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**Information
and anti-terrorist security of Poland.
A critical analysis exemplified
with the tasks and activity
of the Internal Security Agency**

KEY WORDS:

information security, anti-terrorism security, Internal Security Agency, counterespionage, terrorist offences, legal modalities

Introduction

The subject of analysis in this text is information and anti-terrorist security of Poland, which has been approached within the context of a clash of two spheres – the state and the private one. On the one hand, the issues of information security and anti-terrorist security interpenetrate (e.g. as far as the use of proper means of operational control is concerned); on the other hand, both cases are associated with the unsolved problem of the state interference in the private sphere. The issues of security, concerned with the two material scopes indicated in the title have been supplemented and enhanced with the example of the tasks and activity of the Internal Security Agency (Pol. *Agencja Bezpieczeństwa Wewnętrznego* – ABW).

The information security can be analysed within the context of the expansion of the state sphere, that is the powers vested in the state to acquire and retain information on the citizen. The aforesaid context of special state powers is of importance given the clash between the “state sphere” and the “private sphere” concerned with human rights. The discourse on human rights often addresses the issue of state authorities invoking a threat to security, the consequence being the legitimization of the use of ever more advanced methods and techniques for

acquiring information on citizens' private lives. The issues of information security in this text will be narrowed down to the ones concerned with the powers of special services to apply special means of operational control.

An example of the attempt at resolving the clash of the „state sphere” with the „private sphere” is Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950). However, it must be stressed that the Convention is a “protection mechanism” to be used in the event of the private sphere being encroached upon by the state sphere, which is illustrated with the settlements by international institutions as regards individuals suspected of terrorist activity.

Within the context of the operation of liberal democratic states, a capability to engage appropriate means to fight acts of terrorism remains an open question. The state is faced with the necessity to be effective, but at times the effectiveness is unattainable by means of legal instruments that are at the disposal of a democratic state of law. In order not to show its powerlessness and to fulfil its functions, the state engages non-standard means either by breaking the law or by creating new powers with the aid of *lex specialis*.

In order to elaborate the research problem, the text poses the following research questions: (1) *To what degree does invoking a threat to security influence restrictions on rights and freedoms in Poland (with regard to the clash of the state and the private sphere)?*, (2) *To what degree do the tasks and activity of the Internal Security Agency influence the effectiveness of anti-terrorist security in Poland?*

In the analysis of the indicated issues an application of a specified theoretical-methodological framework will play an important role. As for the clash of the state and the private sphere, it will be useful and necessary to invoke the concept of derivative legal modalities, that is legally protected powers, competence and freedoms, which can be pointed to in the relation between state authorities and citizens. As regards the analysis of the regulations concerned with “terrorist offences,” changes to the tasks vested in the Internal Security Agency, and directly and/or indirectly concerned with information and anti-terrorist security, a teleological and functional interpretation of individual legal solutions will be conducted.

The state and the private sphere

It is worth referring to basic legal terms concerned with derivative modalities in law. In this particular case attention will be focused on legally protected powers, competence and freedoms. A special kind of power is legally protected freedom, that is a situation in which one entity is forbidden to interfere in another's sphere of conduct. On the one hand, there is the freedom of action, and on the other hand there is the prohibition of interference. Besides, within the compass of derivative modalities, the term of competence is of vital importance; in effect, it can be understood as an authorization granted to one entity to perform a legally specified conventional act¹. The issues of legally protected freedoms come to the fore especially in the relations between the state and the private sphere.

An example of the clash between the two spheres is a problem of "justice" within the legalist meaning. In order to fulfil its basic functions – and the function of security for that matter – the state must be effective; still, in the case of individuals engaging in acts of terrorism states happen to resort to means beyond or around the bounds of the available powers and competence of the authorities in a democratic state of law, or the legislator lays down *lex specialis* that is supposed to legitimise the use of special instruments. Such activity can not only be connected with the above-mentioned "terrorism," but also with crime directed against state and information security. Hence, these two cases are not only similar, but their material scopes may become interlaced, e.g. in the context of "cyberterrorism," "cyberespionage" or the use of non-standard means of operational control when dealing with individuals suspected of terrorism, or terrorists.

The examples of the violation of the private sphere on account of the necessity, incumbent upon the state, for fulfilling the function of security include, inter alia: (1) a programme of surveillance of citizens with the aid of ICT means, which were pointed to by E.J. Snowden, (2) detention of individuals suspected of terrorism in Guantanamo by the US, (3) the *Military Commission Act* implemented by the US in 2006 (amended in 2009), (4) the use of "enhanced interrogation techniques" with regard to

¹ S. Wronkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, pp. 100–121; M. Szydło, *Wolność prawnie chroniona jako modalność prawną*, [in:] J. Supernat (ed.), *Między tradycją a przyszłością w nauce prawa administracyjnego. Księga jubileuszowa dedykowana Profesorowi Janowi Bociowi*, Wrocław 2009, pp. 729–740.

individuals suspected of terrorism and detained by US forces, (5) relocation of detainees to various states, inter alia, to Poland and Romania by US authorities². Furthermore, apart from these prominent examples, one could point to any kind of operational control (in particular the use of ICT means), apprehensions, detentions, searches of premises due to some nondescript threat to state security³.

Given the title of the text it is worth paying attention to two issues, that is the information security and the anti-terrorist security from the perspective of the encroachment of the private sphere by the state sphere. To illustrate these issues one might use the determinations reached by the Polish Constitutional Tribunal and the European Court of Human Rights (ECtHR). In the former case in 2011 the Polish Ombudsman submitted two motions to the Constitutional Tribunal; the first one was concerned with the use by particular services, and while acting within operational control, of technical means enabling a secret acquisition and recording of information and proof; the second one was concerned with particular services' access to telecommunications data.⁴ In the latter

² OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention, December 2004, Central Intelligence Agency, <http://cryptome.org/2013/09/cia-interrogation-guide.pdf>, 01.07.2015; *Enhanced Interrogation Techniques and the Risk of Criminality*, Physicians for Human Rights and Human Rights First 2007; A. Szpak, *Status prawny zatrzymanych w Guantanamo Bay*, Toruń 2007; *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*, Human Rights First 2008; *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (2012/2014)*, Senate Select Committee on Intelligence, <http://graphics.wsj.com/CIA-report-interrogation-detention/#full-document>, 01.07.2015.

³ R. Rosicki, *The protection of internal security and constitutional order as exemplified by the tasks and activity of the Internal Security Agency – a critical analysis of de lege lata and de lege ferenda regulations*, "Przegląd Politologiczny" 2014, No. 3, pp. 107–118; R. Rosicki, *Information Security as Exemplified by Clandestine Collaboration and Influence Exerted by the Polish Internal Security Agency Officers on Journalists – de lege lata and de lege ferenda regulations*, "Przegląd Strategiczny" 2014, No. 7, pp. 145–154; R. Rosicki, *Surveillance and data retention in Poland*, "Public Policy and Economic Development" 2014, No. 2, pp. 63–75.

⁴ R. Rosicki, *Surveillance...*, pp. 63–75; *Wniosek RPO do TK w sprawie stosowania przez poszczególne służby w ramach kontroli operacyjnej środków technicznych umożliwiających uzyskiwanie w sposób niejawni informacji i dowodów oraz ich utrwalanie – 29 czerwca 2011 r.*, https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_ws_stosowania_przez_sluzby_srodkow_technicznych_uzyskiwanie_informacji_w_sposob_niejawni.pdf, 24.10.2015; *Wniosek RPO do TK w sprawie dostępu poszczególnych służb do danych telekomunikacyjnych – 1 sierpnia 2011 r.*, https://www.rpo.gov.pl/sites/default/files/Wniosek_do_TK_ws_dostepu_sluzb_do_danych_telekomunikacyjnych.pdf, 24.10.2015.

case, the cases lost by Poland at the European Court of Human Rights in 2014 might serve here as examples.

As for the issue of information security, that is the problem of the use of a special kind of operational control by services, including the Internal Security Agency, the Constitutional Tribunal took three years to adjudicate. In 2014 the Court of Justice of the European Union declared the Data Retention Directive (on telecommunications data retention) null and void. The European Court determined, inter alia, that preventive storage of data on all telecommunications connections, and making them available to law enforcement agencies outside the court's control is a disproportionate infringement of civil rights and freedoms⁵.

On 30 July 2014 the Polish Constitutional Tribunal (Pol. *Trybunał Konstytucyjny* – TK) collectively referred to the above-mentioned motions from the Polish Ombudsman and other state administration bodies (seven joint motions), in specific scopes declaring unlawful the rules of access to telecommunications data, technical means that can be applied under operational control and protection of professional secrecy. The Constitutional Tribunal found the powers vested in the services to use telecommunications data in infringement of the constitutional right to privacy, given the fact that they do not provide for independent control of data sharing. As regards the underspecified technical means used in operational control, the Tribunal pointed out that the competent body ordering operational control is to specify the kind of technical means within the compass of statutory capabilities and adequate for a specific case. This issue, rules the Tribunal, should be elaborated, which is to be understood that there is no need to create a comprehensive and exhaustive list of technical means for operational control; the law should rather define the kind of means that can be utilized in individually specified cases⁶. This matter is of great significance given press coverage, as well as comments from human rights organizations on the abuse of data acquisition procedures based on technical means of operational control⁷.

⁵ *Trybunał Sprawiedliwości orzekł, że dyrektywa w sprawie zatrzymywania danych jest nieważna* [Komunikat Prasowy nr 54/14], <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054pl.pdf>, 01.07.2015; *Wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 8 kwietnia 2014 r. w sprawach połączonych C293/12 i C594/12*, <http://curia.europa.eu/juris/document/document.jsf?docid=150642&doclang=EN>, 01.07.2014.

⁶ *Wyrok Trybunału Konstytucyjnego z dnia 30 lipca 2014 r.* Sygn. akt K 23/11, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20140001055>, 24.10.2015.

⁷ R. Rosicki, *Panoptikon – władza, wiedza i informacja*, „Przegląd Naukowo-Metodyczny. Edukacja dla Bezpieczeństwa” 2013, No. 4, pp. 77–94.

The issue of information security and of the state securing extensive capabilities with regard to operational control and data retention is frequently justified as a necessity to be effective in combating organized crime and “terrorist offences.” However, the Polish mass media highlighted the possible as well as effective use of special means in political competition, e.g. in the operation of the overly politicised Internal Security Agency.

As regards the issue of anti-terrorist security, it is worth paying attention to two complaints – Complaint No. 7511/13 (concerned with Husayn/Abu Zubaydah) and Complaint No. 28761/11 (concerned with Al Nashiri) – lodged at the European Court of Human Rights against Poland, which lost both cases at the European Court. A lack of sufficient collaboration with Poland was demonstrated during the proceedings. The ECtHR ruling results in the determination that Poland participated in the violation of human rights with regard to the unlawful detention of foreign citizens and the use of “enhanced interrogation techniques” by the Central Intelligence Agency (CIA)⁸.

“Terrorism” and “terrorist offences”

In the discourse on terrorism an interpenetration of at least two issues becomes a problem, that is the analyses of “terrorism” as a social phenomenon or/and methods of operation, as well as the analyses of “terrorism” as phenomena interpreted with regard to the context or/and criminal acts. Another problem is posed by the systematisation of the issue effected by creating classifications and typologies, the latter being more common, for they are but a partial approach, and as such do not require of the presenter much intellectual effort, so indispensable in the systematic division of social phenomena.

An act of terrorism can be characterised by the goal that the persons engaging in it want to achieve, which is a frequent element in the *definiens* of the term “terrorism”. By way of illustration, R. Schultz stresses the significance of political aims that can be achieved by means of terrorist acts. By the same token, “terrorism” is defined by W. Dietl, K. Hirschmann and R. Tophoven, who refer to the aim of political influence,

⁸ *Case of Al Nashiri v. Poland* (Application No. 28761/11), Judgment Strasbourg 24 July 2014; *Case of Husayn (Abu Zubaydah) v. Poland* (Application No. 7511/13), Judgment Strasbourg 24 July 2014.

while T. P. Thornton points to the arousal of political activity, winning support, as well as staging political provocation⁹.

More often than not, social analyses (within the framework of political, social and cultural studies) point to “terrorism” as a means of attaining ideological objectives encompassing mainly political and religious aspects¹⁰. To simplify matters, one might say that terrorist attacks will be a form of political activity, while anything can be deemed “political”¹¹. Given these approaches, this phenomenon will take on special features – the ones that make it possible to distinguish “terrorism” from individual and similar or completely different phenomena. In these approaches the very fact of replication of terrorist acts is not identical with the phenomenon of terrorism¹². Hence, the views on the phenomenon of terrorism, and by extension on the analyses concerned with this phenomenon, must be connected with a variety of epistemic currents, e.g. (1) the positivist, (2) the constructivist, and (3) the constructionist one. The approaches within the scope of cognition of a given phenomenon will be either deliberately ideologised or merely interpreted, knowingly or not. International and religiously motivated terrorism may serve here as an example of ideologisation or interpretation. The rationale behind its interpretation may be something that Immanuel Wallerstein termed “European universalism,” that is the system of the Western world practices and values predominating in the international arena¹³. The very fact of using the term “terrorism” in the public and/or academic discourse is tantamount to an appraisal of a sort, i.e. negative judgmentalism to all intents and purposes¹⁴. Passing judgments in relation to some more profound premises, but also to the superficiality of analyses may give

⁹ T.P. Thornton, *Terror as a Weapon of Political Agitation*, [in:] H. Eckstein (ed.), *Internal War. Problems and Approaches*, London 1964, p. 73; R. Schultz, *Conceptualizing political terrorism: A typology*, “Journal of International Affairs” 1978, Vol. 32, No. 1, pp. 7–15; R.E. Hall, *A Note on September Eleventh: the Arabization of terrorism*, “The Social Science Journal” 2003, Vol. 40, pp. 459–464; S.H. Başeren, *Terrorism with Its Differentiating Aspects*, “Defence Against Terrorism Review” 2008, Vol. 1, No. 1, pp. 2–5; W. Dietl, K. Hirschmann, R. Tophoven, *Terroryzm*, Warszawa 2009, pp. 27–29.

¹⁰ Cf. T. Hanausek, *W sprawie pojęcia współczesnego terroru*, „Problemy Kryminalistyki” 1980, No 143, pp. 30–31.

¹¹ Cf. A. Pawłowski, *Terroryzm w Europie XIX i XX wieku*, Zielona Góra 1984, p. 24.

¹² J. Muszyński, *Istota terroryzmu politycznego*, [in:] J. Muszyński (ed.), *Terroryzm polityczny*, Warszawa 1981, p. 19.

¹³ I. Wallerstein, *European Universalism: The Rhetoric of Power*, London, New York 2006, p. 1 onwards.

¹⁴ B.M. Jenkins, *The study of terrorism: definitional problems*, Santa Monica 1980, p. 1.

rise to “one-dimensional” approaches to the phenomenon of terrorism, which in turn might result in their meagre empirical value¹⁵.

Less axiological objectives of terrorist acts include that which is related to the etymological origin of the term “terrorism” (Latin *terrere* ‘fill with fear, frighten’) – fear and fright. This element is indispensable to defining both the phenomenon of terrorism and methods used by terrorists. Still, in order to achieve the above-mentioned goals, one should be able to effectively apply violence and force. Hence, it should be pointed out that violence, fear and fright play a decidedly predominant role both in the *definiens* of the term “terrorism” and among the objectives of terrorist acts. The attempts at defining the phenomenon of terrorism made by P. Wilkinson serve here as an example of such approaches; he remarked that the determinant of the phenomenon is fear attained through the medium of violence, the recipient being a group of individuals larger than the direct target group that the attack is directed at¹⁶.

Emphasising fear and fright in the analysis of the term ‘terrorism’ is of some importance with regard to the legal definition of “terrorist offences,” which was introduced by the Polish legislator to Art. 115 § 20 of the Penal Code. “A terrorist offence is a prohibited act... committed with the aim of: 1) *seriously terrorising a large number of people*, 2) *forcing a public authority of the Republic of Poland, or another state or international organisation, to take or not to take a certain course of action*, 3) *cause a serious disturbance in the political system or the economy of the Republic of Poland, or another state or international organisation, – or a threat to commit such an act*. Another reason for recognizing a terrorist offence is a proper penalty range, that is the upper limit of imprisonment period of at least 5 years¹⁷. The result of such a definition of an offence, that is the realisation of the subjective aspect and the inclusion of the guidelines as to the sanctions, is that any conduct corresponding to any type of offence within the compass of the Polish penal and substantive regulations can thus be of a terrorist

¹⁵ Cf. K. Jałoszyński, *Współczesny wymiar antyterroryzmu*, Warszawa 2008, pp. 32–61; A. Wejkszner, *The post-9/11 Al Qaida. The Vanguard of Islamic Terrorism at the Onset of the 21st Century*, [in:] S. Wojciechowski (ed.), *The modern terrorism and its forms*, Poznań 2007, pp. 109–118.

¹⁶ P. Wilkinson, *Terrorism versus Democracy: The liberal state response*, London, New York 2006, pp. 1–3, 15–16; B. Çınar, *The Relationship Between Terrorism and Liberal Democratic States*, “European Journal of Economic and Political Studies” 2010, Vol. 3, No. 2, pp. 207–221.

¹⁷ *Ustawa Kodeks karny z dnia 6 czerwca 1997 r.* (Journal of Laws 1997, No. 88, item 553, as amended).

nature¹⁸. Hence, these offences will constitute varied interests protected by law, offences against state security and public security carrying the same weight as offences against sexual freedom and decency. The consequence of this will be, for instance, categorising the offence of rape (while “blackmailing” the state authorities with the following: “if you don’t revise your decision, I am going to rape this person”) as a terrorist offence.

The regulation concerned with the legal definition of “terrorist offences” was introduced because of the necessity to implement the Council Framework Decision of 2002 on combating terrorism¹⁹. The objective of the decision was to approximate the penalization of terrorist acts in the EU Member States. The decision was based on the following elements: (1) an objective one (pointing to a specific prohibited act) and (2) a subjective one (pointing to the subjective aspect, that is the goals supposedly actuating the perpetrator of a prohibited act). Because of the EU regulations, the Polish legislator’s aim was a proper penal policy on combating terrorism due to a heightened threat of terrorist attacks. Furthermore, given the special kind of evaluation of acts, the legislator recognized that terrorist offences should be subject to more severe criminal sanctions (like in the case of habitual offenders). Attention should also be paid to the function of the new regulations, that is the intention to consolidate the issues concerned with the phenomenon of terrorism within the system of penal regulations.

The tasks and activity of the Internal Security Agency

The legislator defines the material scope of the tasks of the Internal Security Agency in Art. 5 para 1–2 of the *Act on the Internal Security Agency and Foreign Intelligence Agency*.²⁰ These tasks, contained in a cata-

¹⁸ R. Zgorzały, *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, „Prokuratura i Prawo” 2007, No. 7–8, pp. 58–79.

¹⁹ *Council Framework Decision (2002/475/JHA) of 13 June 2002 on combating terrorism*, Official Journal of the European Communities L 164/3–7; *Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism* {SEC(2007) 1463} (2007), Brussels, 6.11.2007 COM(2007) 681 final.

²⁰ *Ustawa o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu z dnia 24 maja 2002 r.* (Journal of Laws 2002, No 74, item 676, as amended); M. Karpiuk, *Zakres działania służb specjalnych*, [in:] M. Bożek, M. Czuryk, M. Karpiuk, J. Kostrubiec (eds.), *Służby specjalne w strukturze władz publicznych. Zagadnienia prawnoustrojowe*, Warszawa 2014, pp. 92–94.

logue, are listed enumerative in the Act, offences against the state coming to the fore:

- (1) Identifying, preventing, and eliminating threats to the state's internal security and its constitutional order, and in particular, its sovereignty and international position, independence and inviolability of its territory, as well as the state's protection.
- (2) Identifying, preventing, and detecting crimes of espionage, terrorism, infringement of the state's secret, as well as other criminal offences threatening the state's security.
- (3) Identifying, preventing, and detecting crimes threatening the state's economic security.
- (4) Identifying, preventing, and detecting crimes of corruption among public officials, should such crimes endanger the state's security.
- (5) Identifying, preventing, and detecting criminal offences regarding the production of and trade in commodities, technologies, and services of strategic importance for the state's security.
- (6) Identifying, preventing, and detecting crimes of illegal production, possession, and trade in weapons, ammunition, explosives, and weapons of mass destruction, as well as narcotic and psychotropic substances in international circulation, and prosecuting the perpetrators.
- (7) Protecting classified information and exercising the state's security powers regarding the protection of classified information in international relations.
- (8) Acquiring, analysing, processing, and providing competent authorities with the information essential for the protection of the state's internal security and for its constitutional order.

Furthermore, it must be stressed that any extra tasks of the Internal Security Agency (ABW) may follow from other acts of internal law or international agreements. An example of the fulfilment of Poland's obligations towards the European Union is referring in the Act on the Internal Security Agency and Foreign Intelligence Agency to the Head of the ABW as the point of contact as regards the exchange of information instrumental in preventing terrorist offences (Art. 5 para 3; Art. 16 para 3 of 2008/615/JHA)²¹.

The legislator's aim was to specify the operation of the central agency of government administration. The above-described scope of activity

²¹ Council Decision (2008/615/JHA) of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (2008), Official Journal of the European Union L 210/1-11.

determines the actions to be undertaken, but also the possibility of using operational control means, for they condition their acquisition. Hence, the generality of the legal phrasing in the said article of the Act became an object of criticism. An attempt was made at resolving this issue – a series of bills were put forth; this time the two special services – the Internal Security Agency and the Foreign Intelligence Agency (Pol. *Agencja Wywiadu* – AW) – were handled separately. Despite the fact that the legal appraisal of *Document No. 2295*, ordered by the Sejm Bureau of Research, is positive about the “new version” of the *Bill*, it would be far-fetched to claim that the legislator removed all the doubts concerning the scope of the ABW’s operation²². Apart from the quality of legislation, the biggest problem was the scope of the application of operational control in the *Bill of 2013* and in the *Bill of 2014* (the content not included in *Document No. 2295*)²³. The reason for ordering the legal appraisal was, among others, the formerly unidentified “counter-intelligence prevention” (Art. 3 para 1 section 3 of the *Bills of 2013 and 2014*), which in effect caused the ABW to have an unlimited capacity for using this legal instrument²⁴. *Document No. 2295* limits the operational control to identifying, preventing, and detecting specified offences (Art. 3 para 1 section 2). Moreover, during the legislative process major shortcomings, which had featured in the *2013 Bill*, were removed; these were concerned with, *inter alia*, the introduction of a division of offences into extremist and terrorist ones, which had no relevance for the Polish criminal law system, and was out of keeping with the art of making acts of law. It must be noted that the *2013 Bill* presented by the Ministry of Interior, headed by B. Sienkiewicz, aroused the greatest number of doubts as regards both solutions and the art of legislative drafting.

²² M. Chmaj, *Opinia prawna w przedmiocie zgodności z Konstytucją RP rządowych projektów ustaw: o Agencji Bezpieczeństwa Wewnętrznego (druk nr 2295) i o Agencji Wywiadu (druk nr 2294), ze szczególnym uwzględnieniem propozycji dotyczących rozwiązań prawnych stosowanych wobec cudzoziemców* (22.08.2014). *Opinia zlecona*, Biuro Analiz Sejmowych, Warszawa 2014, pp. 1–4, [http://orka.sejm.gov.pl/RexDomk7.nsf/0/4C70BBB4BD91E988C1257D-200027158C/\\$file/i1795-14A.rtf](http://orka.sejm.gov.pl/RexDomk7.nsf/0/4C70BBB4BD91E988C1257D-200027158C/$file/i1795-14A.rtf), 24.10.2015; *Rządowy Projekt Ustawy – o Agencji Bezpieczeństwa Wewnętrznego (Druk No 2295) (2014)*, Warszawa 2014, [http://orka.sejm.gov.pl/Druki7ka.nsf/0/2E17AEC9CBA410F5C1257CB7002C9305/\\$File/2295%20cz.%201.pdf](http://orka.sejm.gov.pl/Druki7ka.nsf/0/2E17AEC9CBA410F5C1257CB7002C9305/$File/2295%20cz.%201.pdf), 24.10.2015.

²³ *Projekt Ustawy o Agencji bezpieczeństwa Wewnętrznego przedstawiony do konsultacji w 2013 r.*; *Projekt Ustawy o Agencji bezpieczeństwa Wewnętrznego z projektami aktów wykonawczych przedstawiony przez Prezesa Rady Ministrów Sejmowi w 2014 r.*

²⁴ R. Rosicki, *The protection...*, pp. 107–118.

In the text it was noted that the doubts concerning the relation between Art. 3 and Art. 21 of the 2014 Bill (*Document No. 2295*) were not removed. This assumption follows from the appraisal of the practices of special services, which – in the use of operational control concerning identification and prevention of crime – can easily use the argument of “organized crime” while applying for technical means. Also, from the standpoint of human rights, placing the operational control used against individuals who are not Polish citizens outside the control of the court and prosecution raises serious questions. Still, it is interesting to note that this instrument will be effective in, inter alia, the identification of a terrorist threat to Poland.

It should also be pointed out that the scope of tasks presented in the *Bill on ABW of 2014* did not really limit the agency’s responsibilities. This sort of solutions should be deemed disputable on account of a likelihood of a threat to effective prosecution of crime against the state and “terrorist offences”. This places the Internal Security Agency within the domain of “criminal intelligence,” which – given the operation of the Central Anti-Corruption Bureau (Pol. *Centralne Biuro Antykorupcyjne* – CBA) and the Police’s Central Bureau of Investigation (Pol. *Centralne Biuro Śledcze Policji* – CBS) in Poland – seems rather non-functional and pointless.

An appraisal of a terrorist threat to Poland

In its annual reports the Internal Security Agency itself points out that the possibility of terrorist attacks in Poland is remote, even though it is not impossible²⁵. One should not however welcome this stance, and yet because of the “marginal position” of Poland, as well as such factors as the homogeneity of the society and the not-too-friendly welfare policy (towards immigrants too), we can speak about Poland’s “natural anti-terrorist mechanism”²⁶. The ABW points out that the possible terrorist threats may be connected with Poland being treated as a substitute des-

²⁵ *Raport z działalności Agencji Bezpieczeństwa Wewnętrznego w 2013 r.*, ABW, Warszawa 2014, p. 17; *Raport z działalności Agencji Bezpieczeństwa Wewnętrznego w 2014 r.*, ABW, Warszawa 2015, p. 16.

²⁶ Cf. J. Noch, *Nawet uchodźcy nie chcą mieszkać w Polsce. "Płaczą, gdy dowiadują się, że to nie Niemcy. Polska da im bilet powrotny"*, <http://natemat.pl/138969,nawet-uchodzcy-niechca-mieszka-w-polsce-placza-gdy-dowiaduja-sie-ze-to-nie-niemcy-polska-da-im-bilet-powrotny>, 22.07.2015.

tionation²⁷. Poland may thus become a “transit” area for terrorists due to its weaker protection of the eastern border and less control of individuals coming from high-risk countries (individuals connected with “radical Islam” from the area of Africa, the Middle East, North Caucasus). By way of illustration, in June 2015 a Moroccan citizen travelling via Serbia and Poland to Spain was apprehended. He was suspected of terrorism, and was arrested at a Polish airport under a European Arrest Warrant issued by a Spanish court.

Besides, the ABW points out that the escalation of conflicts on the territories of Syria and Iraq may give rise to a radicalisation of individuals who returned from those areas²⁸. Apart from the ABW analyses it must be noted that the area from which one should expect a threat related to the migration of representatives of “radical Islam” are the countries of the former Yugoslavia. Another threat is posed by the non-standard instruments of conflict escalation used by Russia on the territory of Ukraine. An example of such an instrument is something that might be termed “irelandisation” of the conflict; it is effected through Russia’s support for terrorist attacks all over Ukraine, and not only through a military support for its eastern parts, which is happening these days.

It is worthwhile paying attention to the nature of terrorist attacks, which has already been synthetically presented in the text. The essence of terrorism is supposed to be fear, fright and violence, or – as a matter of fact – the attainment of the former two by means of the latter. While analysing terrorist attacks, one should include one more element, the one infrequently referred to, namely the fact that the goal of the attacks is to demonstrate the organizational helplessness of the state under attack. Interestingly, another factor showing a state’s organizational powerlessness regarding anti-terrorist security can be found in one of the last scenes of the dark comedy *Four Lions* directed by Chris Morris. One of the film characters, a bomber named Omar, is unable to mount a spectacular suicide attack. Instead he causes an explosion at a drugstore²⁹. The conclusions that one might draw from this scene can be encapsulated in the statement that no country is ready to handle dispersed terrorist attacks of non-strategic goals, let alone Poland.

²⁷ *Raport...*, ABW, Warszawa 2015, p. 16.

²⁸ *Ibidem*, p. 16; *Straż Obrony Osobistej. Polska granica wschodnia bezbronna?*, <http://www.defence24.pl/239188,straz-obrony-osobistej-polska-granica-wschodnia-bezbronna,23.07.2015>.

²⁹ *Four Lions*, film of 2010, Dir. Ch. Morris.

Conclusion

The text undertakes to analyse the issue of information and anti-terrorist security of Poland. The two categories of security have been discussed with regard to a clash between two spheres – to wit, the state and the private sphere. The theoretical foundation for the analysis of the conflicting nature of these two spheres is the process of legal qualification of legal entities' conduct with regard to the norm or/and a set of norms, which is referred to with the term of legal modality. In addition, the issues of information and anti-terrorist security have been elaborated by means of the characterisation of the tasks and operation of the Internal Security Agency, as well as a synthetic appraisal of a terrorist threat to Poland. The starting point for the analysis of the tasks of the Internal Security Agency is the notion of “terrorism” and “terrorist offences.” Both notions bear their own significance owing to the fact that they are used to define the statutory tasks of the Internal Security Agency – “terrorism” in the legally binding *Act of 2002*, and the “terrorist offences” in the *Bill on ABW of 2014 (Document No. 2295)* to come in force in 2016.

In order to elaborate the said problem, the text addresses two questions that can be related to the following conclusions:

(1) *To what extent does referring to a threat to security influence a limitation on rights and freedoms in Poland (from the perspective of the clash between the state and the private sphere)?*

From the viewpoint of a terrorist threat, there are occasional activities aimed at limiting man's rights and freedoms. An exception is Poland's spectacular loss of two cases at the European Court of Human Rights in 2014; the cases concerned an unlawful detention of foreign citizens and a use of “enhanced interrogation techniques” (cases of Husayn/Abu Zubaydah and Al Nashiri). The situation evoked an interesting response from the representatives of the majority of political parties, including the left-wing ones, which in the European Union belong to the Party of European Socialists (PES). The response was the one of acceptance and positive argumentation for the “special means” used while combating terrorism by the Central Intelligence Agency in the premises provided by the Polish special services.

From the viewpoint of the information security (viewed as special powers exercised while performing operational control) one should point out that Poland is witnessing a discussion on the number of applications for “wire taps,” “itemized phone bills” and other “tele-

communications data,” submitted by authorized services (e.g. the Internal Security Agency). In the case of the ABW, mechanisms of abuse are provided by the very regulations concerning the tasks of the said service. These were specified in the *Act of 2002*, and served as the basis for an application for operational control. An attempt was made at preserving this state in the *Bills on ABW of 2013 and 2014*; still, in the *Bill of 2014 (Document No. 2295)* the legal basis was limited. This does not mean that the number of applications for the use of technical means for operational control will diminish; noteworthy, a former extension of prosecution and court control over this type of applications did not decrease, but rather increased the number. It must be stressed that, within the scope in question, the intended statutory changes with regard to the *Act on ABW of 2014* are only motivated by the Constitutional Tribunal, which disputed many of the legal solutions. As regards the access to a special kind of information, Poland manifests little motivation in diminishing the competence of special services. For that matter, the most frequent arguments are the ones concerning the effectiveness of the state’s operation in combating organised crime and “terrorist offences” (as well as offences employing the latest technology).

(2) *To what extent do the tasks and activity of the Internal Security Agency influence the effectiveness of anti-terrorist security in Poland?*

It must be pointed out that the scope of statutory tasks of the Internal Security Agency, defined both in the *Act of 2002* and in the *Bill of 2014* does not positively influence the effectiveness of combating crime against the state and “terrorist offences.” An example of the wide scope of the ABW operation is, inter alia, combating tax offences (e.g. VAT extortion). The operation scope of the ABW places this service in the domain of “criminal intelligence,” which is rather debatable given the division of responsibilities between other special services in Poland, e.g. the Central Bureau of Investigation, the Central Anti-Corruption Bureau and the Treasury Intelligence.

As for the analysis of the problem of information and anti-terrorist security of Poland, the text presents only a selection of issues. Hence, the analysis of the information-related threats does not include such issues as “cyberterrorism” or “cyberespionage,” but rather focuses on the problem of a special kind of means used for operational control, which is of significance in the context of legal modalities, as well as the clash between two spheres – the state and the private sphere. As regards the fight undertaken by the Internal

Security Agency against terrorism, the issue of the operation of the Anti-terrorist Centre (Pol. *Centrum Antyterrorystyczne* – CAT) within this service is not addressed. With regard to the state security, all these issues are important enough to merit separate analyses.

ABSTRACT

The subject matter of the analysis conducted in the text is information and anti-terrorist security of Poland, which has been presented within the context of a clash between two spheres – the state and the private sphere. Furthermore, the issues of security have been supplemented with a description of the tasks and activity of the Internal Security Agency, as well as a synthetic appraisal of a terrorist threat to Poland. The main parts of this work are concerned with: (1) the state and the private sphere, (2) “terrorism” and terrorist offences, (3) the tasks and activity of the Internal Security Agency, (4) an appraisal of a terrorist threat to Poland.

Given the necessity to elaborate the research problem, the text features the following research questions: (1) To what extent does referring to a threat to security influence a limitation on rights and freedoms in Poland (with regard to the clash between the state and the private sphere)?, (2) To what extent do the tasks and activity of the Internal Security Agency influence the effectiveness of anti-terrorist security in Poland?

Remigiusz Rosicki

BEZPIECZEŃSTWO INFORMACJI I ANTYTERRORYSTYCZNE POLSKI. KRYTYCZNA ANALIZA NA PRZYKŁADZIE ZADAŃ I DZIAŁAŃ AGENCJI BEZPIECZEŃSTWA WĘWNETRZNEGO

Przedmiotem analizy jest bezpieczeństwo informacji oraz bezpieczeństwo antyterrorystyczne Polski. Zagadnienia zostały przedstawione w kontekście kolizji dwóch domen – państwowej i prywatnej. Ponadto problematyka bezpieczeństwa została uzupełniona przez charakterystykę zadań i działań Agencji Bezpieczeństwa Wewnętrznego oraz syntetyczną ocenę zagrożenia terrorystycznego Polski. Główne części pracy dotyczą: (1) Domeny państwowej i domeny prywatnej, (2) „Terroryzmu” i „przestępstw o charakterze terrorystycznym”, (3) Zadań i działań Agencji Bezpieczeństwa Wewnętrznego, (4) Oceny zagrożenia terrorystycznego Polski.

W związku z koniecznością uszczegółowienia problemu badawczego w artykule postawiono następujące pytania badawcze: (1) W jakim zakresie powoływanie się

na zagrożenie bezpieczeństwa wpływa na ograniczenie praw i wolności w Polsce (w ramach kolizji domeny państwowej i prywatnej)?, (2) W jakim zakresie zadania i działania Agencji Bezpieczeństwa Wewnętrznego wpływają na efektywność bezpieczeństwa antyterrorystycznego w Polsce?

SŁOWA KLUCZOWE: *bezpieczeństwo informacji, bezpieczeństwo antyterrorystyczne, Agencja Bezpieczeństwa Wewnętrznego, kontrwywiad, przestępstwa terrorystyczne, modalności prawne*

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