and concerns private entities, but which is not directly connected with the realisation of public functions by the said entities.
4. The institution of reports including both the description and assessment of the functioning of a given institution, drawn up upon the commission of organs of public authority by specific persons or public authority entities vested with control competence, may be an important instrument serving to ensure lawful and effective activity of the institutions, including the implementation of the right to good administration. In situations where a suspicion exists that a given institution fails to perform its tasks in a proper manner, the justified social interest constitutes a basis for the utilisation of the institution of reports to determine and disclose the actual state of affairs.
5. Any interference on the part of a public authority in the sphere of constitutional rights requires that appropriate procedural guarantees be ensured. The specific character of the report drawn up by the Chairman of the Verification Committee demands that the legislator create adequate procedural guarantees protecting the persons interested against the inclusion of untrue information in the report. On the one hand, the legislator may not violate the informational autonomy and the right to protect good reputation in order to ensure the right to good administration and the right of access to official documents, while, on the other hand, it may not infringe the right of access to official documents or adopt solutions that would render the implementation of the right to good administration impossible.
6. The Constitution does not preclude the publication of the report drawn up by the Chairman of the Verification Committee within the scope of information relating to irregularities within the scope of activity of persons serving or employed in the Military Information Services or military organisational units realising tasks from within the scope of military intelligence and military counter-intelligence before the entry into force of the Act on the Military Information Services. In circumstances where, according to the will of the legislator, the report is to be published without a prior procedure whereby personal data are made anonymous, it is necessary, on account of the principle of fair procedure, to ensure all the persons interested: the right to be heard prior to drawing up the report, the right to access case records, and the right to challenge findings included in the report before a court. Given the specific nature of interference in the good reputation of the individual, the persons concerned

should be provided with an effective protection prior to the publication of the report in question. Civil law solutions do not ensure proper protection of the persons concerned, since they do not prevent the infringement of the rights consequent upon the publication of the report.

7. According to the constitutional principle of equality, all entities characterised to an equal degree by a certain significant (relevant) feature should be treated equally, that is without any favourable or discriminatory differentiation. While assessing the conformity of a given legal regulation to the principle of equality it is necessary in each situation to consider the following: first, whether it is possible to point to a common significant feature justifying equal treatment of legal entities; second, whether the lawmaker makes a differentiation between entities characterised by a common significant feature; third, whether the established differentiation of similar entities is permissible. Any departure from the obligation to treat similar entities equally is permissible if: 1) the differentiation criterion remains in rational relation to the aim and content of a given regulation; 2) the weight of interest that is to be protected by the differentiation remains in appropriate proportion to the weight of interests which will be infringed as a result of the differentiation introduced; 3) the differentiation criterion remains in relation to other constitutional values, principles or norms which justify the different treatment of similar entities.
8. There are significant differences between persons occupying managerial positions in the state, persons serving or employed in the Military Information Services, former soldiers and employees of the Military Information Services or other military organisational units competent in military intelligence or counter-intelligence and persons who cooperated with soldiers and employees of the Military Information Services and the indicated military organisational units. The former circle of persons may expect greater criticism than those employed in the private sector, while persons cooperating with soldiers and employees of military intelligence and counter-intelligence could justifiably expect that the state ensure appropriate protection of their informational autonomy and the right to privacy, in particular, in respect of the fact their cooperation with specific public institutions. The regulation that envisages subjecting soldiers and employees of military intelligence and counter-intelligence services to special vetting procedure is justified by the specific nature of the functioning of the services and a special character of the service performed therein.
9. Persons who before the entry into force of the Act on the Military Information Services had not occupied managerial positions, had not served or been employed in the Military Information Services or in military organisational units competent in military intelligence or counter-intelligence, belong to the category of persons that possess common feature significant from the perspective of the protection of their informational autonomy. Consequently, they should be treated equally in terms of protection at issue. However, the Act differentiates the subjects by creating the possibility of publishing in the report of the Chairman of the Verification Committee the information on persons who knew or suspected and agreed to co-participate in activities specified in Article 70a paragraph 1 of the Act of 9th June 2006. The identified provision does not find justification in any constitutional values or principles, and constitutes an excessive interference in the right to privacy.

10. The terms “national defence” and “security of the Armed Forces” are precise enough to be able to determine the scope of activity of organs of public authority. A specific feature of any natural language is that any phrase existing therein is characterised by a certain degree of imprecision. It is not possible to achieve a greater extent of precision in legal texts. Resolving any potential interpretational doubts as regards the indicated phrase should be the responsibility of courts. Judicial control over the application of law would significantly limit the negative effects arising from the unavoidable lack of clarity of statutory phrases, thereby eliminating the risk of arbitrary activity of public authority organs.
11. The Constitution does not prohibit vesting organs of the executive power with the competence to draw up reports on irregularities in the functioning of specific elements of the state apparatus. In turn, the principle of a democratic state ruled by law does not define any time frame for undertaking such activities, since any competence regarding the identification of irregularities are not – as a matter of principle – subject to temporal limitations. An impediment in this respect may exist where the prosecution for an offence becomes barred by limitation.
12. The principle of the separation of powers does not provide for any prohibition on any transfer of information or documents between organs of public authority. On the contrary, the said principle demands that the organs be granted access to public information and documents in order ensure an effective exercise of their competence. In particular, the obligation concerns documents that are to be made public.
13. The Constitution allows for vesting, by way of a statute, public authority organs with the right to express their non-binding opinion before another organ of public authority exercises its power. Such solutions may be found in the content of the Constitution itself (see Article 98 paragraph 4 sentence 1, Article 122 paragraph 4, Article 190 paragraph 3 sentence 3, Article 204 paragraph 1 point 2). In particular, the principle of the separation of powers does not preclude an organ of executive power from seeking opinions of the Marshals of both parliamentary chambers while exercising some of the competencies.
14. A constitutional review undertaken by the Constitutional Tribunal is based on three main assumptions: the principle of accusatorial nature of proceedings, the presumption of constitutionality of the normative acts under review, and a principle, according to which the burden of proof falls on the subject that initiates the constitutional review of legal norms.
15. The Constitutional Tribunal is an organ of the judicial power which fulfils its tasks from within the scope of constitutional control of law, following specific activities undertaken by authorised subjects. It is admissible to review only those provisions that have been challenged by the subject that has initiated proceedings. Accordingly, it is inadmissible to review legal regulations that have not been identified in the application, question of law or constitutional complaint. The initiator of the proceedings also indicates bases of review, in relation to which the Tribunal examines the challenged provisions (see Article 66 of the Act on the Constitutional Tribunal).
16. The presumption of conformity of normative acts to the Constitution signifies that a legally binding normative act existing in the Polish legal system is deemed

constitutional and is applied until a competent organ, in the course of an appropriate procedure, finds the non-conformity thereof. According to the Constitution, the only organ competent to declare a statute unconstitutional shall be the Constitutional Tribunal. In order to rebut the presumption of the constitutionality, it is necessary to unequivocally demonstrate that there is a conflict between the Constitution and a statute. In situations giving rise to doubts, the presumption in question should act in favour of the constitutionality of the challenged statutory regulations.

17. Within the procedure of constitutional review, the burden of proof falls, as a matter of principle, on the subject that initiates proceedings. Pursuant to Article 32 of the Act on the Constitutional Tribunal, the application submitted to the Constitutional Tribunal shall include, *inter alia*, reasons for the claim alleging the nonconformity of a normative act to the Constitution and indication of supporting evidence. Unless the subject that has initiated proceedings presents specific and convincing arguments supporting the admissibility of the challenge, the Constitutional Tribunal considers the reviewed provisions as conforming to the Constitution.
18. The point of departure in proceedings regarding the constitutional review of statutes is an assumption according to which the legislator enjoys a broad scope of regulatory freedom. The Parliament, members of which are elected in democratic suffrage, possesses broad competencies as regards the shaping of state policy, as well as the realisation and implementation of the Constitution. The limits of the regulatory freedom are determined by constitutional norms and principles. The Constitutional Tribunal is an organ competent in reviewing the constitutionality of the law, as opposed to the assessment of rationality and usefulness of the regulations adopted.
19. The limits as regards the interference of public authority organs in the constitutional freedoms and rights, as specified in Article 31 paragraph 3 of the Constitution, may not constitute independent bases of the constitutional review. Each time the limits have to be related to particular constitutional rights, since the indicated provision of the Constitution does not define the general scope of activity of public authority, but rather specifies the limits of permissible interference in specific constitutional rights.
20. The interpretation of the Constitution must be undertaken autonomously, without referring to the realisation thereof in ordinary statutes. Hence, the content of statutes may not determine the interpretation of constitutional provisions. The Constitutional Tribunal is not competent to adjudicate on inconsistencies existing between ordinary statutes – such matters may only constitute a premise for signalling irregularity to law-making bodies.

EFFECTS OF THE JUDGEMENT

1. By declaring that Article 70a of the Act of 9th June 2006 does not conform to the Constitution, insofar as the provision has failed to include certain regulations, the Constitutional Tribunal has confirmed the constitutional obligation to supplement the provision with regulations envisaging the necessary guarantees as regards the constitutional rights of the individual.
2. Until the legislator supplements the Act and undertakes appropriate proceedings based on new regulations, public authority organs should refrain from publicising the full

version of supplements to the report of the Chairman of the Verification Committee if the data concerning the persons encompassed by the report has not been made anonymous.

3. In consequence of finding Article 70a paragraph 2 of the Act of 9th June 2006 unconstitutional, there are no legal grounds that would allow for public announcement of the data of persons mentioned in the provision. Any publication of supplements to the report concerning the subjects mentioned would require a prior procedure whereby the data is made anonymous.
4. The publication of the report of the Chairman of the Verification Committee (Official Gazette of the Republic of Poland, Monitor Polski, M.P. of 2007 No. 11, item 110) resulted in irreversible consequences for the persons encompassed by the report. One result of finding the above-mentioned provisions unconstitutional is that the persons concerned may seek compensation by virtue of possible non-pecuniary and pecuniary damage caused by the application of the unconstitutional legal regulation.

Provisions of the Constitution

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

Art. 7. The organs of public authority shall function on the basis of, and within the limits of, the law.

Art. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

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. 30. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

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. 42. [...] 3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

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.

Art. 51. [...] 3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.

4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.

Art. 126. [...] 2. The President of the Republic shall ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory.

3. The President shall exercise his duties within the scope of and in accordance with the principles specified in the Constitution and statutes.

Art. 134. 1. The President of the Republic shall be the Supreme Commander of the Armed Forces of the Republic of Poland.

2. The President of the Republic, in times of peace, shall exercise command over the Armed Forces through the Minister of National Defence.

3. The President of the Republic shall appoint, for a specified period of time, the Chief of the General Staff and commanders of branches of the Armed Forces. The duration of their term of office, the procedure for and terms of their dismissal before the end thereof, shall be specified by statute.

4. The President of the Republic, for a period of war, shall appoint the Commander-in-Chief of the Armed Forces on request of the Prime Minister. He may dismiss the Commander-in-Chief of the Armed Forces in accordance with the same procedure. The authority of the Commander-in-Chief of the Armed Forces, as well as the principle of his subordination to the constitutional organs of the Republic of Poland, shall be specified by statute.

5. The President of the Republic, on request of the Minister of National Defence, shall confer military ranks as specified by statute.

6. The authority of the President of the Republic, regarding his supreme command of the Armed Forces, shall be specified in detail by statute.