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National Security Issues in Poland Current Perspective

AGNIESZKA BIEŃ-KACAŁA – MACIEJ SEROWANIEC – KATARZYNA WITKOWSKA-CHRZCZONOWICZ

General Constitutional Provisions

Guaranteeing safety is naturally treated as one of the fundamental objectives and functions of the state consisting in maintaining the capability to react, in a manner suited to an occurred situation, in case of a threat to public and common security, which is connected with the protection of public order, life and health of citizens and national property.[1] Hence, the state policy should not only serve guaranteeing the state sovereignty, protection of integrity of its borders and territory but also ensuring citizen safety, observance of human rights, fundamental freedoms and the democratic order in a country. Thereby security becomes the main national mission of the entire society and its state organisation, whose goal consists in the protection and defence of national values and interests against the existing and potential threats, as well as creating internal and external conditions for an unhindered development.[2]

The category of security is present in the Polish Constitution of 1997; however, the concept of the right to security lacks proper definition. The basic constitutional regulation on security is Art. 5 of the Constitution specifying that the Republic of Poland safeguards the independence and integrity of its territory and citizen security and – inter alia – ensures the rights and freedoms of its persons and citizens. Thus, with regard to security, the state indeed fulfils a very particular role.[3] The term "security" also appears in Chapter II of the Constitution devoted to individual rights, unfortunately mainly in the context of their limitation.[4] It is worth pointing to the fundamental regulation contained in Art. 31 (3) of the Constitution pursuant to which the limitations in the exercise of constitutional freedoms and rights can be established solely 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. Among the detailed restrictive categories, we should also mention Art. 45 (2) of the Constitution

1 Cf. Potrzeszcz 2013, 69–87; Serowaniec–Włoch 2016, 14–15.
2 Cf. Jaskiernia 2012, 49–50.
3 Cf. Wołpiuk 2012, 88.
4 Cf. Bień-Kacała 2015, 18.

pursuant to which 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. Next there is Art. 53 (5) of the Constitution, according to which the freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of state security, public order, health, morals or the freedoms and rights of others. Another provision in this group is Art. 61 (3) of the Constitution stating that the limitation of the right to public information may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or the important economic interest of the state. In the chapter concerning individual rights we will also find detailed security categories associated with the rights of individuals and not their limitation. These mainly include Art. 66 (1) of the Constitution establishing the right to safe and hygienic conditions of work. Then, we have Art. 74 (1) of the Constitution pursuant to which public authorities should pursue policies ensuring the ecological security of current and future generations. A detailed category also results from Art. 76 of the Constitution on the basis of which public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. In the light of the above, we may draw the conclusion that the state constitutes the core value in the obligation to ensure the freedoms and rights of persons and citizens, as well as citizen security. This, however, does not mean acceptance of the explicit superiority of the state over individuals and their freedoms and rights driven by reasons other than the fact that state security, as a component of the common good, serves the citizens organised into a state.[5]

Among the regulations of the legal position of the public authority bodies, the most significant part devoted to security is involved with the institution of the president. The most important provision is Art. 126 of the Constitution, which in concord with the president ensures observance of the Constitution, safeguards the sovereignty and security of the state, as well as the inviolability and integrity of its territory. Substantive provisions concerning security are linked with the Council of Ministers. The main provision in this respect is Art. 146 (4, 7, 8) of the Constitution. In line with these provisions, the government is to ensure the internal security of the state and public order, as well as the external security of the state.[6]

Although the doctrine of law is not uniform with regard to the understanding of the term "state security" *(right to security),* it is nonetheless compatible when it comes to mutual relations between the state and an individual in the context of security. Janusz Karp presents state security as "the collective good, public law value and the premise whose protection allows limitation of individual rights and freedoms. A state of absence of threats to the existence of the State and its democratic system. State security encompasses the directives on the protection of its sovereignty, territorial

5 Cf. Wołpiuk 2010, 186–187.

6 Cf. Bień-Kacała 2016a, 131–142.

integrity and defensive potential – even in the absence of a threat from other countries or terrorists. During peace, this is achieved, *inter alia,* through institutions of state secrecy, espionage prevention and limitations imposed on those serving in the armed forces. Moreover, the value of state security relates to the injunction to undertake actions aimed to prevent internal threats to the existence and functioning of democratic institutions. This particularly concerns the activities of organisations undermining the principles of a democratic system and referring to totalitarian ideologies and organised criminal groups which intend to influence political decisions in the state and the content and application of the law."[7] Leszek Garlicki, on the other hand, establishes that the concept of state security, as an imprecise term, is to be considered in three dimensions. In the Polish Constitution, this term refers both to an external and internal situation, thereby the limitations of rights and freedoms in the country are justified not only in the situation of external but also internal threats. Secondly, ensuring state security should encompass actions aimed at fighting current threats, as well as those that prepare the state for their occurrence and those that will prevent them in the future. In this regard, there is a need to establish a proper defensive potential, which will result in certain limitations of the rights and freedoms in the state. Thirdly, state security should be understood as a lack of risks to the functioning of state institutions.[8]

While interpreting the concept of security, the Constitutional Tribunal consistently emphasises that ensuring state security constitutes one of the fundamental duties of citizens. This stems already from the provisions of art. 1 of the Constitution stating that Poland constitutes the common good of all citizens. The concern for the said common good means the necessity to assume such obligations by the citizens, both indirectly and directly, which are required to ensure the safety of the state. These obligations include the necessity to carry the specific burden in case of a threat to sovereignty, i.e. an immediate internal threat in case of a war or armed aggression without its declaration. According to the CT, ensuring the country's defensiveness justifies an imposition of duties on citizens which are necessary to guarantee the state security. Thus, what is observable is the understanding of the relations within the common good as a result of a juxtaposition of the interests of the state and individuals. It appears, however, that the common good – the Republic of Poland constitutes a separate value that joins the pursuits of the state organisation and the individuals.[9]

The consideration of the tasks of the state and its security from the point of view of its subsidiary functions towards the citizens and community does not mean that in each situation the interest of individuals and communities will be taken into account. In a situation of a threat to state security, it is in the interest of the nation as a whole, as well as of each and every citizen to submit to the state institutions because an effective implementation of the undertaken actions can have an impact on the further

7 Cf. Karp 2009, 108–109.
8 Cf. Garlicki 2003, 23.
9 Cf. Piechowiak 2008, 157.

functioning of the common good – the Republic of Poland. Therefore, it is possible to have a situation requiring limitation of the rights and freedoms of persons and citizens due to the necessity to ensure the security of the state. This is due to the fact that the legislator has established a general clause enabling limitation in the exercise of constitutional rights and freedoms [Art. 31 (3)], and it has also introduced the principle of limiting the freedoms and rights of persons and citizens for the duration of a period of extraordinary threats to state security solely by statute [Art. 228 (3)].

The assessment of the Constitutional Tribunal is that state protection is a special value and when it is juxtaposed with the rights of an individual, even the fundamental ones, it is permissible if such rights are limited – within the necessary scope.[10] The CT has held that "the rights of a person collide in this case with the purposefulness of protection of the public interest strictly connected with state security, that is with the very value which in each democratic legal order may, within limits demarcated by necessity, justify violation of the rights of an individual, even fundamental ones". Although such an interference may take various forms, it should undoubtedly be contained within the effective law and, most importantly, take into consideration the constitutional values. The implementation of proper legislative mechanisms in this scope must not lead to a violation of these values and should be performed with the preservation of the proportionality principle expressed in Art. 31 (3) of the Constitution.[11] One of the most difficult dilemmas in relation to this subject matter, which the Constitutional Tribunal considered in its case law consisted in the settlement of admissibility and limits of activities of bodies establishing and practising law according to the "life for life" model. A very important sentence of the CT in this context is that of 30 September 2008 (K 44/07). It concerned a regulation allowing shooting down of aircraft in a situation where it is unlawfully used and when it would be justified on the grounds of security. The Court was faced with the challenge of conducting an analysis of this matter in relation to the motion submitted by the First President of the Supreme Court requesting to examine the compatibility between: Art. 122a of the Act of July 3, 2002 – Aviation law and Art. 38, Art. 31 (3), Art. 2, Art. 26 and Art. 30 of the Polish Constitution. As a result of an examination into the constitutionality of Art. 122a of the aviation law – regarding procedures in the application of means of air defence in relation to foreign aircraft ignoring the calls of a national air traffic management body – a dilemma connected with recognising aircraft as a "renegade" arose. The challenged provision established the basic empowering measure authorising the Minister of National Defence to take the decision on shooting down civilian aircraft "used for unlawful purposes, in particular as a means of a terrorist air attack". The Tribunal noted in this case that the occurred constitutional problem touches upon one of the most difficult issues that may be brought before bodies establishing and enforcing the law, namely the admissibility

10 Polish Constitutional Court, judgement of 16 February 1999, No. SK 11/98.
11 Polish Constitutional Court, judgement of 25 November 2003, No. K 37/02.

and limitations of acting in accordance with the "life for life" model. The dramatic character of this dilemma is enhanced with the fact that the colliding values, on the one hand, consist in the lives and safety of the people on the ground, in the area of a presumable terrorist attack, whereas on the other, in the lives of assassins indivisibly connected with the lives of innocent passengers of the said aircraft. In its argumentation, the Tribunal referred to the regulation applicable to the states of emergency. In consequence, it indicated that pursuant to Art. 233 (1) of the Polish Constitution, the statute defining the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Art. 30 (the dignity of the person) and Art. 38 (protection of life). Such a limitation must not be imposed in an emergency situation, much less without an implementation of one of the more relevant emergency states. The obligation to ensure security, constituting a component of the right to legal protection of life in its positive aspect is imposed on the state both in relation to people on the ground, as well as those on board of the plane. The state's failure in the effective implementation of this obligation does not dismiss the obligation to observe the negative aspect of law regarding the legal protection of life, i.e. the prohibition to deliberately creating a threat of the loss of lives of innocent persons. By performing a compatibility assessment of the components of the legal system in the critical issue of finding a balance between public security and the right to legal protection of life of particular persons, the Constitutional Tribunal unambiguously gives priority to such values as the life and dignity of a person. These values are the foundation of European civilisation and define the meaning of the concept of humanism constituting the central value in our culture. They are inalienable in the sense that they do not permit a "suspension" or "annulment" in particular contexts. At the same time, the Constitutional Tribunal consistently repeats in its judgements that limitations of constitutional rights and freedoms, apart from fulfilling the formal criterion of establishment in the statute, must not violate the principle of freedom, must be useful, necessary (indispensable) and proportional in the context of the assumed objective of a regulation, as well as it must be justified with at least a single substantive requirement. Such a requirement may be the protection of public order.[12] It is worth mentioning that the said requirement refers to threats of lesser importance, whereas external threats, if they "reach […] such a size as to touch the very basis of the state's existence, integrity of its territory, fate of its inhabitants or the essence of its system of governance" is to be connected with the requirement for state security.[13]

The abstractly worded hierarchy determined on the basis of constitutional provisions indicated an advantage of state security over the rights of an individual. The situations considered by the Tribunal, however, seem to present a reversed

12 Polish Constitutional Court, judgement of 21 September 2015, No. K 28/13.

13 The Constitutional Court invoked this opinion, inter alia, while justifying the limitation of freedom of speech with regard to state security (judgement of 6 July 2011, No. P 12/09) or the right to property due to ecological safety (judgement as of May 15, 2006, file No. P 32/05).

system of values. In the mentioned judgement, the CT portrays a specific relationship between state security and the rights of the person. The possibility to limit the latter as explicitly indicated in the constitutional provision is not absolute. Thus, the value of state security does not justify every limitation to the rights of an individual. The individual good in a particular factual situation is more important.

The adopted systemic solutions meet the standards of international law resulting from the provisions of the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the EU. However, significant legal and political consequences of a national and international scale were observed following the disclosure of the matter of the so-called secret CIA prisons in Poland. Two complaints filed to the ECHR against Poland regarding a CIA prison in Kiejkuty presented a similar factual justification to a large extent and were based on similar accusations against the public authorities of the Republic of Poland. The accusations raised in both complaints were concerned with the violation of Art. 2 (right to life), Art. 3 (prohibition of torture), Art. 5 (right to liberty and security), Art. 6 (right to a fair trial), Art. 8 (right to respect for private and family life) and Art. 13 of the ECHR (including absence of an effective remedy resulting from ineffective investigation related to CIA prisons in Poland).[14] While passing judgements in the matters of Al-Nashiri and Abu Zubaydah versus Poland, the European Court of Human Rights strongly emphasised that the manner of deprivation of liberty of the claimants and their out-of-court transfer constituted flagrant violation of the right to personal freedom resulting from Art. 5 of the ECHR. In reference to the Polish Government's failure to ensure the claimants the right to a trial, the Court once again used the expression of a "gross refusal to ensure justice".[15]

The ongoing dispute regarding the Constitutional Tribunal in Poland has proven that amongst the legal measures serving the protection of constitutional rights and freedoms we should also indicate judicial supervision of constitutionality of legal acts conducted by the CT. It is not only incidental in character as by principle, the scope of competences vested in the constitutional courts is much broader since they also encompass what can be referred to as a legal coordination of interaction between particular links in the state apparatus, as well as care for respecting constitutionally defined principles of legal order. Thereby, through its function the constitutional judicature not only safeguards the observance of the constitution but also the political system it proclaims.

Thus, ensuring state security is the objective stemming from the necessity to satisfy the most fundamental needs for the existence and preservation of its integrity.[16]

14 Case of Al Nashiri v. Poland (Application No. 28761/11); Case of Husayn (Abu Zubaydah) v. Poland (Application No. 7511/13).

15 See the judgement of the European Court of Human Rights in cases of Al Nashiri v. Poland § 562–567 and Husayn (Abu Zubaydah) v. Poland § 552–557.

16 Cf. Kukułka 1984, 43.

For this reason, the needs of the state are ready to limit other needs, interests and goals only if this will serve their security. In a situation of a tension or conflict, guaranteeing security is the goal to which all forces and measures are subjected.

Special Legal Order

The Polish Constitution of 1997, regarding a crisis situation, provides a state of war (Art. 116) and extraordinary measures (Chapter XI).

The state of war refers mainly to international level.[17] In this situation, the Constitution does not adopt any special limitations of fundamental rights. For a period of war, which is perceived in a broader sense than the state of war, the President of the Republic shall appoint the Commander-in-Chief of the Armed Forces on request of the Prime Minister [Art. 134 (4)]. Additionally, extraordinary courts or summary procedures may be established only during a time (period) of war [Art. 175 (2)]. It needs to be emphasized that implementation of the latter provision may affect the constitutional status of individuals. Moreover, in the event of a direct external threat to the State, the President (on request of the premier) shall order a general or partial mobilization and employment of the Armed Forces in defence of the Republic of Poland (Art. 136).[18] The mobilization is strictly connected with the duty of every Polish citizen to defend the Homeland (Art. 85). The question arises on the systemic role of the duties. Should they be perceived as the limitation of human rights and freedoms? One can find the answer among the provisions of the Universal Declaration of Human Rights (1948). According to Art. 29 (1) of the Declaration everyone has duties to the community in which alone the free and full development of his personality is possible. Which means that this obligation cannot be observed as a suspension of fundamental rights.

The extraordinary measures could be employed during the situations of particular danger if ordinary constitutional measures are inadequate (the principle of exceptional threat).[19] According to Art. 228 actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat (the principle of proportionality) and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State (the principle of purpose). Detailed criteria of the proportionality principle have been formulated in the doctrine and judicial decisions of the Constitutional Tribunal. In fact, they boil down to answers to three questions: Does the legislative regulation lead to the intended effects? Is it indispensable for the protection of public interest? Are the effects of the introduced

17 Article 116. 1. The Sejm shall declare, in the name of the Republic of Poland, a state of war and the conclusion of peace. 2. The Sejm may adopt a resolution on a state of war only in the event of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreements. If the Sejm cannot assemble for a sitting, the President of the Republic may declare a state of war.

18 See more in Wołpiuk 2002, 60–72.

19 See more in Eckhardt 2012; Brzeziński 2007; Prokop 1997.

regulation proportional to the burdens it imposes on the citizens?[20] Extraordinary measures may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicized (the principle of legality and proclamation). The academic analysis of constitutional notions indicates that the characteristics of emergencies include an executive's strengthening (e.g. regulations having the force of statute[21]) and a limitation of fundamental rights.[22]

The Polish Constitution provides three kinds of extraordinary measures[23] – a state of martial law,[24] a state of emergency[25] and a state of natural disaster.[26] The above mentioned state of war, as well as the period of war, cannot be qualified as a kind of extraordinary measures.[27]

First of all, it should be emphasised that, according to the constitutional provision, freedoms and rights of persons and citizens may be subject to statutory limitation [Art. 31 (3) in general and Art. 228 (3) in connection with extraordinary measures]. Additionally, an alteration of the legal status of an individual can be observed.[28] A statute may specify the principles, scope and manner of compensating for loss of property resulting from limitation of the freedoms and rights of persons and citizens during a period requiring introduction of extraordinary measures. The inviolable, inherent and inalienable dignity of the person is perceived as the constrain for

20 Cf. Garlicki 2001, 5–23.

21 Article 234. 1. Whenever, during a period of martial law, the Sejm is unable to assemble for a sitting, the President of the Republic shall, on application of the Council of Ministers, and within the scope and limits specified in Article 228, paras. 3–5, issue regulations having the force of statute. Such regulations must be approved by the Sejm at its next sitting. 2. The regulations, referred to in para. 1 above shall have the character of a universally binding law.

22 Cf. Kustra 2015, 693–694.

23 Additionally, all extraordinary measures regulated by the Basic Law may be introduced in case of a terrorist attack. Nevertheless, provisions in this scope are only on statutory level (Art. 2 Ustawy o stanie wojennym oraz o kompetencjach Naczelnego Dowódcy Sił Zbrojnych i zasadach jego podległości konstytucyjnym organom Rzeczypospolitej Polskiej z dnia 29 sierpnia 2002 r. Dz.U. z 2016 r. poz. 851; Art. 2 Ustawy o stanie wyjątkowym z dnia 21 czerwca 2002 r. Dz.U. z 2016 r. poz. 886; Art. 3 Ustawa o stanie klęski żywiołowej z dnia 18 kwietnia 2002 r. Dz.U. z 2014 r. poz. 333).

24 Article 229. In case of external threats to the State, acts of armed aggression against the territory of the Republic of Poland or when an obligation of common defence against aggression arises by virtue of international agreement, the President of the Republic may, on request of the Council of Ministers, declare a state of martial law in a part of or upon the whole territory of the State.

25 Article 230. 1. In case of threats to the constitutional order of the State, to security of the citizenry or public order, the President of the Republic may, on request of the Council of Ministers, introduce for a definite period no longer than 90 days, a state of emergency in a part of or upon the whole territory of the State. 2. Extension of a state of emergency may be made only once for a period no longer than 60 days and with the consent of the Sejm.

26 Article 232. In order to prevent or remove the consequences of a natural catastrophe or a technological accident exhibiting characteristics of a natural disaster, the Council of Ministers may introduce, for a definite period no longer than 30 days, a state of natural disaster in a part of or upon the whole territory of the State. An extension of a state of natural disaster may be made with the consent of the Sejm.

27 Cf. Kustra 2015, 703–705; Brzeziński 2007, 201–202.

28 Cf. Serowaniec 2016, 593–603.

statutory suspension, because the respect and protection of human dignity shall be the obligation of public authorities including the Sejm and the Senate. (Art. 30)

Secondly, the Basic Law indicates the fundamental rights excluded from limitation (non-derogable rights) and those which might be limited (Art. 233).[29] One can find two groups of rights and freedoms due to different extraordinary measures.

In a period of martial law and state of emergency, the statute shall not limit the freedoms and rights specified in Art. 30 (dignity of person), Art. 34 and Art. 36 (citizenship), Art. 38 (protection of life), Art. 39, Art. 40 and Art. 41 (4) (humane treatment), Art. 42 (ascription of criminal responsibility), Art. 45 (access to a court), Art. 47 (personal rights), Art. 53 (conscience and religion), Art. 63 (petitions), as well as Art. 48 and Art. 72 (family and children). This means, in conjunction with Art. 31 (3) of the Polish Constitution, that the essence (core) of non-derogable rights and freedoms shall not be violated.[30] Other fundamental rights may be derogated during mentioned extraordinary measures.

During a state of natural disaster, the subject of limitation (derogation) may include the freedoms and rights specified in Art. 22 (freedom of economic activity), Art. 41 (1, 3 and 5) (personal freedom), Art. 50 (home inviolability), Art. 52 (1) (freedom of movement and sojourn on the territory of the Republic of Poland), Art. 59 (3) (the right to strike), Art. 64 (the right of ownership), Art. 65 (1) (freedom to work), Art. 66 (1) (the right to safe and hygienic conditions of work) as well as Art. 66 (2) (the right to rest). No other constitutional rights can be derogated in the period of natural disaster, but they can be still limited in accordance to Art. 31 (3) of the Polish Constitution.

Regardless of the kind of extraordinary measure, limitation of the constitutional freedoms and rights only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited [the principle of non-discrimination, Art. 233 (2)]. This provision varies from the general open clause [Art. 32 (2)].[31]

Generally, there is no case law available concerning the limitation of fundamental rights during extraordinary measures, whereas there are some decisions of the CT connected with a broadly perceived security.[32] Slightly related may be the judgement of 30 September 2008 (K 44/07[33]) concerning the permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened.

The only judgement strictly connected with a martial law concerns the conformity of extraordinary laws with the 1997 Constitution of the Republic of Poland in conjunction with the 1952 Constitution of the People's Republic of Poland.

29 Cf. Bień-Kacała 2016b, 57–58.

30 Cf. Eckhardt 2012, 212–213.

31 Article 32. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

32 Cf. Bień-Kacała 2016b, 58–62.

33 Available: http://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf (Downloaded: 06.12.2016.)

This verdict of 16 March 2011 (K 35/08[34]) refers to a violation of the fundamental principles for enacting laws.

Publicity

Common access to public information constitutes the necessary condition for the existence of a civil society and, what follows, the realisation of democratic principles of the functioning of public authorities in the rule of law. Moreover, it enables effective civic control of the actions undertaken by public authority bodies.[35]

Until the adoption of the Polish Constitution of 1997, the right to information was present in the Polish legal system only within a limited scope. It served solely the parties and other participants in administrative proceedings and consisted in the obligation of the bodies to inform them on the conducted proceedings. Only the entry into force of the Constitution provided the legal bases for the common right to information, which granted each person the freedom to express their opinions, acquire and disseminate information [Art. 54 (1)], as well as guaranteed the citizens the right to obtain information on the activities of bodies of public authorities and persons discharging public functions [Art. 61 (1)].[36] Despite a certain affinity, we need to separate the right proclaimed by Art. 16 from the guarantees included in Art. 54 (1). As it is accurately raised in the body of rulings, not each piece of information, which in concord with Art. 54 may be acquired and disseminated, can also be recognised as information required to be made public. The correlate to the right specified in Art. 61 indeed is the obligation to disclose information on the part of the competent subject.[37] However, this obligation relates exclusively to the information which is connected with the activities of bodies of public authorities and persons discharging public functions. In this sense, we may speak of a certain complementarity of both analysed constitutional regulations.[38]

The transparency principle is most commonly treated as an extension of the right to public information, which is to guarantee the transparency of the actions of public administration. The transparency principle is to guarantee that the activities of bodies of public authority are conducted with the participation and supervision of the society.[39] This is particularly visible in the light of the recent parliamentary crisis in Poland which occurred due to the introduction of changes in the organisation of

34 Available: http://trybunal.gov.pl/fileadmin/content/omowienia/K_35_08_EN.pdf (Downloaded: 19.12.2016.)

35 Cf. Skrzydło 1998, 58.

36 In a broader context, the constitutional right to public information is also considered in relation to the right to information on the quality and protection of the environment (Art. 74 of the Constitution), as well as authorising the access of an interested person to personal data in official documents [Art. 51 (3) of the Constitution].

37 Cf. Bernaczyk 2014, 363–366.

38 Polish Constitutional Court, judgement of 20 March 2006, No. K 17/05.

39 Cf. Bałaban 1999, 63.

work of the media in the Parliament by the Speaker of the Sejm which limits the journalists' freedom of work. Thus, it is not possible to implement the principle of transparency without the effective right to access to information, which is further connected with the obligation of the body to make it public. Consequently, we may conclude that transparency is an objective which can be achieved through a rationally shaped right to information. This situation may also be shown to indicate that the right to information constitutes a tool for the implementation of the transparency principle.

The constitutional right to information encompasses acquisition of information on the activity of bodies of public authority and persons discharging public functions. Moreover, this right also encompasses obtaining information on the activities of economic and professional self-government, as well as other persons and organisational entities within the scope of their tasks of public authority and management of communal property or the property of the Treasury. The right to acquire information includes access to documents and admission to sittings of collective bodies of public authority formed by universal elections, with the opportunity to make sound and visual recordings (Art. 61 [2]).[40] Since the Polish Constitution grants the right to information on the activities of bodies of public authority, the obligation to render information available to an equal extent refers to the bodies of state authority and local governments.[41]

In the case law and jurisprudence, it is assumed that public information is any message created or referring to broadly-understood public authorities and created or referring to other entities discharging public functions within the scope of their tasks of public authorities and management of communal property or property of the State Treasury.[42] According to W. Sokolewicz, we should assume that in concord with the intention of the lawmaker, each piece of information generated, processed or held by public authorities or other entities discharging public tasks constitutes "information on public matters". Therefore, public information is constituted by the content of documents referring to a body of public authority, connected with that body or concerned with it.[43] Administrative courts also quite explicitly support the broad understanding of the term "public information". This was most fully embraced by the Supreme Administrative Court in the ruling of July 2, 2003, where it recognises that in case of doubts, regarding the interpretation of the indicated definition of public information, the case needs to be resolved to the benefit of the person exercising their right to information, i.e. assuming that the given information has got the status of public information.[44] Thereby, public information does not only constitute a message generated by broadly-understood public entities but also messages not generated

40 Cf. Szmyt 1999, 68–70.
41 Polish Constitutional Court, judgement of 10 September 2001, No. K 8/01.
42 Cf. Jaśkowska 2002, 28.
43 Cf. Sokolewicz 2005, 22.
44 Supreme Administrative Court, judgement of 2 July 2003, No. II SA 837/03.

by public bodies but referring to them. A comprehensive coverage of the right to information is of a great significance. The aware participation of citizens in the life of the society and state is indeed indispensable in a democratic system and its extent largely depends on the political culture and the state of collective knowledge of the problems of the nation and the state. This is further connected with the postulate of establishment of a civil society. In its resolution of April 11, 2005 the Supreme Administrative Court of Poland rightly noted that this right "enables the citizen a real involvement in the public life and, moreover, serves the transparency of public life, commonly defined as the transparency of actions of public authorities and persons discharging their tasks. This right also serves exercising of civic control over the functioning of a public authority".[45]

We should also note that the acquisition of public information in the Polish Constitution is referred to as "a civil right". The constitutional right to public information has thus taken on a character of a subjective right vis-à-vis public authorities ensuring the citizens the possibility to effectively demand from bodies of public authority a specific behaviour, enforceable, if necessary, by means of competent administrative institutions. The placement of the right to public information amidst political rights and freedoms is justified by the fact that this right is closely related to other public civil rights (suffrage, right to equal access to public service, etc.), as well as to fundamental principles of the political system of the state.[46]

The Polish Constitution provides a limitation of this right, however only in specific cases. A general clause regarding limitation of the right to information due to the statutorily defined protection of freedoms and rights of other persons and economic subjects and protection of public order, security or important economic interests of the State results from Art. 61 (3) of the Constitution.[47] What seems particularly flexible here is the prohibition to violate public order, which can be understood as an observance of legally and customarily defined frameworks, principles and procedures of the functioning of bodies of public authority. A very delicate matter, on the other hand, is covered by the clause regarding protection of the freedoms and rights of other persons. It concerns both the issues of threats to the subjective rights of other persons and, for instance, the order to observe the principle of an equal access to information. Pursuant to Art. 5 of the Access to Public Information Act, the right to public information shall be limited within the scope and on principles set forth in the regulations on the protection of classified information and protection of statutory-protected secrets, as well as due to privacy of a physical person or business confidentiality. Therefore, the act contains "[…] legal solutions standardising the relations between the area encompassing public and protected information".[48] The Supreme Administrative Court has stressed that the right to information

45 Supreme Administrative Court, judgement of 11 April 2005, No. I OPS 1/05.
46 Cf. Sokolewicz 2005, 5–8.
47 Cf. Winczorek 2000, 84.
48 District Administrative Court in Warsaw, judgement of 22 August 2006, No. II SAB/WA 193/05.

constitutes, in the light of Art. 61 of the Polish Constitution, a public right of citizens, and thus – any exceptions should be interpreted strictly. Furthermore, as the court ruled, insofar as "the protection of classified information requires isolation of specified materials by imposition of a specific clause, the remaining secrets (prosecutorial secrets, telecommunications secrets, personal data protection, treasury secrets, etc.) do not require a special form of documentation as they are material in character". In consequence, a refusal to render information available by invoking the fact that "the applicant demands access to the whole-case file whilst a part of it is classified" is inadmissible. The above means that a subject is obligated to ensure access to information and may refuse to do so only in statutorily defined situations.[49]

In the judgement of June 27, 2008 the Constitutional Tribunal emphasised that "the civil right of access to information […] is not absolute and may be limited by statute due to necessity to ensure public order or state security. The concept of public order "has a broad meaning by relating not only to the assurance of peace and safety of citizens but formulating a general principle for the functioning of social relations". The basic function of this condition is "ensuring correct functioning of social life" which makes it "not directly or exclusively connected with the «state», but still closer than the requirement of «state security» to the protection of rights and freedoms of an individual from everyday threats". State security, on the other hand, means a state of a minor threat generated by internal or external factors. The science of constitutional law aims to separate it from the public order by pointing to security as a condition justifying the protection against threats to the foundations of "existence of the state, integrity of its territory, fate of its inhabitants or the essence of the system of its governance". Similarly to public order, security does not have a single indisputable definition and it is possible that it partially overlaps with that of the public order. State security encompasses the area associated with the professed "national security". The latter was traditionally connected with "the existential needs and interests of human communities organised in states". In such a depiction, national security is mainly associated with a classic external threat in the form of a war (military aggression), thus the institutions of national security find their primary embodiment in military state structures and special forces. New values become the criteria of national security level, e.g. political affiliation, freedom to act on the international arena or the quality of life.[50] Moreover, the CT pointed that one must not identify each threat to current foreign policy or international relations as a threat to raison d'etat. However, any limitations constitute exceptions which call for a justification in the light of the effective Constitution and must fall within the prescribed limits of interference of public authority into constitutional rights.[51]

As indicated in the body of rulings of the CT in the light of Art. 61 of the Polish Constitution, it also cannot be ruled out that the implementation of the right to

49 Supreme Administrative Court, judgement of 7 March 2003, No. II SA 3572/02.
50 Polish Constitutional Court, judgement of 27 June 2008, No. K 51/07.
51 Polish Constitutional Court, judgement of 15 October 2009, No. K 26/08.

information will touch upon the circumstances from the border of public and private life of persons discharging public functions. The "pervasion" of these spheres may stem, for instance, from the character of public activity, contacts with defined entities, performance of activities from the private sphere while conducting public tasks.[52] However, by pointing predominantly to the rights and freedoms of other persons as the grounds for the limitation of an access to public information, Art. 61 (3) must not be understood in this context as an outright prohibition of any kind of interference into the privacy of persons discharging public functions. In fact, an interference into the private lives of persons holding public offices is admissible in the light of the provisions of the Polish Constitution. As it was noted in the body of rulings of the CT, persons discharging public functions "due to the citizens' right to obtain information on the activities of organs of public authority must be aware of the obligation to disclose at least certain aspects of their private life".[53] On the other hand, the right to information does not always take precedence over the right to privacy of public persons, as the opinion on guaranteeing civil access to information at any expense has been rejected.[54] The right of access to information is not absolute in character, and its boundaries are designated, inter alia, by the requirement to respect the rights and freedoms of other subjects, including the constitutionally guaranteed right to protection of the private life. The criterion employed to settle the conflict between the right to information and the right to privacy is that of a "justified" interest. Here, the Constitutional Tribunal indicates information which do not fall within the scope of the discussed sphere of the right to information also in case of public persons. This is in principle information concerning the health status or the area of intimacy, including sexual life. Moreover, whenever the implementation of the right to information enters the area where the public life of a subject is inevitably connected with the private life, the assessment of the permissibility of an interference "should be conducted with great caution and consideration of arguments for the acknowledgement of the priority of public interest expressed in the constitutional assurance of the right to information with regard to the protection of privacy".[55] For the reasons explained above, the conflict between the right to public information and the right to privacy should be settled in the same manner as the conflict between other constitutional principles. The following conditions for the recognition of the primacy of an interest connected with the access to public information over the privacy of subjects were formulated in the body of rulings of the CT. First of all, the access to information must not fall beyond the necessity resulting from the need for transparency of the public life assessed in accordance with the standards adopted in a democratic state. Secondly, public information needs to be significant for the evaluation of the functioning of institutions and persons discharging public functions, and thirdly,

52 Polish Constitutional Court, judgement of 20 March 2006, No. K 17/05.
53 Polish Constitutional Court, judgement of 13 July 2004, No. K 20/03.
54 Polish Constitutional Court, judgement of 19 June 2002, No. K 11/02.
55 Polish Constitutional Court, judgement of 20 March 2006, No. K 17/05.

the access to the indicated information must not compromise the very essence of protection of the right to private life.

Migration

Since the beginning of the 1990s, we have observed a significant inflow of foreigners into the territory of the Republic of Poland. Because of this process, Poland has transitioned from an emigration state into an emigration–immigration state. Among foreigners arriving in Poland there are also those who seek permanent protection in the form of refugee status or asylum. The migration situation in Poland is still characterised by an increased inflow of citizens of Ukraine, as well as an increase in the number of applications for granting international protection submitted by citizens of Russia (90% of them declare Chechen nationality), Georgia, Tajikistan and Armenia.[56] In concord with the effective constitutional regulation, foreigners are allowed to take advantage of the right to asylum in the Republic of Poland on the conditions set out in the act. A foreigner seeking protection against persecution, on the other hand, may be granted the status of a refugee pursuant to effective international agreements to which the Republic of Poland is a party. For the above reasons, there was a need to create efficient mechanisms for the prevention of illegal immigration, and at the same time ensure proper protection for persons who found themselves in a particularly difficult position due to the situation prevailing in the countries of their origin.

The Polish Constitution does not define "the right of asylum". The principle of defining this term is also absent in regulations of statutory ranking. Although Art. 90 (1) of the June 13, 2003 Act on granting protection to foreigners within the territory of the Republic of Poland does not specify the principle of the right of asylum, it indicates that a foreigner may be granted asylum in the Republic of Poland at his/her application when it is necessary to provide them with protection or when the vital interest of the Polish state so requires. The above provision indicates two conditions whose simultaneous fulfilment enables granting a foreigner asylum in the territory of Poland.[57]

In relation to the subjects who may take advantage of the right of asylum the term "foreigners" is applied in Art. 56 (1) of the Polish Constitution. However, the legislator failed to include in the Constitution its own definition of the term "foreigners", which makes it legitimate to refer to the understanding of the analogous term used in the act on foreigners. Pursuant to Art. 3 (2) of the act on foreigners this term refers to all persons who do not possess Polish citizenship. Thus, the right of asylum applies both to citizens of foreign countries, as well as stateless persons. Such a definition of the personal scope of the analysed guarantee is compatible with the international

56 See Zestawienia liczbowe dotyczące postępowań prowadzonych wobec cudzoziemców w latach 2010–2015 r. Available: http://udsc.gov.pl/statystyki/raporty-okresowe/zestawienia-roczne/ (Downloaded: 16.12.2016.)

57 Cf. Skrzydło 2013, 67.

commitments of the RP. A person interested in obtaining asylum should personally file a suitable application to initiate proceedings in this matter. Moreover, foreigners may also apply for asylum for their minor children dependent on them and unmarried [Art. 24 (1)], as well as spouses being their dependants and their unmarried children [Art. 25 (1)].[58]

In comment to Art. 56 (1) of the Polish Constitution, we may assume that the right of asylum involves providing shelter in the territory of the Republic of Poland to a person who is not in possession of the Polish citizenship, consisting in the right of entry and permanent residence in this territory on conditions laid down in the act whilst respecting regulations of the binding international agreements. The thus understood asylum is sometimes referred to in the literature of the subject matter as a territorial asylum (as opposed to diplomatic asylum).[59] By granting asylum to a foreigner, the Republic of Poland assumes sovereign power over the applicant and obligates itself to grant him/her a broader scope of protection than that guaranteed to other foreigners remaining in the territory of Poland. The manifestation of a special protection connected with obtaining the right of asylum consists in the limitations regarding surrender under extradition, surrender on the basis of a European arrest warrant and administrative regulations. A foreigner who had been granted the right of asylum in the Republic of Poland may settle in Poland permanently, has the right of entry and the right of legal residence in the territory of the Republic of Poland. What needs to be emphasised is the fact that a person with asylum obtains the right to settle in Poland, whereas that with the status of a refugee obtains only an authorisation to reside in Poland over a defined period of time.

Moreover, from Art. 56 (1) of the Polish Constitution it also stems that granting of asylum belongs to the prerogatives of the state, which means it remains facultative even when the conditions formulated in that provision are met. Such a standpoint was also presented by the District Administrative Court in Warsaw in the judgement of January 29, 2008 stating that the decision to grant asylum is arbitrary and belongs to the exclusive competence of the state.[60] Decisions in the matters of asylum are issued by the Head of the Office for Foreigners with the approval of the minister responsible for foreign affairs. The person whom the decision concerns may appeal it to the Refugee Board. Its decisions, on the other hand, may be brought before the administrative court.

Whereas the status of a refugee, according to the international agreements to which the Republic of Poland is a party, may be granted to a foreigner seeking protection from persecution. The basic law does not define the term "refugee", therefore it is necessary to refer to the statutory definition. Pursuant to the provisions of Art. 13 of the act on granting protection to foreigners within the territory of the Republic of Poland, the status of a refugee is granted if, as a result of a justified threat of persecution in the

58 Cf. Białocerkiewicz 1999, 151–155.

59 Cf. Banaszak 2012, 339.

60 District Administrative Court in Warsaw, judgement of 29 January 2008, No. V SA/WA 2289/07.

country of origin due to race, religion, nationality, political opinion or membership of a particular social group he/she is unable or unwilling to avail himself/herself of the protection of that country, however the said persecution must: 1. due to its nature and repeated character constitute a gross violation of human rights, in particular the rights from which derogation cannot be made under Art. 15 (2) of the ECHR; or 2. constitute an accumulation of various measures, including violations of human rights which are equally acute as the persecution specified in Art. 13 (3, 1).

In the light of the analysed statutory regulation, persecution may in particular consist in: the use of physical or psychological violence, including sexual violence; the use of legal, administrative, police or judicial measures in a discriminatory manner or with a discriminatory character; initiation or conducting penal proceedings or penalisation in a manner that is disproportionate or discriminatory; lack of the right to appeal to a court in case of a punishment of a disproportionate or discriminatory character; initiation or conducting penal proceedings or a punishment for refusal to perform military service in a conflict, where performing military service would include crimes; measures directed against persons due to their gender or minority. The provisions of the act on granting protection to foreigners within the territory of the Republic of Poland and the regulations resulting from the act must not introduce additional requirements for granting the refugee status beyond those provided for in the Geneva Convention. In this place we should note the judgement issued by the Supreme Administrative Court on February 2, 2000, which in the context of the act on refugees states that in the determination of the substantive conditions justifying a refusal to grant the refugee status to a foreigner, the act refers to the Geneva Convention and the New York Protocol and does not allow for the imposition of additional requirements. Article 56 (2) of the Polish Constitution, on the other hand, stipulates that applying for the refugee status is conducted in concord with international agreements to which the Republic of Poland is a party. Such an interpretation applied to regulations of a statutory character would be unacceptable, including in particular the provisions of the act on foreigners, as it would contradict the provisions of Art. 9 and 91 (2) of the Polish Constitution prioritising international law over internal law, as well as Art. 56 (2) of the Polish Constitution, which provides for the granting of the refugee status "in accordance with international agreements to which the Republic of Poland is a party".[61] It is worth pointing out the standpoint of the Supreme Administrative Court, which noted that the right to obtain the refugee status "to the extent provided for in the Geneva Convention takes on a character of a constitutional right, which may be subject to limitation solely by statute and exclusively due to reasons specified in Art. 31 (3)".[62]

As it is the case with the right of asylum, the burden to prove the existence of circumstances justifying the granting of the refugee status rests on the foreigner applying for such a protection. What needs to be stressed is the fact that the Geneva

61 Supreme Administrative Court, judgement of 1 February 2000, No. V SA 859/99.
62 Supreme Administrative Court, judgement of 26 August 1999, No. V SA 708/99.

Convention within this scope is confined to the requirement for a foreigner applying for the refugee status to present a rational justification of his/her fear from persecution, and the arguments put forward by that person are subject to verification on the basis of an objective assessment of the situation in the country of his/her origin. Thus, the fear of persecution as a category that determines the decision concerned with granting of the refugee status contains a subjective component. The said assessment is that performed by the foreigner who applies for the refugee status. However, this subjective category is verified by an objective element – the fear needs to be rational. The subjective conviction does not have to result from a personal experience of the person applying for the refugee status. Decisions in the matters of obtaining the status of a refugee are issued by the Head of the Office for Foreigners with the approval of the minister responsible for foreign affairs. An appeal to that decision, the applicant may direct to the Refugee Board. Its decisions, on the other hand, may be brought before the administrative court.

In the course of the last six years, nearly 61 thousand foreigners have submitted applications requesting international protection. In comparison with other EU states, Poland occupies the 10th–13th position in Europe with respect to the number of applicants. Nonetheless, the vast majority of immigrants treat Poland only as a transit country on the way to Western Europe guaranteeing better social and existential conditions.

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