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TENSION BETWEEN HUMAN RIGHTS PROTECTION AND THE NECESSITY TO ENSURE PUBLIC SECURITY IN THE CONTEXT OF POLISH ANTI-TERRORISM LAW

1. INTRODUCTION

Recurrent events of a terrorist character, especially those occurring not in arenas of armed conflict or in countries that are not – at least formally – at war with others, make it necessary not only to consider a redefinition of the state security systems, but also to reflect deeply on the human rights-inspired paradigms accepted hitherto. This paper does not set out to advocate backing away from the human rights standards developed in our legal culture and the kind of relationship between an individual and the state that stems therefrom. Rather, the subjective and objective scope of those standards shall be rethought. In other words, regardless of one's convictions and interpretation of current events, it is difficult to avoid repeating questions concerning the efficiency of public authorities and our legal system in the context of European experiences with terrorism. First, however, we shall examine whether the commonly recognized constitutional and human rights standards facilitate the development by the state of instruments aimed at the effective prevention of terrorism.

Stopping short of discussing the exponential growth in the fear of potential attacks, it should be said that terrorism triggers consequences not only on a social and political level, but also on a legal one. New normative devices pose a challenge to the classic paradigms of particular branches of law¹. This should not automatically result in their impermissibility, since the efficiency of legal norms

¹ One fitting example on the grounds of criminal law is the concept of *Feindstrafrecht* proposed by Günther Jakobs. In the face of an intensifying terrorist threat, this idea has once again become an important element of legal discourse. Cf. G. Jakobs, *Zur Theorie des Feindstrafrechts*, (in:) H. Rosenau, S. Kim (eds.), *Straftheorie und Strafgerechtigkeit*, Frankfurt am Main 2010, p. 167 et seqq.; L. Greco, *Feindstrafrecht*, Baden-Baden 2010, *passim*.

is more important than the compatibility of novel ideas with entrenched dogmatic assumptions. However, efficiency is hardly the decisive value in the process of assessing new additions to a legal system. For law may not go beyond the borders delineated by certain absolutely binding axiological norms, the origin, content and character of which have given rise to much discussion and controversy in jurisprudence. The Polish Constitution may be referred to as the source of knowledge about goods which the state must protect, including against its own infringements. As a consequence, the Constitution as well as other legal pronouncements which prevail in a conflict with an act enacted by parliament, may serve as a prism through which one may assess the justifiability of a given anti-terrorist law. This finding, evidently, does not exhaust discussion about the axiological propriety of the institutional make-up of the Polish state, including its Constitution, nor about whether at least some of the current standards should be reformulated. These questions would need to be addressed separately to be fully explored. This paper does not intend to vet and verify the axiological foundations of the Polish institutional make-up. On the contrary, we aim to study whether consequent normative decisions fit within the limits drawn by the complex of legal goods enshrined in the Polish Constitution. To that end, a list of goods protected by anti-terrorist laws, as well as those limited thereby, must be devised². Next, a proportionality test is to be undertaken, in which we shall see which of the goods involved in a particular conflict is to prevail – this will allow us to establish whether a given regulation is consistent (if the good protected by the scrutinized law edges out the other) or inconsistent with the Constitution.

Terrorist attacks directed against democratic states have provoked much discussion over the necessity to reevaluate the scope of human rights and citizens' freedoms³. Governments, particularly following the failure of anti-terrorist tactics

² Justice Sandra Day O'Connor referred to such a necessity in her opinion in the U.S. Supreme Court case *Hamdi v Rumsfeld*, 124 S. Ct. 2633, 2652 (2004): "We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns". Justice William Brennan on another occasion, however, highlighted one recurrent regularity: "The trouble in the United States (...) has been not so much the refusal to recognize principles of civil liberties during times of war and national crisis but rather the reluctance and inability to question, during the period of panic, asserted wartime dangers with which the nation and the judiciary [are] unfamiliar (...) After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along" (W. J. Brennan, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, "Israel Yearbook on Human Rights" 1988, Vol. 18, pp. 16–17). Cf. also S. P. Waxman, *The Combatant Detention Trilogy Through the Lenses of History*, (in:) P. Berkowitz (ed.), *Terrorism, the Laws of War, and the Constitution. Debating the Enemy Combatant Cases*, Stanford 2005, *passim*.

³ C. Gearty, *Reflections on Civil Liberties in an Age of Counterterrorism*, "Osgoode Hall Law Journal" 2003, issue 41, p. 185; Ch. Michaelsen, *Balancing Civil Liberties Against National Secu-*

employed hitherto, have to face up to a very serious dilemma. In this context, some argue that the catalogue of human rights and freedoms, albeit very momentous, is valid only in times of peace, and should be subjected to limits during times when terrorism is being fought against⁴. Others, however, counter that a steady level of human rights protection ought to be maintained regardless of any threat or danger – or, as some venture to say, precisely because of such a threat⁵. As Christopher Michaelsen has rightly noted, both proponents and opponents of limiting human rights in the face of anti-terrorist activities call for an examination of relations between the values of security and freedom⁶. They differ, of course, in their results of the conflict of values so stated, however the dominant thrust in the literature is that the tension created by anti-terrorist laws is to be interpreted through the perspective of a conflict of values.

Doubtless, terrorism as such, especially in its contemporary form, addressed principally against Western culture, constitutes a threat to the safety and security of people, and, as a consequence, to the values most fundamental for the functioning of societies as a whole, and to particular individuals. The very fact a danger of such attacks exists brings into question the ability of individuals to make use of human rights and freedoms. A challenge to such a basic good as security must bring about public anxiety and impede attempts to preserve a proper degree of protection of other material values. In any event, counteraction against terrorism, i.e., various legal regulations and anti-terrorist operations, also often carry the risk of being incompatible with fundamental rights. All this sets the scene for a peculiar paradox. The state, by expanding the scope of its prerogatives with a view to ensuring a proper level of security to society, and therefore, in principle, to every individual, ushers in legal instruments which, in effect, hinder security, or at least the feeling of security among citizens. This argument is buttressed by a relatively self-evident assumption that it is not only terrorists that may be a source of danger – the state may also be a danger in relation to its own citizens⁷. Such a coupling of potential ramifications of anti-terrorist decisions makes it very

rity? *A Critique of Counterterrorism Rhetoric*, “The University of New South Wales Law Journal” 2006, issue 29, p. 1.

⁴ Ch. Michaelsen, *Balancing Civil Liberties...*, pp. 1–2. Cf. V. D. Dinh, *Freedom and Security after September 11*, “Harvard Journal of Law and Public Policy” 2002, Vol. 25, No. 2, p. 399.

⁵ This view was shared by U.S. Senator Russell Feingold, who was the only senator not to vote in favour of the USA Patriot Act. His reasoning went as follows: “(...) preserving our freedom is one of the main reasons we are now engaged in this new war on terrorism. We will lose that war without firing a shot if we sacrifice the liberties of the American people” (147 Cong. Rec. S 11019, daily ed. Oct. 25, 2001, quoted after: Ch. Michaelsen, *Balancing Civil Liberties...*, p. 2).

⁶ Cf. A. M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven: Yale University Press 2002, pp. 165–222.

⁷ Emanuel Gross notes that people’s sense of security is influenced by the rule of law and citizens’ freedoms. Cf. E. Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, “The UCLA Journal of International Law and Foreign Affairs” 2001, issue 89, pp. 164–167.

difficult for the state to react⁸. For it turns out that both terrorist and anti-terrorist activities may endanger human rights. This does not mean, however, that the state is helpless in its fight against terrorists. One fundamental difference between terrorist and anti-terrorist activity is that the former always violates human rights and freedoms, whilst the state, in undertaking the latter, may resort to a number of regulatory choices and options which do not necessarily trigger an incompatibility with fundamental rights.

Another problem in the context of weighing goods against each other concerns the substantiation of the term “security”, particularly as against citizens’ freedoms which have been quite precisely enshrined in instruments of both domestic and international law⁹. Security shall not be understood in isolation from freedom. If freedom on an individual level is to be read as the ability to shield oneself from danger, we could distinguish two types of freedom. Insecurity stemming from acts of terror, or from a threat thereof, is directed at entire societies and as such it makes the individualization of freedom difficult. In this sense, insecurity is aimed against the state, which, as a result, must lead to the state’s engagement in protecting its society from that insecurity by guaranteeing general or collective freedom. By doing this, the state shall not curb individual freedom – the ability to shield oneself from danger. Collective security, inextricably linked with freedom as the state’s actions protecting its order and existence from incursions therein, is a foundation of any legal order. It may even be perceived as an unquestionable and absolute value of a legal system. In view of such an understanding of security, it is subject to a weighing exercise only where its relation to individual freedom is concerned, i.e., where respect for security results in imposing limits on one’s freedoms as against the state. The conundrum outlined here boils down to asking whether collective freedom prevails over individual freedom, or *vice versa*.

In the light of the above, we shall consider the relationship between security and freedom. These two goods are closely linked to each other and cannot function in isolation if one approaches them in a broad context, comprehensively. As noted above, however, this does not mean that the legislator is left no room to decide in this matter. Above all, it shall identify the proper balance between

⁸ Christopher Michaelsen, basing his observations upon John Locke’s liberalism, has written that it is a mistake on the part of governors in having a one-sided perception of the relation between freedom and security which leads to a conclusion that national security is a condition precedent of freedom. He argues that it is individual freedom that legitimizes the existence of the state. Cf. Ch. Michaelsen, *Balancing Civil Liberties...*, p. 5. Doubtless, freedom is a fundamental value, however it is equally apparent that a host of limits upon freedom shall be accepted, for otherwise it would be difficult to envisage the smooth functioning of a community. In this way we go back to the question of limits of permissible interference with human freedom. Another issue, which Michaelsen does not elaborate upon, is the *a priori* assumption that systems of liberal democracy must be upheld. Even though, admittedly, the advantages of having a liberal democracy are well known, its existence should not be treated as an axiom, not least because of its shortcomings.

⁹ Ch. Michaelsen, *Balancing Civil Liberties...*, p. 14.

those values. For freedom cannot exist without security and *vice versa*; boundless freedom may pose a significant threat to security, and the excessive protection of security could violate freedom. It appears that there is a pattern here: the more freedom from state inference there is, the more emboldened the feeling of security understood as a negligible risk from danger coming from the state. On the contrary, a too far-reaching reluctance of the state to act may result in an erosion of the feeling of security viewed through the prism of a risk of a danger coming from agents other than the state, e.g. terrorists. Therefore, the state should work out a balanced *modus operandi* in which tensions resultant from the need for the simultaneous respect for freedom and security are alleviated. If we were to step beyond the bounds of liberal democracy, we could envisage the state eliciting in its citizens a conviction that the community must be shielded from dangers whilst declaring that the solutions adopted would not be used against the innocent. Of import here is the existence of a relationship of trust between a citizen and the state. If, for some reason, trust cannot form, if only due to previous abuses of power by the state, it will be difficult to persuade citizens that new prerogatives acquired by the state are conducive to their good.

The relationship between security and freedom does not, however, exhaust the question of anti-terrorist undertakings of the state. It cannot escape our attention that there are other significant goods which may be targeted by prerogatives rested in the hands of the state and used in fighting terrorism. Security and freedoms are goods in and of themselves, however they are strongly connected with and support the existence of other goods. An excellent example, discussed further below, is the good of human life¹⁰. Protection of human life is necessary to fully safeguard security and freedom. Backing away from preserving security effectively prevents the state from protecting human life. By security as a good in and of itself one should understand a state of affairs where a given agent – the state or a citizen – does not sense any dangers. Security is a state of sensing no danger¹¹. Security perceived from the perspective of the state consists of “conditions where the state does not feel threatened by military, political or economic pressure and, at the same time, is possessed of means to develop and progress itself”¹².

¹⁰ UN Commission on Human Rights, *Summary of Arbitrary Executions: Report by the Special Rapporteur (S. Amos Wako)*, UN Doc. E/CN.4/1983/16 (January 31, 1983), para. 22; cf. also R. Otto, *Targeted Killings and International Law*, Heidelberg–Dordrecht–London–New York 2010, p. 47 et seqq.

¹¹ A. D. Rotfeld, *Bezpieczeństwo Polski a bezpieczeństwo Europy. Narodowa polityka bezpieczeństwa i jej międzynarodowe uwarunkowania*, (in:) A. D. Rotfeld (ed.), *Międzynarodowe czynniki bezpieczeństwa Polski*, Warszawa 1996, p. 10. Cf. also. M. Szydło, *Komentarz do art. 31*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, p. 787.

¹² M. Pawełczyk, *Publicznoprawne obowiązki przedsiębiorstw energetycznych jako instrument zapewnienia bezpieczeństwa energetycznego w Polsce*, Toruń 2013, pp. 29–30. Cf. also M. Szydło, *Komentarz do art. 31*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP...*, p. 787.

State security is one criterion which, pursuant to art. 31.3 of the Polish Constitution, may justify the imposition of limits upon rights and freedoms. As noted by numerous academics, this can be done in order to eradicate dangers to the Polish state, whether they originate abroad or domestically, which may be directed against its foundations or its existence as a democratic state¹³. In this context, security is, without a doubt, a separate good that must be taken into account in a constitutional assessment of anti-terrorist legal instruments. Public order, a good linked to security, may also justify interference with human rights and freedoms. As the Polish Constitutional Court has established, “the criterion of protection of public order, despite its content not being entirely spelt out, surely involves shaping the reality within the state in a way that makes it possible for individuals to coexist in one state organism. In limiting a particular right or freedom, the legislator guides itself by the respect for proper, harmonious coexistence of members of society, which encompasses both the protection of individual interests and also certain societal goods, including public property”¹⁴.

Before we move on to discuss selected aspects of Polish anti-terrorist law, we shall examine at least three more goods, through the prism of which one should assess the adopted solutions. These are: life, health and privacy. The matters considered here are so complicated that it is impossible to simply identify these goods with principles which would indicate whether a given anti-terrorist provision is constitutional or otherwise. It is the essence of anti-terrorist laws that they protect human life and health. We could even venture to say that the ineffectiveness of anti-terrorist regulations in the realm of protection of human life would question the justifiability of maintaining them within a legal system. In any case, however, one must pay heed to the state’s ability to interfere with the life and health of a person who, at the same time, may be involved in the commission of a crime of a terrorist character. Such interference is not, in principle, impermissible, however the state should be especially circumspect when it comes to extending its operations onto the most important goods belonging to persons, certainly where the state bestows upon itself a general and abstract right to resort to relevant tools of intrusion¹⁵. Rather, one should consider that an assessment of proportionality of numerous anti-terrorist legal instruments is hampered by the existence of the same kind of goods on both sides of the conflict.

¹³ M. Szydło, *Komentarz do art. 31*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP...*, p. 787.

¹⁴ Judgment of the Polish Constitutional Court dated January 12, 1999, P 2/98.

¹⁵ Analogies to justifications, particularly to self-defence, appear to be unwarranted. Self-defence is a construct which disables illegality in cases where a defender fends off an attack on a legal good. Therefore, it is not a provision that creates a right to violate goods belonging to another, but it secondarily legalizes given behaviour by reference to other goods, which the defender shielded or intended to shield. With regard to anti-terrorist laws, the state often quips itself with competences to deprive one of one’s life or health where certain criteria are met. This must lead one to conclude that such situations are qualitatively different.

The right to privacy, it appears, is not embroiled in the complications discussed above. Here, the legislator interferes by introducing new norms into the group of anti-terrorist laws. This is because it is difficult to authoritatively declare that anti-terrorist regulations or provisions governing operational control are directed at the protection of the privacy of individuals. Privacy is a good especially susceptible to violations by anti-terrorist laws, notably by the surveillance prerogatives of the state. In analyzing the degree to which the right to privacy is violated by a given pronouncement, one should establish whether the conflict between this right and other goods the legislator intended to protect was resolved properly.

Human dignity is destined to be the crucial point of reference in assessing anti-terrorist regulations. It is one of the fundamental principles of the Polish constitutional order, one that forms the basis and the starting point of all human rights and freedoms guaranteed therein¹⁶. This principle's function in a legal system is twofold: 1) it represents a standalone protected good, with its own content; 2) it is a meta-principle for other principles, in that it helps resolve conflicts between goods. As a standalone good, human dignity directs a legal system towards the subjectivity of a person and the autonomy rooted in her free and rational nature. As a consequence, the state cannot treat a person as a means to an end; instead, it should shape laws in a way that they conduce to the good of every person. Every person is possessed of internal value, inviolable even by that person herself, or her actions¹⁷. That human dignity is a meta-principle is evident from the essence of dignity, as well as from art. 30 of the Polish Constitution, which stipulates that it is a source of the freedoms and rights of persons and citizens. The special status of this principle means that in the case of a conflict between goods, preference should be attributed to that good whose content corresponds with dignity to a greater extent. Therefore, to establish whether a given anti-terrorist regulation directly violates human dignity as a standalone good means that such a provision is incompatible with the Polish Constitution. The principle of human dignity may not be subjected to a weighing exercise. In other cases, one must consider which of the conflicting goods, in a given context, realizes the principle of dignity to a greater extent. This is not to say that the good which is prevailed over in such circumstances does not deserve any protection – it should only be limited to the extent that is necessary to safeguard the preferred good¹⁸.

¹⁶ More on this: K. Szczucki, *Wykładnia prokonstytucyjna prawa karnego*, Warszawa 2015, p. 222 et seqq.

¹⁷ L. Bosek, *Komentarz do art. 30*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, p. 723.

¹⁸ It is justified to refer here to the concept of fundamental rights proffered by Robert Alexy. Cf. R. Alexy, *Teoria praw podstawowych*, Warszawa 2010, p. 84 et seqq.

2. THE MOST IMPORTANT PROVISIONS OF THE LAW ON ANTI-TERRORISM ACTIVITIES

On June 10, 2016, the Polish Sejm enacted the Law on anti-terrorist activities¹⁹. It is the first act to provide a systemic and comprehensive regulation of the state's capabilities in the realm of protecting its institutions and citizens against the threat of terrorism. As stated in the reasons appended to the bill: "Even though Poland has not, as of yet, been the target of a terrorist attack, it is not free from such a threat. Considering Poland's participation in the international anti-terrorist coalition, as well as the fact that its territory is referred to in materials spread by terrorist organizations as a potential target, it is justified to undertake proper legislative steps on a domestic level, with a view to enhancing security in the face of the threats"²⁰. What follows is an account of the most momentous provisions of the abovementioned Law.

The matters regulated in the Law are so complex that we shall only point to the most important and directional normative solutions. We could systematize the content of the Law in a number of ways, depending on what criteria we are inclined to adopt. A subjective criterion, by reference to the traditional divisions within a legal system, seems most fitting for the purposes of this paper. Provisions of the Law on anti-terrorist activities may therefore be divided into administrative, criminal and hybrid provisions. By availing ourselves of such a categorization, we are able to distinguish criminal provisions as well as hybrid provisions of a predominantly criminal character, hence those regulations which are liable to interfere with human rights and freedoms to the greatest extent. We shall not neglect, however, to verify the constitutionality of administrative rules, in spite of them not, by definition, being directed against fundamental human rights²¹. Legal solutions adopted in this realm may also have the effect of inflicting considerable harm upon ordinary citizens.

The Law contains a glossary of terms, wherein frequent references to concepts already existing in the legal system are made. Principally, the legislator makes it clear that anti-terrorist activities are operations conducted by public authorities which consist in preventing events of a terrorist character, attempting to take control over them through planned endeavours, reacting to such events and eradicating their consequences, including restoring the resources necessary to

¹⁹ Journal of Laws of the Republic of Poland from 2016, item 904.

²⁰ Reasons appended to Sejm paper No. 516, available at <http://sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=516> (visited September 19, 2016).

²¹ As a side note, the legislator has widened the application of administrative law on the grounds of criminal law. Such a state of affairs gives rise to a plethora of doubts of a systemic and constitutional character. Cf. M. Kolendowska-Matejczuk, V. Vachev (eds.), *Węzłowe problemy prawa wykroczeń*, Warszawa 2016, *passim*.

counteract them. The definition of counter-terrorist activities plays a supplementary role here – these are actions against attackers, preparers, aiders or abettors of crimes of a terrorist character (defined in art. 115 § 20 of the Polish Criminal Code), initiated in order to eliminate direct threats to the life, health or freedom of persons or to property whilst using specialist forces and resources as well as specialized operational tactics.

With regard to the administrative norms contained within the Law, it is apparent that the Polish Parliament designated the Chief of the Internal Security Agency as the authority responsible for preventing events of a terrorist character. The Minister of the Interior takes upon himself the responsibility for preparations aimed at taking control over events of a terrorist character through planned endeavours, reacting to such events and eradicating their consequences, including restoring the resources necessary to counteract them. One of the main tasks of a projected anti-terrorist regulation was to devise a coordinated system for reacting to dangers of a terrorist character. The Law on anti-terrorist activities of June 10, 2016 obliges all public authorities, owners and possessors of property, installations as well as facilities of public and critical infrastructure to cooperate with the Chief of the Internal Security Agency.

The Chief of the Internal Security Agency has been granted the right to establish a register which may contain information regarding: 1) persons undertaking actions for the benefit of terrorist organizations or organizations associated with terrorist activity, as well as members of such organizations; 2) persons wanted for terrorist activity or persons suspected of committing crimes of a terrorist character, against whom Polish authorities have issued an arrest or a search warrant, or persons wanted on the basis of a European arrest warrant; 3) persons for whom there is a reasonable suspicion that they may be involved in activities leading to the commission of a crime of a terrorist character, including persons who pose a threat to civil aviation; 4) persons participating in terrorist training or embarking on travel to commit a crime of a terrorist character. Detailed rules governing the operation of this register are to be determined in an order to be issued by the Chief of the Internal Security Agency.

Whilst performing his anti-terrorist duties, the Chief of the Internal Security Agency may freely obtain access to databases and other information gathered in public registers and records run by a plethora of public authorities enumerated in art. 11 of the Law. In addition, the Chief may be granted access to audiovisual recordings of events made by equipment operated in objects of public utility, near public roads and other public places, and may receive copies of these recordings free of charge.

One new measure introduced by the Law is emergency levels which may be introduced in cases of an event of a terrorist character or threats thereof. The legislator distinguished four emergency levels (ALFA, BRAVO, CHARLIE and

DELTA) and, separately, four emergency levels to be used where ICT²² systems as part of critical infrastructure are under threat (ALFA-CRP, BRAVO-CRP, CHARLIE-CRP, DELTA-CRP). Successive levels are instituted along with the rise in the danger of an event of a terrorist character occurring, whilst the fourth level is reserved mainly for a situation when such an event actually takes place. The emergency levels are introduced, modified and recalled by the Prime Minister, by means of an order, following consultation with the Minister of the Interior and the Chief of the Internal Security Agency. In urgent cases, these decisions may be taken by the Minister of the Interior following consultation with the Chief of the Internal Security Agency, so long as the Prime Minister is informed immediately afterwards. A statutory instrument to be issued by the Prime Minister is to determine the detailed scope of operations that may be conducted by public authorities after a given emergency level is announced.

Another administrative provision worthy of our attention is the Minister of the Interior's ability, following the institution of the third or fourth emergency level, to prohibit, by means of an order, public gatherings or mass events on the territory where the level is in force, for the duration of the emergency. In addition, the introduction of these emergency levels legitimizes the use of divisions and sub-divisions of the Armed Forces of the Republic Poland, so long as the use of divisions and sub-divisions of the police force is insufficient or may transpire to be insufficient.

Among the criminal provisions in the Law on anti-terrorist activities, some of the most far-reaching are special regulations concerning preparatory proceedings. Pursuant to art. 25 of the Law on anti-terrorist activities, a prosecutor may decide to order a search of premises and other places, as well as the arrest of a suspect. A special basis for remand was also provided for. Under art. 25.1, where, if one is suspected of having committed a crime of a terrorist character, charges may be formulated based upon information extracted in the course of preliminary investigative activities, if this would be conducive to the good of the preparatory proceedings. In such a case the court, upon a prosecutor's request, may hold a suspect on remand for up to fourteen days. For that purpose, it is sufficient to substantiate the likelihood of the commission, attempt or preparation of a crime of a terrorist character. Remand may be extended in line with the rules prescribed in art. 263 of the Code of Criminal Procedure.

New criminal offences have been introduced, particularly in art. 255a § 2 of the Criminal Code, which criminalizes participation in training that facilitates the commission of a crime of a terrorist character, so long as directional intent, in which equates to acting in order to commit a crime, is present. Article 259a of the Criminal Code makes it illegal to enter the territory of the Republic of Poland in order to commit a crime of a terrorist character on the territory

²² ICT stands for information and technology.

of another state or to commit any other crime listed in this provision. Punishment may be extraordinarily mitigated or its execution conditionally suspended in relation to a person in breach of art. 259 if she has voluntarily refrained from committing the offence (which was the reason why she entered Poland) or has refrained from aiding and abetting other persons in committing the offence in art. 259a, so long as she discloses all the material circumstances surrounding the crime, information about the persons involved, or if she prevents the offence from being carried out.

The Law on anti-terrorist activities contains a host of regulations regarding preliminary investigative activities, which may be said to be of a hybrid – administrative and criminal – character. Operational control, for the most part, was the subject of the Law on the amendment of the Law on the Police of January 15, 2016 (Journal of Laws of the Republic of Poland from 2016, item 147). The Chief of the Internal Security Agency may order the undertaking of preliminary investigative activities against a non-citizen of the Republic of Poland who is suspected of being involved in terrorist activity. Operational control ordered on the basis of art. 9 of the Law on anti-terrorist activities lasts, in principle, for three months, however it may be extended. The legislator does not authorize the courts to scrutinize and assess preliminary investigative activities conducted under this mandate. In any event, they may be halted following an order issued by the Attorney General.

The 2016 Law empowers officers of the Internal Security Agency, the Police and the Border Guard to extract fingerprint data, store facial images and collect biological material in a non-invasive manner to identify the DNA profile of a non-citizen of the Republic of Poland. Officers may resort to such tactics if: 1) there are doubts as to the identity of the person in question; 2) there is a suspicion that the person entered the territory of Poland illegally or that she withheld the true reason for her arrival from the authorities; 3) the person is suspected of intending to illegally remain on the territory of Poland; 4) the person is suspected of having links to an event of a terrorist character; 5) the person could have taken part in terrorist training.

One of the more controversial provisions of the Law on anti-terrorist activities concerns the possibility of the so-called special use of a firearm. Under art. 23 of the Law, if it is essential to combat a direct, illegal, violent attack on the life or health of a person or to free a hostage, and the use of a firearm in a manner which causes the least harm possible is insufficient and counteraction against such an attack or freeing a hostage is impossible, it is permissible, taking into account all the circumstances of the event of a terrorist character and available counter-terrorist operations, to use a firearm against the attacker or a person who has taken or detained hostages, as a result causing the death or a direct threat to the life or health of such a person. A decision to that effect may be made by a person in charge of counterterrorist activities at any given time.

The legislator has also introduced, along with the ones discussed above, other solutions directed towards the prevention of terrorism, such as an obligation to register pre-paid SIM cards, a power to block websites and the expulsion of a foreigner from the Republic of Poland.

3. CONSTITUTIONAL AND INTERNATIONAL LEGAL DOUBTS

The entry into force of the Law on anti-terrorist activities of June 10, 2016 was preceded by an extensive public debate on the dangers the Law may create for human rights and fundamental freedoms²³.

The Polish Ombudsman²⁴ (also referred to as the Commissioner for Human Rights in English publications) lodged a complaint with the Polish Constitutional Court²⁵, challenging a number of provisions of the Law on anti-terrorist activities as unconstitutional. In its complaint dated July 11, 2016 the Ombudsman accepted that it was a positive development that anti-terrorism legislation had finally been passed because combatting terrorism and the proper detection of terrorist threats constitute an important task before the state, as it is its duty to protect the security of the people in its jurisdiction²⁶. However, the Ombudsman was insistent that

²³ It is pertinent here to at least mention that public consultations with non-governmental organizations and activists regarding the draft of the anti-terrorist law took place on May 6, 2016 in the Office of the Polish Ombudsman. Also, a public hearing was hosted by the University of Warsaw on June 6, 2016, organized by the University, the Panoptikon Foundation, the Helsinki Foundation for Human Rights, the ePaństwo Foundation and Amnesty International. The event was sponsored by the Stefan Batory Foundation and the Unit for Social Innovation and Research “Shipyard”.

²⁴ It is worth emphasizing that before submitting a complaint in this regard to the Constitutional Court, the Ombudsman wrote to the President of Poland on June 21, 2016 and requested that he file a complaint with the Court questioning the constitutionality of the Law on anti-terrorist activities before signing it into law. On July 11, the Ombudsman received an answer in which the President argued that due to an unquestionable, imminent danger of terrorism he refused to subject the Law to constitutional scrutiny. The Law, the President’s Chancellery maintained, enhances Poland’s security by increasing the effectiveness of public authorities – it was indispensable in the circumstances and therefore the President signed it into law on June 10, 2016. The correspondence is available at <https://www.rpo.gov.pl/sites/default/files/List%20min.%20Anny%20Sur%C3%B3wkaPasek%20w%20sprawie%20ustawy%20antyterrorystycznej%2C%207%20lipca%202016.pdf> (visited September 1, 2016).

²⁵ The complaint (VII.520.6.2016.VV/AG) is available at <https://www.rpo.gov.pl/pl/content/rzecznicz-praw-obywatelskich-skar%C5%BCy-ustaw%C4%99-antyterrorystyczny%C4%85-do-trybuna%C5%82u-konstytucyjnego> (visited September 1, 2016); henceforth referred to as “Ombudsman’s complaint”.

²⁶ The Ombudsman stressed that the projected aim of the new regulation, i.e. “increasing the effectiveness of the Polish anti-terrorism system, and therefore enhancing the security of all Polish citizens by: bolstering the mechanisms of coordination; providing a more precise descrip-

any legal instruments implemented to this end must be proportionate and as such may interfere with human rights only to the extent that is necessary and essential. Numerous provisions of the Law on anti-terrorist activities, in the estimation of the Ombudsman, give rise to serious doubts as to their compatibility with the Polish Constitution, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union²⁷. It is a positive obligation of the state to not only ensure public security, but to do so in a way that adequately protects the essence of fundamental rights²⁸.

First, the Ombudsman took issue with the term “event of a terrorist character”²⁹, which the legislator uses frequently throughout the text of the Law and which determines the meaning of numerous of its provisions³⁰. The term, the Ombudsman submitted, albeit key for the entirety of the Law, is ambiguous and imprecise, something which, in breach of constitutional standards, creates room for very broad interpretations, especially where a “threat of occurrence” of an event of a terrorist character is concerned. The legislator neglected to specify who, in what circumstances and by means of what procedure, is to assess whether there is a suspicion or a threat of an event of a terrorist character occurring, which gives rise to uncertainty that these mechanisms could be used frivolously and not exclusively in cases where there is real urgency to counteract terrorism. The broad interpretation of “an event of a terrorist character” may result in the expansion of the scope of the Law on anti-terrorist activities and therefore in an increase, unanticipated by persons and citizens, in the degree of interference with fundamental rights and freedoms. This, in turn, means that art. 2 point 7 of the Law falls short of fulfilling the requirements of trust towards the state and the principles of proper legislation derived from art. 2 of the Constitution³¹. The Ombuds-

tion of the duties of particular agencies and offices as well as rules of cooperation between them; ensuring that effective actions may be undertaken in cases where there is a suspicion of a crime of a terrorist character, including at the preliminary proceedings stage; providing mechanisms which are adequate to existing threats and adjusting criminal laws to new threats of a terrorist character”, is unquestionably correct and commonly approved, both in public opinion as well as among scholars; *cf.* Ombudsman’s complaint, pp. 4 and 8.

²⁷ Ombudsman’s complaint, p. 100.

²⁸ Ombudsman’s complaint, p. 5.

²⁹ The Ombudsman argued that art. 2 point 7 of the Law on anti-terrorist activities was incompatible with art. 2 of the Constitution.

³⁰ As the Ombudsman noted, the term “event of a terrorist character” features directly in the Law on anti-terrorist activities in: art. 2 point 6; art. 3; the title of chapter 2; art. 4.3; art. 5.1; art. 6.2; art. 7; art. 8.1; art. 10.1 point 4; art. 13; art. 15–17; the title of chapter 4; art. 18; art. 19; art. 20; art. 23; in the acts being amended, particularly in the Law on the Internal Security Agency, to the extent to which the competences of the Agency with regard to assessing the security of ICT systems were expanded (art. 32a), demanding information concerning the creation, functioning or rules of exploitation of ICT systems (art. 32b), implementing a ban on access (art. 32c) – *cf.* Ombudsman’s complaint, pp. 17–18.

³¹ Ombudsman’s complaint, pp. 16–23.

man expressed similar reservations about allowing the Chief of the Internal Security Agency to maintain a register of persons who may be involved in an “event of a terrorist character”³². The complaint noted that the register would store personal data, and it would be maintained for the very general purpose of preventing events of a terrorist character (art. 6.1 of the Law on anti-terrorist activities). Article 6.2 of the Law authorizes the Chief of the Internal Security Agency to share the data gathered on the register with a vast number of authorities (special agencies enumerated in art. 5.1 of the Law). The Ombudsman asserted that collection of data concerning both citizens and non-citizens of Poland, assuming that the requirements concerning the protection of secret information are obeyed, constitutes interference with the right to privacy and the right to protect one’s personal data. On the contrary, art. 6 of the Law on anti-terrorist activities does not envision any procedure that could verify the justifiability of including any one person on the register – as a result, people may find their way onto the register mistakenly and not have recourse to any legal instruments to challenge this. Also, art. 6 of the Law does not oblige the Chief of the Internal Security Agency to verify the utility of the processed information (such a mechanism was devised in 22a.8 of the Law on the Central Corruption Bureau of June 9, 2006³³), which, the Ombudsman contended, may lead to gathering and processing information considered useless from the perspective of a terrorist threat. Doubts as to the compatibility of this provision with the Constitution and the abovementioned international laws are strengthened by the fact that no public authority was designated to control the actions of the Chief of the Internal Security Agency. The Law also neglects to regulate the rights of people who are included on the register. Not only do they not have any right to be informed of their inclusion, but they also cannot demand the rectification of mistakes or the deletion of false, incomplete or illegally collected information, nor is there any other avenue of control³⁴. In addition, pursuant to art. 6.3 of the Law on anti-terrorist activities, the Chief of the Internal Security Agency was authorized to enact an order to specify the scope of information to be collected on the aforementioned register, the mode in which it is to be maintained, as well as the procedure for sharing information gathered on the register with special agencies. The Ombudsman deemed this provision to be incompatible with art. 51.5 of the Constitution, according to which the principles

³² The Ombudsman argued that art. 6 of the Law on anti-terrorist activities was incompatible with art. 2, art. 47, art. 51.2, 51.3 and 51.4 of the Constitution in connection with art. 31.3 thereof, as well as with art. 8 of the European Convention on Human Rights (hereinafter referred to as “ECHR”) and with art. 7 and 8 in connection with art. 52.1 of the Charter of Fundamental Rights of the EU.

³³ In line with art. 22a.8 of the Law on the Central Anti-Corruption Bureau of June 9, 2006, the Bureau is entitled to process personal data over such a period of time as is necessary to ensure the proper realization of its duties. The Bureau verifies, at least once every five years, the need to continue to process information in its possession, and destroys redundant material.

³⁴ Ombudsman’s complaint, pp. 23–39.

and procedures for collection of and access to information shall be specified by statute, as well as art. 93.2, which stipulates that orders shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects³⁵. Reservations were also addressed about art. 9.1 of the Law on anti-terrorist activities³⁶, which allows preliminary investigative activities to be undertaken against non-citizens of the Republic of Poland. This is an exception to regulations concerning preliminary investigative activities that pertain to Polish citizens, as laid down in the Law on the Police of April 6, 1990³⁷. The Chief of the Internal Security Agency's decision to preliminarily investigate a non-citizen does not require, in the light of art. 9 of the Law on anti-terrorist activities, the approval of any other public authority. The Ombudsman, by reference to relevant a case of law of the Polish Constitutional Court and the European Court of Human Rights, demonstrated that such mechanisms give rise to constitutional doubts as they do not provide for any – either antecedent or subsequent – control of a court or any other independent authority. Furthermore, art. 9.1 of the Law uses the very ambiguous term of “concern as to the possibility” of a person being involved in terrorist activity. This means that non-citizens may be subjected to preliminary investigation way before any legal good is violated. The Ombudsman maintained that such an abstract wording of the provision, one that gives ample opportunities to interfere with rights and freedoms of individuals, means it fails the constitutional tests of determinacy and clarity of the law, or, speaking more broadly, the test of citizens' trust towards the state. In addition, art. 9.1 of the Law appears to unwarrantedly discriminate in terms of the legal situation of non-citizens and citizens of Poland. The Constitutional Court in its case law has repeatedly said that discrimination between citizens and non-citizens is permissible, however non-citizens cannot be left without any protection by the state. Discrimination between citizens and non-citizens in this regard cannot be understood as an ability to strip a certain group of people of state protection, i.e., taking away from them secrecy of correspondence or the right to privacy in general³⁸. Article 10.1 of the Law is also doubtful to the extent that it refers to the criteria governing the authority to extract biometrical data³⁹ (fingerprints, facial images or non-invasive gleaning

³⁵ Ombudsman's complaint, pp. 39–40.

³⁶ The Ombudsman argued that art. 9.1 of the Law on anti-terrorist activities was incompatible, to the extent to which it envisions the possibility of employing secret preliminary investigative tactics which constitute excessive interference with the rights and freedoms of persons and also where it distinguishes between the legal situation of Polish citizens and foreigners, as well as where it fails to establish a mechanism to control the implementation of tactics and operations prescribed therein – with art. 2, art. 47 and art. 51 of the Constitution in connection with art. 37 and art. 31.3 of the Constitution, as well as with art. 8 of the ECHR.

³⁷ Journal of Laws of the Republic of Poland from 2015, item 355, as amended.

³⁸ Ombudsman's complaint, pp. 40–46.

³⁹ The Ombudsman argued that art. 10 of the Law on anti-terrorist activities was incompatible with art. 2, art. 47 and art. 51 of the Constitution in connection with art. 37 and art. 31.3 thereof,

of biological material to identify the DNA profile of a non-citizen of Poland) where: there are doubts as to the identity of the person in question; there is a suspicion that the person has entered the territory of Poland illegally or that she has withheld the true reason for her arrival from the authorities; the person is suspected of intending to illegally remain on the territory of Poland; the person is suspected of having links to an event of a terrorist character; or the person could have taken part in terrorist training. The Ombudsman stated that this is not a complete novelty in the Polish legal system as similar provisions feature in the Law on the Border Guard or the Law on the Internal Security Agency. However, the latter measures do not create a power to extract biological material in order to specify a person's DNA. This prerogative was added to art. 10.1 of the Law on anti-terrorist activities during debates in the Sejm, and no procedural guarantees were provided for people whose data is collected and who, as a result, will not have recourse to any legal means. Furthermore, as the Ombudsman asserted, even though the provisions are intended to pertain to "a non-citizen of the Republic of Poland", citizens could also theoretically be subjected to this procedure so long as "there are doubts as to the identity of the person in question". Crucially for the Ombudsman, not only does the provision not refer to legal terms already recognized in the Criminal Code (something that would trigger procedural guarantees), but it also appeals to very general and vague terms such as the "existence of suspicion" and "existence of doubts", which makes it justified to declare the incompatibility of art. 10.1 with art. 2 of the Constitution. Moreover, since the measure may have the effect of allowing the collection of biometrical data not only where it is necessary for the discovery or prevention of terrorist activity, but also where it is the most convenient method of investigation for the authorities. Also, the Ombudsman disagrees with the fact that the procedure for collecting data and passing it onto the General Commandant of the Police is to be regulated in secondary legislation to be enacted by the Prime Minister (art. 10.6 of the Law on anti-terrorist activities), and not in an Act of Parliament. Another point of contention involves the fact that art. 10 does not specify any rules for destroying data where it is no longer necessary in the performance of the tasks of a relevant agency, nor does it grant the right to demand the rectification of mistakes or the deletion of false, incomplete or illegally collected information⁴⁰. Article 11 was also challenged⁴¹. It authorizes the Chief of the Internal Security Agency to freely access databases and other information gathered on public registers and records run by a plethora

as well as with art. 8 in connection with art. 14 of the ECHR and art. 7 and 8 in connection with art. 20 and art. 52.1 of the Charter of Fundamental Rights of the EU.

⁴⁰ Ombudsman's complaint, pp. 46–59.

⁴¹ The Ombudsman argued that art. 11 of the Law on anti-terrorist activities was incompatible with art. 2, art. 47 and art. 51.2 of the Constitution in connection with art. 31.3 thereof, as well as with art. 8 of the ECHR, and with art. 7 and 8 in connection with art. 52.1 of the Charter of Fundamental Rights of the EU.

of public authorities, including almost all the central state authorities and most public bodies overseen by them. In addition, the Chief may be granted access to audiovisual recordings of events made by equipment operated in objects of public utility, near public roads and other public places. In addition, as the Ombudsman noted, it is impossible to deduce on the basis of the Law on anti-terrorist activities how this “obtaining access” by the Chief of the Internally Security Agency is to function in practice. It must be remembered that there are no measures regulating the course of action the Chief should follow when in possession of the abovementioned information. The Ombudsman contended that such broad and practically boundless access on the part of the Chief of the Internal Security Agency to data (including sensitive data), coupled with the imprecisely expressed purpose of the Law (i.e. “preventing events of a terrorist character”), violates the principle of proportionality. Such unfettered and far-reaching interference with the right to privacy does not give rise to any rights on the part of the people whose data is to be accessed⁴². The Ombudsman also alleged the unconstitutionality of art. 26.2 of the Law⁴³, which makes it lawful to hold a suspect on remand merely on the basis of the substantiated likelihood that an event of terrorist character has been committed, attempted or prepared. The challenged regulation makes proof of the likelihood of the commission, attempt or preparation of an event of terrorist character a condition of remand being granted. Importantly, it alters the basis and procedure for instituting remand from that known in the Code of Criminal Procedure. It is the Ombudsman’s opinion that the measure, by using exceptionally vague terms, may give rise to far-reaching, unwarranted interference with rights and freedoms, particularly the bodily inviolability of an individual. “Substantiation of the likelihood” of the commission, attempt or preparation of an event of terrorist character cannot legitimize such intrusive interference with the rights and freedoms of an individual⁴⁴. The next objection concerns provisions of the Law on anti-terrorist activities which authorize blocking Internet sites. Article 38 point 6⁴⁵ amends the Law on the Internal Security Agency by inserting in it art. 32c, which permits blocking certain terrorism-related “computer data” in an “ICT system”, or “ICT services” used to bring about an event of a terrorist character. In the Ombudsman’s opinion, the provision is liable to be indiscriminately and arbitrarily applied by public authorities⁴⁶ because of the generality of its elements, the

⁴² Ombudsman’s complaint, pp. 59–69.

⁴³ The Ombudsman argued that art. 26.2 of the Law on anti-terrorist activities was incompatible with art. 2 and art. 41.1 of the Constitution and with art. 5 of the ECHR.

⁴⁴ Ombudsman’s complaint, pp. 70–73.

⁴⁵ The Ombudsman argued that art. 38 point 6 of the Law on anti-terrorist activities was incompatible, to the extent to which it added art. 32c to the Law on the Internal Security Agency and Foreign Intelligence of May 24, 2002, with art. 2 and art. 54.1 of the Constitution in connection with art. 31.3 thereof, as well as with art. 6 and 10 of the ECHR.

⁴⁶ Ombudsman’s complaint, pp. 74–83.

imprecise scope thereof⁴⁷, as well as the procedure itself, which does not ensure sufficient guarantees for citizens who are subjected to it. Last but not least, the Ombudsman challenged art. 48⁴⁸ and art. 57⁴⁹ of the Law on anti-terrorist activities. The former measure added art. 73c to the Law on the entry into, residence in and exit from the Republic of Poland of nationals of European Union Member States and members of their family, which provides for the expulsion from the Republic of Poland of an EU citizen or a non-EU family member who is suspected of being involved in terrorist or spying activity. Article 57 added art. 329a to the Law on foreigners, pursuant to which a foreigner may be obliged to leave the territory of Poland if there are concerns that she may be involved in terrorist or spying activity, or is suspected of such activity. The Ombudsman maintained that these provisions contain ambiguous terms, whilst not offering any procedural guarantees⁵⁰ pertaining to the expulsion and deportation of foreigners⁵¹.

The Constitutional Court will examine the correctness of the above reservations in case K 35/16, yet it should be said that the Court is not expected to depart from the conclusions voiced in its judgment in case K 23/11 dated July 30, 2014⁵². The judgment was handed down following the submission of joint complaints by the Ombudsman and the Attorney General which concerned provisions regulating preliminary investigative authorities and, broadly put, the surveillance of citizens⁵³.

⁴⁷ As noted by the Ombudsman, the provision avails itself of terms which either do not have a legal definition and will therefore give rise to problems surrounding their interpretation (e.g. “computer data”), or makes a reference to the term “events of a terrorist character”, which is also imprecise.

⁴⁸ The Ombudsman argued that art. 48 of the Law on anti-terrorist activities was incompatible, to the extent to which it added art. 73c to the the Law on the entry into, residence in and exit from the Republic of Poland of nationals of European Union Member States and members of their family of July 14, 2006, with art. 2, art. 52.1, 52.3 and art. 45.1 of the Constitution in connection with art. 77.2, art. 37 and art. 31.3 of the Constitution as well as with art. 13 of the ECHR in connection with art. 2 of the Fourth Protocol to the ECHR, as well as with art. 45 and art. 47 in connection with art. 52.1 of the Charter of Fundamental Rights of the EU.

⁴⁹ The Ombudsman argued that art. 57 of the Law on anti-terrorist activities was incompatible, to the extent to which it added art. 329a to the Law on foreigners of December 12, 2013, with art. 2, art. 52.1, 52.3 and art. 45.1 of the Constitution in connection with art. 77.2 as well as with art. 37 and art. 31.3 of the Constitution, and with art. 13 of the ECHR in connection with art. 2 of the Fourth Protocol to the ECHR.

⁵⁰ The Ombudsman opined that both provisions give rise to fundamental doubts with regard to the right to a fair trial or the right to privacy, enshrined in the Polish Constitution, the ECHR and – in relation to EU citizens and their families – in the Charter of Fundamental Rights of the EU.

⁵¹ Ombudsman’s complaint, pp. 83–99.

⁵² The judgment was published on August 6, 2014 in the Journal of Laws of the Republic of Poland, item 1055.

⁵³ These complaints focused on such questions as: a non-exhaustive catalogue of means that can be used by agencies and services whilst conducting operational control activities and what information they are entitled to extract; the disproportionality of the application of those means;

The Constitutional Court in its judgment in K 23/11⁵⁴ expressed views on the conflict between two goods, i.e., ensuring public order and internal and external security, and the protection of constitutional rights and freedoms, particularly privacy, informational autonomy and secrecy of correspondence. The Court, in addressing the relationship between the duty to respect human freedom and the necessity to protect public order, stated that the status of a person in a democratic state ruled by law is based upon respect for her inherent and inalienable dignity (art. 30 of the Polish Constitution), as well as her autonomy to make decisions about her actions according to her will (art. 31.1 and 31.2)⁵⁵. The constitutional legislator assumed that it was of utmost importance to ensure the most comprehensive protection of human freedom possible, as it is a natural attribute of the legal status of a person. Constitutional protection of human freedom pertains chiefly to one's privacy. Privacy is shaped in the Constitution not as a right bestowed upon persons, but as a constitutionally protected freedom with all the consequences that stem therefrom⁵⁶. Protection of privacy (art. 47 of the Constitution) and so-called informational autonomy (art. 51.2⁵⁷) represent a consequence of protecting the inherent and inalienable dignity of the person⁵⁸. In a democratic state ruled by law the organization of social and public life must account for the anonymity of individuals⁵⁹. However, as the Constitutional Court rightly noted, it is the Polish state's duty to guard the independence and inviolability of its territory, as well as to ensure the security of its citizens (art. 5 of the Constitution). Poland is also obliged, based on international treaties binding upon it, to cooperate in the fight against international crime and terrorism. The state cannot duly

the breadth of the catalogue of data to which the agencies should be granted access, including that covered by the rules of solicitor, notary, medical or journalistic secrecy; the collection of telecommunication data without judicial approval; the lack of precision in regulations governing the limits within which the Internal Security Agency may conduct operational control activities; the excessively wide catalogue of situations where special agencies may engage in operational control. All the complaints and opinions on the matter are available at <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2023/11> (visited September 10, 2016).

⁵⁴ To which the Ombudsman refers in its constitutional complaint regarding the Law on anti-terrorist activities, discussed at length here.

⁵⁵ Judgment of the Polish Constitutional Court in case K 23/11, thesis 1.1.

⁵⁶ Judgment of the Polish Constitutional Court in case K 23/11, thesis 1.2.

⁵⁷ Importantly, the Constitutional Court has insisted that constitutional protection guaranteed by art. 47, art. 49 and art. 51.1 of the Constitution pertains to all modes of transferring information, every manner of communication, regardless of its physical carrier (e.g. personal and telephone conversations, written correspondence, fax, instant messages, e-mail). Constitutional protection encompasses not only the content of a message, but also all the circumstances around the process of communication, which includes personal data of the participants in the process, phone numbers, websites browsed, data concerning time and frequency of calls as well as information about the geographical location of interlocutors, IP addresses or IMEI numbers – judgment of the Polish Constitutional Court in case K 23/11, thesis 1.4.

⁵⁸ Judgment of the Polish Constitutional Court in case K 23/11, thesis 1.3.

⁵⁹ Judgment of the Polish Constitutional Court in case K 23/11, thesis 1.4.

perform its duties if it does not equip specialized public authorities, such as the police and investigative agencies, with adequate prerogatives, thanks to which they are capable of preventing and detecting crimes, investigating their perpetrators, as well as gathering information concerning threats to legally protected goods⁶⁰, especially in the face of the increasing significance of new technologies and the rising risk them being used to commit crimes and breach the law⁶¹. Therefore, the public authorities' obligation to guarantee rights and freedoms means, in the Court's estimation, that it is not only excessive interference, including the secret collection of information about individuals, that is prohibited. The obligation denotes a duty on the part of the state to create conditions in which citizens may make free use of their guaranteed rights and freedoms. The feeling of security and lack of threat is a condition for ensuring rights and freedoms. The achievement of this ideal is possible by, *inter alia*, combatting crime that may pose a danger to human freedom, the usage of property or embarking on business activity. At the same time, the Constitutional Court asserted that citizens' right to have their security and safety protected from internal and external dangers, including from terrorism and crime, integrally correlates with the constitutional duty of the state enshrined in art. 5 of the Constitution. The Court rejected the notion of there being an insurmountable "natural antinomy" between ensuring security and public order and the protection of constitutional rights and freedoms. This is because sometimes the use of secret preliminary investigative activities results in the curbing of crime, and that translates into an increase in the feeling of security among citizens and consequently more freedom in making use of their freedoms and rights⁶².

In weighing these two unquestioned values, i.e., ensuring public order and security and the protection of constitutional rights and freedoms, the Constitutional Court, by reference to its own case law as well as that of the European Court of Human Rights and the Court of Justice of the European Union, concluded that regulations concerning secret extraction of data about individuals must conform to the following requirements: collection, storage and processing of data concerning individuals, particularly their privacy, is permissible solely based on the precise and explicit provision of a statute; the statute must precisely specify the public authorities which are authorized to collect and process information about an individual, including the conduct of preliminary investigative activities; the only lawful reason for secret collection of information about persons is the investigation and prevention of serious crimes, and this reason must be stated clearly in the statute; the statute should name the types of such crimes; the statute must state the types of subjects against whom preliminary investigative activities may not be undertaken; it is desirable to describe the means of the

⁶⁰ Judgment of the Polish Constitutional Court in case K 23/11, thesis 1.7.

⁶¹ Cf. judgment of the Polish Constitutional Court in case K 23/11, thesis 1.6.

⁶² Judgment of the Polish Constitutional Court in case K 23/11, thesis 1.8.

secret collection of information, as well as types of information collected by each of those means; preliminary investigative activities shall be a subsidiary method of collecting information or evidence concerning individuals, only if these are irrecoverable in another, less intrusive manner; the statute shall clearly state the maximum time when preliminary investigative activities will be conducted against individuals, and that time shall not exceed what is necessary in a democratic state ruled by law; it is necessary to detail the procedure for authorising preliminary investigative activities, including the requirement of obtaining clearance from an independent authority; the statute must precisely determine the rules for dealing with the material collected in the course of preliminary investigative activities, especially those concerning its usage and the destruction of impermissible and redundant data; the statute must provide for the security of the data from unauthorized access by third parties; a procedure of informing individuals about the secret collection of information about them must be regulated – such people shall be informed within a reasonable time following the conclusion of preliminary investigative activities and be granted the right to challenge the collection in court (derogations are allowed in exceptional cases); the transparency of the preliminary investigative activities must be guaranteed by public authorities, which means that public openness and access of aggregated statistical data pertaining to the number and type of preliminary investigative activities undertaken must be provided; different levels of protection of privacy, informational autonomy and secrecy of correspondence are permitted, depending on whether data is collected by investigative authorities tasked with protecting the security of the state or by the police force; differentiation in the levels of protection of privacy, informational autonomy and secrecy of correspondence may also occur, depending on whether the secret collection of information pertains to citizens or non-citizens of Poland⁶³.

4. CONCLUSIONS

The above considerations concerning the relationship between the state and the most important goods, particularly human dignity, security, public order, life and health, as well as numerous doubts expressed by the Polish Ombudsman against the Law on anti-terrorist activities, where constitutional and international contexts were highlighted, make it possible to attempt to identify the criteria to be used in the process of enacting anti-terrorist laws, their application, as well as the assessment of their compatibility with the Polish Constitution. As noted above, the Ombudsman's complaint will be adjudicated upon by the Constitu-

⁶³ Judgment of the Polish Constitutional Court in the K 23/11, thesis 5.3.

tional Court. This does not, however, free academic writers from their duty to conduct independent analyses and formulate their own conclusions. This is the case not only because the Court is not infallible, but also in order to propose to the Court's Justices plausible directions of reasoning. Whenever the constitutionality of a measure that interferes with the rights and freedoms of persons and citizens is considered, one should have as the starting point the criteria pointed to by the principle of proportionality under art. 31.3 of the Constitution. Attention should be paid to the utility of the adopted laws, as well as to proportionality in its strict sense. The latter criterion necessitates a preference test to resolve a conflict between protected goods and the goods that a given law interferes with. It is impossible to conduct in one academic paper a comprehensive review of all the constructs included in the Law on anti-terrorist activities, however, we shall venture to highlight the largest problems and suggest certain directional criteria with a view to facilitating a more detailed analysis of the provisions.

The dynamics of our reality, unabated inter-cultural and civilizational tensions, but first and foremost, a sequence of terrorist attacks, are circumstances one has to keep in mind when trying to realize why states strive towards acquiring the authority that enables them to protect their citizens, and also to properly react to acts of terror or threats thereof. It is therefore difficult to rationally question any laws that intentionally steer a country towards engaging in anti-terrorist activities. A deepened analysis of the necessity and utility of particular solutions necessitates research on the dependencies between an increase in state security and the security of its citizens and equipping the state with the above prerogatives. Such an analysis should also take into account the experiences of foreign states. As a matter of fact, establishing how effective preventive mechanisms provided for by anti-terrorist laws are without access to secret information is problematic. Looking at the issue from another angle, it may be said that no stark abuses in the application of the Law of June 10, 2016 have been noted – abuses that could warrant the thesis that combating terrorism is only a façade for the state's attempts to curb the rights and freedoms of persons and citizens.

In the process of enacting and applying anti-terrorist laws one must pay heed to the mutual relations between goods protected and violated by a given regulation. As noted above, there is no freedom without security, but there is also no security without freedom. This tension makes a proportionality test very troublesome. The legislator should, above all, harmonize the axiological contexts of the provisions constructed thereby, so that they are orientated towards the protection of both security and freedom. It is often the case that proper safety valves, such as the prior consent of a court or a general judicial review of state actions liable to breach human freedom, and not renunciation of anti-terrorist regulations, constitute a sufficient means of protecting freedom. Solutions like this would create a secondary proportionality test, conducted at the stage of the application of the law, which, in turn, would be conducive to the exercise of proper proconstitu-

tional construction. A conclusion on an abstract level may be different from that reached in the context of a specific set of facts. The chief good to be taken into account in the processes of applying and enacting the law should be human dignity, which testifies to people's subjectivity, and therefore to their responsibility for their actions. Dignity should not be understood here as some manifestation of pacifism in criminal law, but rather as a voice in favour of the subjective treatment of persons, in a way that is adequate to their actions. Dignity is not dependent upon one's nationality, hence any conclusions and postulates drawn therefrom may not discriminate between citizens and non-citizens of a given entity. Other conclusions, i.e., those that dignity does not directly give rise to, may be contingent upon one being a citizen or not.

A notably high and meticulous level of control must be afforded in the case of preliminary investigative activities carried out by the state, especially surveillance. It appears that operational control may be the most abused instrument by the state. Therefore, the introduction in this realm of effective judicial review is all the more justified. Detailed criteria of the review of provisions pertaining to operational control were formulated in the Constitutional Court's judgment of July 30, 2014⁶⁴. Combating and preventing terrorist attacks is not achievable without a competent educational and informational policy for society. This aspect featured in the National Anti-Terrorist Program for the period 2015–2019⁶⁵, and it is also frequently commented upon in the doctrine⁶⁶. This did not escape the attention of the Ombudsman in its statement to the Minister of the Interior and Administration dated August 9, 2016⁶⁷.

To finish our deliberations in this paper⁶⁸, it must be emphasized that the legal context, within which the Law on anti-terrorist activities functions, it would not be without significance to review of the proportionality between the state's duty to ensure security and public order and its simultaneous obligation to make provisions for human rights and freedoms. This background highlights the totality of legal situations that persons targeted by domestic public authorities may find

⁶⁴ K 23/11.

⁶⁵ Cf. resolution No. 252 of the Council of Ministers dated December 9, 2014 regarding the "National Anti-Terrorism Plan for years 2015–2019" (Monitor Polski from 2014, item 1218), pp. 4, 33.

⁶⁶ Cf. K. Jałoszyński, A. Letkiewicz (eds.), *Edukacja antyterrorystyczna. Konieczność i obowiązki naszych czasów*, Szczytno 2010.

⁶⁷ The Ombudsman maintained that the textbook "Terrorism – what to do in the case of a danger", available on the Ministry of the Interior and Administration's website, only partially realizes the Minister's task within the educational and informational realm, and further steps need to be taken to impart information to the greatest number of people possible – cf. at <https://www.rpo.gov.pl/pl/content/wystapienie-do-ministra-spraw-wewnetrznych-i-administracji-w-sprawie-wzmocnienia-antyterrorystycznej> (visited September 17, 2016).

⁶⁸ Due to the limits of this article, it would be impossible to give a comprehensive account of all aspects surrounding this issue.

themselves in. The Law on the amendment of the Law on the Police of January 15, 2016⁶⁹ is pertinent to this discussion as its provisions formed the basis for the employment of operational control and surveillance methods on a wide scale. Moreover, art. 168a of the Code of Criminal Procedure⁷⁰ transposed into Polish law the so-called doctrine of “fruit of the poisonous tree”. In line with that regulation, one is allowed to use in the course of a criminal trial, with one exception⁷¹, evidence obtained illegally, contrary to the law, as a result of committing a crime. The measures must give rise to a myriad of doubts if one realizes that, in practice, any evidence obtained in breach of the law could be used in court, including that extracted in violation of evidential prohibitions (e.g., the prohibition on questioning a defence counsel, a priest, a close relative who has chosen not to testify, the prohibition on influencing an answer through threats or duress, the prohibition on using hypnosis, chemical substances) or as a result of preliminary investigative activities conducted in breach of the law. Further, art. 168b and 237a, added to the Code of Criminal Procedure pursuant to the Law of March 11, 2016, creates new rules for giving subsequent consent to using in a criminal trial materials collected thanks to operational control pertaining to another crime or a person other than the one specified in a court order. Under those laws, subsequent consent may be granted not only with regard to the crime, in pursuit of which operational control could be lawfully ordered, but to any indictable offence or any fiscal offence. In addition, subsequent consent is not given by the court, but by a prosecutor, and there is time limit within which consent may be validly expressed.

Taking the above into consideration, all guarantees in the face of art. 168b and 237a of the Code of Criminal Procedure appear insignificant, as these provisions have the power to make illegal actions by the state lawful. Article 168a of the Code of Criminal Procedure has been challenged before the Constitutional Court both by the National Council⁷² of the Judiciary and by the Ombudsman⁷³;

⁶⁹ Journal of Laws of the Republic of Poland from 2016, item 147.

⁷⁰ As of now, art. 168a of the Code of Criminal Procedure reads: “Evidence may not be deemed inadmissible merely because it was acquired through a violation of procedural laws or by means of a criminal act, pursuant to art. 1 § 1 of the Criminal Code, unless the evidence was acquired in connection with the performance of professional duties by a public official, by means of: murder, the intentional infliction of grievous bodily harm or imprisonment”.

⁷¹ The exception introduced, i.e., where “the evidence was acquired in connection with the performance of professional duties by a public official, by means of: murder, intentional infliction of grievous bodily harm or imprisonment” refers to relatively rare situations and will not be overly significant for practitioners.

⁷² Complaint dated May 12, 2016, available at <http://ipo.trybunal.gov.pl/ipo/Sprawa?&poka-z=dokumenty&sygnatura=K%2027/16> (visited September 17, 2016). The National Council of the Judiciary argued that art. 168a of the Code of Criminal Procedure was incompatible with art. 2, art. 7, art. 31.3, art. 32.1, art. 45.1, art. 51.2, art. 174 and 178.1 and 178.2 of the Constitution in connection with art. 3 and art. 6.1 of the ECHR.

⁷³ Complaint dated May 6, 2016 (II.510.360.2016); available at <https://www.rpo.gov.pl/sites/default/files/Wniosek%20do%20TK%20owoce%20zatrutego%20drzewa%20art%20art.%20>

the complaints will be jointly adjudicated upon by the court under case K 27/16. The Ombudsman also challenged art. 168b and 237a⁷⁴, and the Court will give its judgment on this under case K 24/16. The decisions of the Court will surely determine the shape and scope of the protection of citizens' rights and freedoms against the actions of the state⁷⁵.

168a%20%20KPK%206.05.2016.pdf (visited September 17, 2016). The Ombudsman argued that art. 168a of the Code of Criminal Procedure was incompatible with art. 42.2, art. 45.1, art. 47, art. 51 .2, 51.3 and 51.4 of the Constitution in connection with art. 31.3 thereof, as well as with art. 2, art. 7 and art. 40 of the Constitution in connection with art. 3 and 6 of the ECHR.

⁷⁴ Complaint dated April 29, 2016 r. (11.520.1.2016), available at <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2024/16> (visited September 17, 2016). The Ombudsman argued that art. 168b and art. 237a of the Code of Criminal Procedure was incompatible with art. 47, art. 49, art. 50, art. 51.2 of the Constitution in connection with art. 31.3 thereof, as well as with art. 45.1, art. 51.4 and art. 77.2 of the Constitution.

⁷⁵ The Polish Constitutional Court is yet to consider joint complaints filed by the Polish Ombudsman and the Polish Attorney General concerning the unconstitutionality of provisions governing the use of operational control by the police and other specialized agencies (broadly put, the challenged provisions are those of the Law on the Police and other agencies to the extent to which they, *inter alia*, limit the materials handed over to judges only to those which supported the use of operational control, which means that a court's order is promulgated based upon material purposely selected by the body which requests the use of control; do not prescribe an upper time limit for the use of operational control and therefore constitute excessive interference with citizens' freedoms; do not entitle the object of operational control to be provided with the relevant court order mandating such operations following the conclusion thereof, and therefore deprive such a person of the right to challenge the court order; do not equip prosecutors or the Attorney General to challenge the court order which authorized or otherwise greenlighted the use of operational control – the case will be adjudicated upon by the Constitutional Court under case K 32/15; these complaints are available at <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2032/15>), as well as provisions of the new Law on the Public Prosecutor's Office (generally, the challenged provisions are those of the Law to the extent to which they, *inter alia*, impose on a prosecutor a duty to perform an action during court proceedings in line with the Minister of Justice's (acting as the Attorney General) commands; entitle the Minister of Justice (acting as the Attorney General) to change or invalidate a decision made by a prosecutor inferior to him; equip the Minister of Justice (acting as the Attorney General) with the right to take over cases from prosecutors under his command; make it possible for the Attorney General to pass on to the media information about preparatory proceedings in a given case, dispensing with the requirement of obtaining the consent of the prosecutor who is responsible for the proceedings – *cf.*: joint complaints of the Polish Ombudsman and Senators of the Republic of Poland (K 19/16); available at <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2019/16> (visited September 16, 2016) and a separate complaint by the National Council of the Judiciary of Poland dated May 13, 2016, available at <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2029/16> (visited September 16, 2016).

TENSION BETWEEN HUMAN RIGHTS PROTECTION AND THE NECESSITY TO ENSURE PUBLIC SECURITY IN THE CONTEXT OF POLISH ANTI-TERRORISM LAW

Summary

Recurrent events of a terrorist character, especially those occurring not in arenas of armed conflict or in countries that are not – at least formally – at war with others, make it necessary not only to consider a redefinition of the state security systems, but also to reflect deeply on the human rights-inspired paradigms accepted hitherto. Regardless of one's convictions and interpretation of current events, it is difficult to avoid repeating questions concerning the efficiency of public authorities and our legal system in the context of European experiences with terrorism. It is necessary to examine whether the commonly recognized constitutional and human rights standards facilitate the development by the state of instruments aimed at the effective prevention of terrorism. In the process of enacting and applying anti-terrorist laws one must pay heed to the mutual relations between goods protected and violated by a given regulation. As noted above, there is no freedom without security, but also there is no security without freedom. This tension makes a proportionality test very troublesome. The legislator should, above all, harmonize the axiological contexts of the provisions constructed thereby, so that they are orientated towards the protection of both security and freedom.

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KEYWORDS

anti-terrorism law, constitutional law, human rights, principle of proportionality, security, freedom

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prawo antyterrorystyczne, prawo konstytucyjne, prawa człowieka, zasada proporcjonalności, bezpieczeństwo, wolność