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WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

Raboszuk, Dzioba and Pastuszka v. Poland

Applications nos. 231/22, 5126/22, 5449/22

EXECUTIVE SUMMARY:

- The case of *Raboszuk, Dzioba and Pastuszka v. Poland* concerns reduction of old age pensions of retired functionaries of uniformed services of the communist Poland on the basis of a controversial law enacted in December 2016 ('the 2016 Act').
- The 2016 Act is the second law aimed at reduction of pensions of this group of functionaries. Comparing to the previous law (adopted in 2009), it is much more radical.
- The 2016 Act was adopted in controversial circumstances with possible violations of the rules of legislative procedure and disregard for the rights of the opposition.
- It is questionable whether the 2016 Act serves any legitimate aim. It was adopted 26 years after the transition into democracy. Moreover, it is the already the second act reducing old-age pensions of former officers passed in the space of a few years.
- Some solutions adopted in the 2016 Act seem inconsistent with its declared purposes. It is difficult to justify lowering the pension of a person who served few years before 1989 and many years for the democratic state to the amount of average pension under the general system by the need to abolish unjustified privileges.
- Provisions of the 2016 Act seem very rigid – they provide reduction of pensions of all functionaries who 'performed service for totalitarian state', what is defined as being employed by one of the agencies specified in the law. Some of the functionaries performed administrative tasks which could hardly be described as 'totalitarian'.
- The 2016 Act contain some provisions which may exceptionally allow to disapply reductions to certain individuals, but they are not sufficiently effective in practice. However, the resolution adopted by the Supreme Court introduced the necessity to conduct individual assessment of the character of work of given functionary, what, in many cases, allowed to mitigate negative consequences of the 2016 Act.
- For the assessment of the proportionality of the application of the 2016 Act in specific cases such factors as the scale of the reduction, the nature of the service, and the existence of individual assessment by domestic court may be relevant. It may also be justified to consider whether the individual has previously been subject to a reduction under the earlier law.

I. INTRODUCTION

1. Under Article 36 of the European Convention on Human Rights ('ECHR', 'the Convention'), pursuant to the leave granted on 13 July 2023 by the President of the Section of the European Court of Human Rights ('ECtHR', 'the Court'), the Helsinki Foundation of Human Rights ('HFHR', 'The Foundation') presents its written comments on the case of *Raboszuk, Dzioba and Pastuszka v. Poland* (applications nos. 231/22, 5126/22, 5449/22).

II. LEGAL FRAMEWORK

General rules concerning system of retirement pensions of uniformed services officers

2. Issues related to pensions of uniformed service officers are regulated in the Act of 18 February 1994 on old-age pensions of functionaries of the police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families[1] (hereinafter: 'the Pensions Act').

3. The amount of an officer's old age pension is 40% of the salary in the last position held for 15 years of service, increased by additional coefficients such as 2.6% of the assessment base for each additional year of service. The pension determined in such a way could not be higher than 75% of the basis of assessment, or 80% in the case of pensioners whose disability was related to service. As a result, as the Constitutional Tribunal noted, 'despite a shorter period of required employment, military pensioners and police pensioners (…) receive significantly higher pensions than a pensioner under the general system'.[2]

4. Already in the original version of the Pensions Act there was a provision targeting functionaries of the repressive apparatus of the communist regime. Article 13 (2) of the said law stated that the period of service, on which the acquisition of pension rights depends, does not include 'service in the years 1944-1956 in the capacity of an officer of the organs of state security, order and public safety, if in the performance of his/her official duties the officer committed an offence against the administration of justice or violating personal rights of a citizen and for this he/she was dismissed on disciplinary grounds, the criminal proceedings against him/her were discontinued due to a negligible or insignificant degree of social danger of the act or he/she was convicted of intentional fault by a final court verdict'.

5. It is also worth to underline that in 1990 the officers of the communist Security Service were subject to the vetting procedure.[3] Out of 24.000 officers approximately 14.000 participated in this procedure; approximately 20% were not offered a job in newly-established security services.[4]

Reduction of pensions in 2009

6. On 23 January 2009 the Sejm enacted the law which restricted certain pension privileges of officers of the security apparatus of the communist regime[5] (hereinafter:

[1] Journal of Laws 2023, item 1280.

[2] Judgment of the Constitutional Tribunal of 24 February 2010 (ref. no. K 6/09).

[3] The principles of the vetting procedure were established by the resolution no. 69 of the Council of Ministers of 21 May 1990 (*Monitor Polski* No. 20, item 159). The commissions consisted of i.a. MPs and Police trade unions members. Under § 8(1) of this resolution the positive verification was possible when a person concerned 'possessed moral qualifications for the service, in particular … in the course of service he did not violate a law … performed his duties without infringing rights and dignity of others … did not abuse office for extra-office gains'.

[4] M. Szukała, *30 lat temu Sejm uchwalił ustawę o likwidacji SB*, „Dzieje.pl", 5 April 2020, https://dzieje.pl/aktualnosci/30-lat-temu-sejm-uchwalil-ustawe-o-likwidacji-sb (last access: 10 August 2023).

[5] Act of 23 January 2009 amending the Act on old-age pensions of professional soldiers and their families and the Act on old-age pensions of functionaries of the police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-

'2009 Act'). According to the new provisions, pensions of this group of officials were to amount to 0.7% of the basis of assessment (i.e. the amount of salary received in the last position held) for each year of service in the state security bodies in the years 1944-1990. However, there was an exception to this rule - the period of service in the security bodies could be taken into account in full, 'if an officer proves that before 1990, without the knowledge of his/her superiors, he/she cooperated and actively supported persons or organisations working for the independence of the Polish State'. Moreover, it was possible to increase the amount of the pension by the periods provided for in the Pensions Act (in particular by the period of employment after dismissal from service).

7. In a judgment of 24 February 2010. (ref. no. K 6/09), the Constitutional Tribunal ruled that the 2009 Act is, for the most part, consistent with the Constitution. The Tribunal noted that 'the legislator had the right, arising from constitutional values, to negatively assess the security organs of the People's Republic of Poland. This allowed the legislator to adopt a regulation aimed at nullifying the unjustly acquired privileges of the officers of these organs…'. In examining the constitutionality of the challenged provisions, the Tribunal pointed out that despite the reduction of pensions, the legislator left in place many other solutions favourable to pensioners. As a result, the average pension of officers covered by the Act was still higher than the average pension under the general system. Thus, in the opinion of the Constitutional Tribunal, the law did not violate the essence of the right to social security or infringed the principle of human dignity. The Tribunal also ruled that there was no violation of the principle of protection of acquired rights. According to the Tribunal, 'the principle of protection of acquired rights does not apply to rights acquired unjustly or unjustly, as well as to rights that are not supported by the assumptions of the constitutional order in force on the date of adjudication'. Likewise, there was no violation of the principle of social justice. The curtailment of the privileges of former officers was justified and was carried out in a balanced and restrained manner. The Constitutional Tribunal found violation of the Constitution only with regards to solutions adopted in the 2009 Act concerning the former members of the Military Council of National Salvation.

8. The 2009 Act was also the subject of the ruling of the ECtHR. In the decision of 14 May 2013 in *Cichopek and Others v. Poland* (app. no. 15189/10) the Court declared the complaint of persons affected by the reductions manifestly ill-founded.

The origin of 2016 Act

9. In July 2016, the Minister of the Interior and Administration presented a draft law providing another reduction of pensions for former officers of the security organs.[6] The drafters argued that the enactment of a new law was needed, as the 2009 Act had proved insufficiently effective. According to the drafters 'there is no justification for the former officers serving in the organs of state security (as well as their widows or widowers) to

Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families (Journal of Laws No. 24, item 145).

[6] Draft law available at: https://legislacja.rcl.gov.pl/docs//2/12287556/12366411/12366412/dokument231784.pdf (last access: 10 August 2023).

receive pension and disability benefits in amounts grossly exceeding the average amount of benefit paid under the general pension system'.

10. Already at the stage preceding official submission of the bill to the Sejm, doubts were expressed about the law's compliance with the Constitution and international standards of human rights protection. For example, the Ministry of Foreign Affairs indicated that an in-depth analysis of the draft would be warranted because it could be expected that the law would lead to influx of complaints to the Constitutional Tribunal and the ECtHR.[7] The author of the opinion also indicated that it could not be ruled out that such complaints would be resolved differently than in the case of *Cichopek and Others v. Poland*, as the draft covers a broader group of persons and introduces much more far-reaching solutions. The Ministry of Justice, in turn, pointed to possible problems arising from the need for the Warsaw Regional Court to hear all appeals against decisions reducing pensions.[8] A clearly critical opinion of the draft was presented by the trade union of Police Officers.[9] The Central Board of the Association of Retired and Retired Police Officers also negatively assessed the draft,[10] and additionally presented a legal opinion drawn up by Professor Marek Chmaj indicating gross unconstitutionality of the provisions of the draft with a number of constitutional norms.[11] In the course of legislative work in the Sejm, the Supreme Court[12] and the Helsinki Foundation for Human Rights[13] presented critical opinions to the law, pointing to its unconstitutionality.

11. The law was adopted by the Sejm on 16 December 2016. The circumstances in which the Sejm was proceeding that raised serious controversies. Following the opposition's protest after exclusion of one of MPs from the session, the proceedings were moved to the Sejm's Column Hall. The Chancellery of the Sejm indicated that all MPs had been informed of the change in venue via text messages and a display of messages in the plenary chamber. However, constitutional law experts pointed to various irregularities in the course of the session that day. For example, Professor R. Balicki stated that 'Based on the video footage made available, it must be concluded that the MPs in the Sejm were treated unequally, some of them having been invited to the Column Hall earlier and given the

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[7] Letter of 25 July 2016, available at: https://legislacja.rcl.gov.pl/docs//2/12287556/12366411/12366414/dokument251472.pdf (last access: 10 August 2023).

[8] Letter of 13 September 2016, available at: https://legislacja.rcl.gov.pl/docs//2/12287556/12366411/12366414/dokument252016.pdf (last access: 10 August 2023).

[9] Opinion of 25 July 2016 prepared by advocate Kacper Matlak, available at: https://legislacja.rcl.gov.pl/docs//2/12287556/12366417/12366420/dokument251478.pdf (last access: 10 August 2023).

[10] Letter of 29 July 2016, available at: https://legislacja.rcl.gov.pl/docs//2/12287556/12366417/12366420/dokument251481.pdf (last access: 10 August 2023).

[11] Opinion by Professor M. Chmaj, 25 July 2016, available at: https://legislacja.rcl.gov.pl/docs//2/12287556/12366417/12366420/dokument251483.pdf (last access: 10 August 2023).

[12] Opinion of the Supreme Court, 9 December 2016, available at: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/021-525-16_Uwagi_SN_do_rz%C4%85dowego_projektu_ustawy_o_zm._ustawy_o_zaopatrzeniu_emerytalnym_funkcjonariuszy_i_ich_rodzin.pdf (last access: 10 August 2023).

[13] Opinion of the Helsinki Foundation for Human Rights, 13 December 2016, available at: https://www.hfhr.pl/wp-content/uploads/2016/12/HFPC_opinia_13122016.pdf (10 August 2023).

opportunity to take a seat (Law and Justice Club MPs attending a club meeting previously held in the hall), while the rest of the MPs were notified by SMS of the start time of the session and had limited time (10 minutes) to appear in the hall'.[14] Moreover, continues the author quoted above, even if the opposition MPs had turned up in the Column Hall, there would not have been enough seats for all of them.[15] There were also doubts as to whether the requirement for an adequate quorum had been met.[16] The violations of the Constitution during the sitting in the Column Hall were also drawn to the attention of Professor A. Rakowska-Trela, who concluded her opinion by stating that, in her opinion, 'none of the votes held in the Columned Hall were conducted in a proper and effective manner'.[17] Numerous irregularities allegedly occurring during the Sejm meeting in question were also pointed out by the Regional Court in Warsaw in its decision of 18 December 2017 (ref. no. VIII Kp 1335/17) concerning the criminal investigation into, inter alia, the Speaker of the Sejm's alleged abuse of powers.[18]

12. After the 2016 Act was adopted by the Sejm, it was forwarded to the Senate. On the same day, the Legislative Office of the Senate Chancellery presented a legal opinion in which it indicated doubts as to the constitutionality of some solutions introduced in the Act[19]. Nevertheless, the Act was accepted by the Senate without amendments. The 2016 Act was signed by the President and then entered into force on 1 January 2017 (with the exception of two provisions that came into force 9 months later).[20]

The overview of the 2016 Act

13. The 2016 Act is applicable to persons who performed 'service for totalitarian regime'. Articles 13b of 1994 Act defines the 'service for totalitarian regime' as service between 22 July 1944 and 31 June 1990 for explicitly enumerated state entities, including state security bodies, being Ministry/Committee of State Security (until 1950s) or some Ministry of Interior units, associated with the Security Service (*Służba Bezpieczeństwa*, 'SB'). The reference to these units is drafted in a broad manner, as to include—apart from departments clearly aimed at disintegration of the democratic opposition— also e.g. Inspectorate of Protection of Żarnowiec Power Plant, or PESEL (national identification number) department.

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[14] R. Balicki, *O sejmowym posiedzeniu, którego nie było - uwagi na marginesie obrad w Sali Kolumnowej w dniu 16 grudnia 2016 r.*, „Gdańskie Studia Prawnicze" 2018, vol. XL, pp. 421-422.

[15] Ibid., p. 422.

[16] Ibid., p. 422-423.

[17] Legal opinion of A. Rakowska-Trela, 9 January 2017, p. 26, available at: https://fssm.pl/ckfinder_pliki/files/Opinie%20prawne/2017.01.09_Opinia_dr_hab.Anny_Rakowskiej-Treli_dot_legalno%C5%9Bci_posiedzenia_Sejmu_16.12.2016.pdf (last access: 10 August 2023).

[18] On 6 July 2023 the Court issued judgment in the case of *Tuleya v. Poland* (app. nos. 21181/19 and 51751/20) which concerned, among others, lifting of the judge's immunity in connection to criminal investigation into his alleged unlawful authorization of the media to record image and sound during the session on which he announced the decision no. VIII Kp 1335/17 and presented oral reasons for it.

[19] Opinion of B. Langner, 19 December 2016, available at: https://www.senat.gov.pl/gfx/senat/pl/senateksperty zy/3748/plik/394o.pdf (last access: 10 August 2023).

[20] The Act of 16 December 2016 amending the Act on old-age pensions of professional soldiers and their families and the Act on old-age pensions of functionaries of the police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families (Journal of Laws item 2270; hereinafter: "2016 Act").

14. As already mentioned, the basis of assessment of a pension of officers of uniformed services is the remuneration on the last occupied post. After 15 years of service the pension amounts to 40% of the basis. Normally, every year of further service means adding 2,6% of the basis until reaching 75%-80% of the basis, depending on the circumstances. However, article 15c(1) of 1994 Act provides that for every year of service for totalitarian regime the coefficient used for calculation of old-age pension is reduced to 0%. Years of service after 1990 are formally not affected and counted as 2,6% per year. At the same time, however, in accordance with Article 15c (3) of the Provision Act, the amount of the pension of an officer who performed, even briefly, 'service for a totalitarian state' may not be higher than the monthly amount of the average pension under the general system. Therefore, even if a given officer worked in the services of the People's Republic of Poland for a relatively short period of time, and then continued his/her career in the uniformed formations of the democratic state for many years, his/her pension will still be reduced on the basis of that provision.
15. The 2016 further provided reduction of the amount of disability pensions by 10% per every year of service for totalitarian regime. The pension reduced in such a way cannot exceed the average disability pension paid by the general system of social security (Articles 15c(3) and 22a(3))[21].
16. The act in question also reduced the amount of the survivor's pension to which the family members of a deceased functionaries who performed 'service for totalitarian regime' are entitled. The amount of the survivor's pension should be established on the basis of the benefit to which the officer was or would have been entitled after the reduction of benefits introduced by the Act. Moreover, the amount of the survivor's pension cannot exceed the amount of the average survivor's pension paid under the general system. However, the survivor's pension is not reduced in a situation where it is due to an officer who died in connection with the performance of service or died in an accident related to the performance of service after 31 July 1990.
17. The reductions provided in the 2016 Act are not applied, when a person concerned proves that he supported democratic opposition (Articles 15c(5) and 22a(5)). Moreover, under Article 8a the Minister of Interior may exclude the operation of provisions on reductions if the service of the person concerned before 1990 was short or performing tasks by such person after 1989 was diligent (in particular with risk for life and health). However, this legal avenue does not seem particularly effective. As of March 2021, only in 38 cases the minister excluded the operation of provisions introduced by 2016 Act, whereas in 2877 (first-instance) cases he refused to do so.[22]

The 2016 Act before the Supreme Court and the Constitutional Tribunal

19. By order of 24 January 2018. The Regional Court in Warsaw submitted a legal question to the Constitutional Tribunal concerning the compliance with the Constitution of the provisions of Pension Act II concerning the reduction of pensions and disability benefits

[21] As of 1 March 2023, this amounts to 2918,16 PLN (old-age pension) and 2171,28 PLN (ill-health pension), see: https://www.zus.pl/-/komunikat-prezesa-zak%C5%82adu-ubezpiecze%C5%84-spo%C5%82ecznych-z-dnia-15-lutego-2023-r.-kwoty-od-1-marca-2023-r.

[22] M. Szwed, *Ustawa o obniżeniu świadczeń funkcjonariuszom służb mundurowych. Ocena skutków regulacji ex post* (Helsinki Foundation for Human Rights, July 2021) 30—31. Such decision is subject to appeal to administrative courts.

(ref. no. P 4/18). The doubts of the court were related both to the substantive compliance of the solutions introduced in the 2016 Act with a number of constitutional norms and by the correctness of the procedure in which the Act was passed. The proceedings have not yet been concluded, which may cast into doubt their effectiveness[23].

20. However, the Constitutional Tribunal concluded proceedings initiated by a legal question from the Regional Court of Kraków on 19 December 2019 (ref. no. 10/20). In a judgment of 16 June 2021, it ruled that the provisions of the 2016 Act concerning reduction of disability pensions of persons 'serving for a totalitarian state' who were dismissed from service before 1 August 1990 was consistent with the Constitution. The Tribunal's ruling had therefore very narrow scope and did not address a number of the controversial solutions mentioned above. Nonetheless, the reasoning presented in the judgment suggest that the Constitutional Tribunal will present similar approach towards the entire statute. It is worth noting, however, that the judgement was issued with the participation of two incorrectly elected persons.

21. The 2016 Act was also the subject of the Supreme Court resolution of 16 September 2020. (ref. III UZP 1/20). The Supreme Court ruled that the criterion of service for the totalitarian state 'should be assessed on the basis of all the circumstances of the case, including individual acts and their verification in terms of violation of fundamental human rights and freedoms'. The concept of service for the totalitarian state cannot be understood in a strictly formal way, as the mere fact of employment in the bodies listed in the Act. It is necessary to distinguish between service which was directly connected with the realisation of the tasks and functions of a totalitarian state service consisting in undertaking 'activities acceptable and performed in any state, including a democratic one, without associations leading to negative evaluations'. The Supreme Court further stated that, given the repressive nature of the law, it is also necessary to take into account the principle of ne bis in idem. It must therefore be determined whether, in the case of a particular officer, there is a repeated (i.e. after the 2009 Act) reduction of the same benefit.

III. THE ASSESSMENT OF RELEVANT STANDARDS

22. As already mentioned, in *Cichopek and Others* the ECtHR reviewed the reduction of pensions on the basis of the 2009 Act and found that there was no violation of the Convention. However, in the HFHR opinion the conclusions of the Court made in the abovementioned decision cannot be easily applied to the cases concerning the 2016 Act.

23. The reductions of pensions introduced in the 2016 are much more radical than those provided in the 2009 Act. This is manifested by the application of 0% coefficient for years of service for totalitarian regime (instead of 0.7% as in 2009), reduction of disability pensions and survivor's pensions and the application of ceiling of average pension for every person who worked in the communist services even for a brief period of time.

24. It is also important that the 2016 Act is already the second act reducing old-age pensions of former officers passed in the space of a few years (after the 2009 Act). Even if one accepts that reduction of pension coefficient for years of service during communism

[23] The excessive length of proceedings before the Constitutional Tribunal in case No. P 4/18 was confirmed by ECtHR in *Bieliński v. Poland*, App no. 48762/19, 21 July 2022.

to 0%, at least in some cases, could be justified,[24] the question remains whether such limitation could be introduced in two 'instalments'. It appears that the 2009 Act was aimed at providing definite solution to unjustly acquired pension privileges of state security forces. Therefore, following its adoption, officers – by virtue of operation of principle of legal certainty – could expect that their pensions would not be lowered once again. Arguably, the in the state based on the rule of law the Parliament should not introduce the second set of reductions of pensions simply because it 'changed its mind' and decided that the previous reductions were not sufficiently restrictive. Such action may violate the principle of legal certainty and the protection of trust of individuals towards the State and law, protected under Article 2 of the Constitution of Poland. It is also worth to reiterate that according to the resolution of the Supreme Court, due to repressive nature of the 2016 Act the second reduction of pension of the same person may even violate the principle of *ne bis in idem*.

25. The abovementioned possible violation of the principle of legal certainty and the protection of trust of individuals towards the State and law is further exacerbated by the fact that some (or even majority) of officers affected by the 2016 Act were positively verified in 1990 in an individualised manner. The legal provisions governing vetting process made further employment contingent upon moral qualifications, including i.a. lack of 'infringement of rights and dignity of others'. This could strengthen the expectations of those vetted that their various rights would remain unaffected because of their former service for the communist regime.

26. It is also necessary to take into account that the 2016 Act was enacted 26 years after transition to democracy. Even though states have a wide margin of appreciation in respect of how to deal with vestiges of authoritarian regimes[25] , the significant passage of time since the democratic transition should be taken into account while assessing the proportionality of given measures.[26]

27. Furthermore, in the case-law concerning lustration the Court held that measures imposed by the State cannot serve a purpose of 'punishment, retribution or revenge'.[27] If it decides to apply legislative measures, instead of individualised decision, restrictions must be sufficiently narrowly tailored to respond a pressing social need.[28] It may be argued that the 2016 Act fails to satisfy this requirement because it is overbroad and, as a result, disproportionate.

28. The reductions provided in the 2016 Act concern all persons who worked in entities specified in the catalogue provided in Article 13b of the Pensions Act. At first glance, the law did not require any individual assessment of the actual nature of service of given person and that is how it was interpreted by the pension authorities. In the HFHR opinion, the indiscriminate reduction of pensions of all people working in certain units,

[24] See *Cichopek and Others v. Poland* (dec.), App no. 15189/10 et al., 14 May 2013, § 153. As a side note, one may emphasise that given the full employment policy during communism 0,7% coefficient (equal to non-contributory periods) seemed to be rational solution, although 0% can be accepted as well, by virtue of comparison with arrested supporters of the oppositions.

[25] See *Anchev v. Bulgaria* (dec.), App no. 38334/08 et al., 5 December 2017, § 102.

[26] *Polyakh and Others v. Ukraine*, App no. 58812/15 et al., 17 October 2019, § 320.

[27] *Polyakh and Others v. Ukraine*, App no. 58812/15 et al., 17 October 2019, § 275.

[28] *Polyakh and Others v. Ukraine*, App no. 58812/15 et al., 17 October 2019, § 293.

irrespective of the character of their work and their individual behaviour, is a very controversial step and it could be justified only exceptionally.

29. In this regard we would like to underline that the catalogue provided by Article 13b of 1994 Act covers e.g. Inspectorate of Protection of Żarnowiec Power Plant, or PESEL department, although it does not seem that they supported in any way persecutions of democratic opposition. It can be suspected that similar entities (of security of nuclear energy or national register) exist in every democratic country. Moreover, even if the functioning of some units was indeed aimed at strengthening of authoritarian regime, some of their employees could perform only ancillary functions (e.g. accountant or typist). Those who directly and flagrantly violated human rights during the communism, and those who only supported the machine of oppression should not be treated in the same way. Similarly, the methods of state security changed over time to become more relaxed in 1980s. It would be difficult to treat extensive tortures in 1950s, and 'softer' manner of influence in 1980s in the same way.[29]

30. It is also worth to underline that due to the fact that the 2016 Act provided also for a reduction of survivor's pensions, it affected not only those who directly worked in the communist services, but also their family members. Thus, it also reduced, sometimes significantly, the benefits of people who had not been involved at all in activities for the 'totalitarian state', due to the work carried out by their parents or spouses.

31. One should note that the abovementioned rigidity of restrictions imposed in the 2016 Act was to some extent mitigated by the interpretation provided in the abovementioned resolution of the Supreme Court which underlined the necessity to assess individual circumstances of each case. By virtue of this resolution courts can indeed exercise proper judicial review of administrative decisions of pensions authorities. One should keep in mind, however, that the resolution of the Supreme Court is not formally binding for all ordinary courts and thus some courts are resistant towards interpretation provided in it.[30] Therefore, resolution of the Supreme Court, even though very important, cannot fix all the problems resulting from the flawed provisions.

32. Furthermore, some solutions introduced in the 2016 Act seem to be inconsistent with the declared purpose of the reform. As already mentioned, the law provides that the pension of the person who performed service for totalitarian state cannot exceed the average pension under the general system. Such a limitation is applicable both to those pensioners who served most of their career under the communist regime, as well as to those who worked only few years before 1989 and had many years of service for the democratic state.[31] In the case of the latter it seems impossible to argue that the reduction of pension to the level of the average under the general level could be justified by the aim of taking away unjustly acquired rights, the reduction for the period of democracy cannot follow the same logic. When reduction interferes with rights acquired through service in democracy, it should be treated as unjustified punishment.

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[29] See resolution of the Supreme Court of 16 September 2020, No. III UZP 1/20, § 94—95.

[30] See e.g. judgment of Court of Appeals in Szczecin of 29 December 2022, No. III AUa 103/22 with further references; judgment of Court of Appeals in Warsaw of 31 January 2022, No. III AUa 730/21.

[31] The same can be said about reduction of ill-health pension (Article 22a(1)) of 10% per every year of service for totalitarian state. In the extreme example of third-group ill-health pension (40% of the basis), 4 years of service for totalitarian state and 11 years of service for democratic state would reduce the pension to 0% of the basis (later increased to minimum ill-health pension from the general social security system).

33. Finally, the HFHR believes that the Court may also take into account the quality of legislative process leading to adoption of the 2016 Act. According to the Court, 'the solutions reached by the legislature are not beyond [its] scrutiny. It falls to the Court to examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices'.[32] As R. Spano noted, 'In other words, the Court will look closely at whether the national parliament, in enacting primary legislation which adversely affects Convention rights, has openly and in good faith engaged in the balancing of conflicting interests'.[33] One may argue that in the case of 2009 Act the quality of decision making at the domestic level generally conform to the standards of the rule of law. The law was adopted by the Parliament and subsequently it was reviewed by the independent Constitutional Tribunal which did not found any substantive or procedural violations of the Constitution. However, in case of the 2016 Act the situation was significantly different. The law was adopted in extremely controversial circumstances and, according to some experts, with violations of the rights of the political opposition. The Parliament ignored opinions indicating possible inconsistencies between the statute and the Constitution and the ECHR. Moreover, the law was not reviewed by the Constitutional Tribunal due to a general crisis around this body while the ordinary courts and the Supreme Courts noted a disproportionate character of reductions and in many cases tried to mitigate the effects of the 2016 Act via interpretation.

IV. CONCLUSION

34. The 2016 law is already the second law, after the one passed in 2009, introducing reductions in pension and disability benefits for former communist service officers. In *Cichopek and Others v. Poland*, the ECtHR found that the reduction of pensions under the 2009 Act did not violate the ECHR. The 2016 Act, however, is much more radical: it covers a wider range of pensioners, introduces more far-reaching reductions (and even for those who worked most of their careers for the services of a democratic state) and also covers a wider range of benefits (including disability and survivor pensions). Although the negative effects of the law's radicalism have been reduced in many cases thanks to the adoption of a Supreme Court resolution presupposing an individualised assessment of the nature of each officer's work, the interpretation put forward by the Supreme Court is not formally binding on the courts and is not always adopted by them.

35. In the opinion of the HFPC, the entire 2016 Act raises serious doubts in terms of its compliance with the Constitution, both on substantive and procedural grounds. For the assessment of the proportionality of the application of the Act in specific cases such factors as the scale of the reduction, the nature of the officer's service and whether the court made an individualised assessment, may be relevant. It may also be justified to take into account whether the individual has also previously been subject to a reduction under the 2009 Act.

[32] *Parrillo v. Italy* [GC], 27 August 2015, app. no. 46470/11, § 170.

[33] R. Spano, *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law,* "Human Rights Law Review" 2018, Vol. 18, Issue 3, p. 489.