Martin Bożek

Operational powers of special services[1] as means to interfere into rights and freedoms of people (the outline of the problem)

1. Doctrine assumptions

In current democracy concepts where democracy is treated as a certain system of government, a menial role of the state and its apparatus is stressed. The essence of the issue is given by Sartori's statement that in current democracies "a state is a servant of citizens and not the other way round; a government is for people and not vice versa[2]". So, the crucial task for a country is to shape public space in such way that every citizen has opportunities of free development and the rights of others are respected at the same time. However, realization of such tasks requires from authorities taking up a wide range of activities in different state's areas.

One of these areas, where the state's activity is concentrated, is security understood both as individual (security of the people) and over-individual (security of the state as an organization). Individual freedoms and the state's activity (the area of security) are interconnected in this system. Without the state's activity there are no individual freedoms understood as possibilities of taking up initiatives by individuals aimed at their individual development. And in this case, when such assumption is a starting point of the rationale, it seems natural that individual rights can be restricted and interfering with individual freedom is possible. Particularly when maintaining of public space in which individuals operate is required.

In the human rights doctrine assumptions mentioned above take the form of the so called restrictive clauses. These are legal constructions that make state's interference into human rights and freedoms possible to protect social and general state interests[3]. In view of theses clauses a state can grant its functionaries some powers to interfere into human rights and freedoms. Nevertheless, the state cannot act in arbitrary way in this respect. In contemporary democracies conditions under which such interference is possible are defined in constitutions[4]. Constitutional restrictive clauses are particularly

[1] „(…) the term 'special services' applies only to five services: the Internal Security Agency, the Intelligence Agency, the Central Anticorruption Bureau, the Military Intelligence Service and the Military Counterintelligence Service (…)". More on the topic see in: M. Bożek, *Special services and their classification in Polish legislation*, in: M. Bożek, M. Czuryk, M. Karpiuk, J. Kostrubiec, *Special services in public authorities structure. Legal and constitutional issues*, Warsaw 2014, p. 19.

[2] See: G. Sartori, *Theory of democracy*, translation by P. Amsterdamski, D. Grinberg, Warsaw 1998, p. 53.

[3] See: M. Piechowiak, *The notion of human rights*, in: *Basic human rights and their judicial protection*, L. Wiśniewski (scientific ed.), Warsaw 1997, p. 34.

[4] See: W. Sadurski, *Law before a court (Study on constitutional courts in post-communist coun-*

important because they are *sui generis* directives for public authorities. Their initial addressee is legislator (parliament) which has to take under consideration arguments and reasons arising under the clauses in the process of lawmaking (acts).

In this respect acts adopted by the parliament should be tied to constitutional norms. Legal acts beyond could be perceived as unconstitutional. Naturally, it is an ordinary legislation's role to firm up constitutional provisions what may cause, at least at first glance, a certain flexibility in the final shape of these provisions. Nevertheless, legal solutions always have to respond constitutional circumstances which enable restrictions of human rights.

In Polish legislation these conditions are set out in Article 31(3) of the Constitution of 2 April 1997. The provision of this Article contains a constitutional standard associated with rules and criteria enabling public authorities (parliament) to interfere into human rights and freedoms in Poland. According to this constitutional standard *restrictions in constitutional rights and freedoms can be constituted only in legal acts and only when they are necessary in democratic country for its security or public order or security of environment, health and public morality or other people freedoms and rights. The restrictions cannot infringe the substance of freedoms and rights*.

In this context, there is a scientific problem, which can be formed as a following question: whether the legislator (parliament) respected (has had respected) conditions expressed in Article 31(3) of the Constitution in the lawmaking process? The answer for such question shall be given by the analysis of the competence acts[5], which are legal basis for Polish special services.

It is not the author's ambition to present the subject in an exhaustive and categorical way. It would be impossible though because of the form of such expression as an article. It is more to draw attention to the most crucial issues and problems connected to shortcomings in regulations concerning operational powers of special services which enable their officers to interfere into human rights and freedoms.

2. Special services operational powers under the applicable law

In the competence acts there is no such term as "operational powers" but operational and intelligence activities. To be more specific provisions of such acts constitute that officers of special services realize operational and intelligence activities within the limits of their tasks. Although the provisions do not include a legal definition of the term the legislator tends to use it quite often. It should be added that the biggest

tries of the Middle and Eastern Europe), Warsaw 2008, p. 362.

[5] Competence acts are legal acts forming a legal basis for special services in which basic organizational and functional issues are included. Currently in force are the following acts on special services: *The Act on the Internal Security Agency and Intelligence Agency of 24 May 2002* (Journal of Laws 2016, item 1897, 1948, 1955, Journal of Laws 2017, item 60); *The Act on the Central Anticorruption Bureau of 9 June 2006* (Journal of Laws 2016, item 1310, 1948, 1955, 2255, Journal of Laws 2017, item 60, 244); *The Act on the Military Counterintelligence Service and Military Intelligence Service of 9 June 2006* (Journal of Laws no. 104, item 709 as amended).

saturation of the term contain provisions enclosed in chapters entitled *The powers of officers* (…). It allows to treat operational and intelligence activities as one of the legal ways to realize legal tasks of the services by their officers.

Immediately the question arises as to what is the true meaning of operational powers to effectively realize legal tasks of special services? This is a question – no more no less – about the "utility" (usefulness) of the operational and intelligence activities within special services current work. The question is vital in the assessment of special services activities in the sphere of state's security but also very important to bring the nature of such activities closer. The shape of competence acts and their provisions can be, at least to some extent, helpful in replying to the question. Also in this context, even a cursory analysis of the provisions implicates the first ascertainment here and it refers not so much to the meaning (essence) of operational powers but it refers to their position in the legal systematic of officers' powers. In the light of the systematic it is a prominent place.

Such opinion is justified by the fact that in competence acts just operational and intelligence activities shall be listed in the first place and then investigative activities, analytical and informative or supervisory. It concerns those provisions which contain general norms regarding tasks that special services officers can perform[6]. Nevertheless, on this stage this is only a preliminary signal of the possible legal activities which special services are allowed to perform and only subsequent provisions in competence acts may be their instance. What is important here is that ample room is devoted also to operational and intelligence activities in these next provisions.

Both show the importance the legislator attach to operational powers of special services; first – by showing in general the competences to use them and second – by detailing some of them in separate editorials of the legal texts. Such solution is naturally only a suggestion that the meaning of operational and intelligence powers in special services activities is crucial. But it is only an analysis of particular solutions in competence acts as far as operational and intelligence activities are concerned that makes it easier to highlight their role and therefore the clue of operational powers assigned to special services.

What emerges from this analysis as a rather legible attribute of operational and intelligence activities is their discreet nature. This trait is treated in the doctrine as one of the traits which set up operational and intelligence activities and without which the activity of special services is hard to understand at all. It is also added that special services are this particular element of the state's apparatus that is by nature (…) *closed and surrounded by a barrier of strict protection and accompanied by specific conditions of special services activities*[7]. Although there are also some more moderate voices that claim that all issues related to operational work in general should be open whereas (…)

[6] See: Article 21(1.1) (1.2) and Article 22 of the Act on the Internal Security Agency and Intelligence Agency; Article 13(1.1–3) of the Act on the Central Anticorruption Bureau; Article 25 and Article 26 of the Act on the Military Counterintelligence Service and Military Intelligence Service.

[7] *Special services in the UK*, Warsaw 1994, p. 4.

the content of operational methods should be (…) *classified as top secret*[8]. In competence acts this secrecy trait is underlined by saying that operational and intelligence activities are performed in a secret way or in accordance with the requirements of secrecy[9].

In addition, in competence acts there are particular regulations introduced concerning making information on operational and intelligence activities openly available, i.e. outside the structures of special services. Generally speaking, information on "the particular forms and rules of operational and intelligence activities" and "on the means and methods used in relation to them" and in some cases also on the effects of those activities are under the statutory ban of their exposure[10]. There are only few cases precisely described in competence acts which allow some people from outside of special services[11] to have access to such information and in such cases it does not mean that the information are not secret any more. They are still protected as secret and cannot be disseminated further. It should also be added that access of people from outside the services indicated in competence acts as entitled entities to such information – is carried out while preserving particular disciplines and in camera[12].

In the competence acts there is one more aspect pointed out which refers to the nature of operational and intelligence activities. They can be carried out in order to collect evidence of crimes but also to collect information on threats. The law precisely indicates that special services (…) *perform operational and intelligence activities in order to prevent crimes, in order to recognize crimes and in order to investigate them* but also in order to (…) *gather and transform information important for fighting crimes aimed at certain values (state's security, constitutional order, national defense, state's economic interests)*. In competence acts there is no detailed information on what exactly threats it is all about though. Even if there are some threats listed, the legislator uses only vague terms (general clauses)[13].

---

[8] See: P. Kosmaty, *Operational law* „Prokurator" („Prosecutor") 2010, no. 1–2, p. 85–87.

[9] See: for example Article 27(6.3) and Article 29(1) of the Act on the Internal Security Agency and Intelligence Agency.

[10] See: Article 39 (3.1)(3.2) of the Act on the Internal Security Agency and Intelligence Agency; Article 28(1)(2) of the Act on the Central Anticorruption Bureau; Article 43(3.1)(3.2) of the Act on the Military Counterintelligence Service and Military Intelligence Service.

[11] According to Article 39 (3) and (4) of the Act on the Internal Security Agency and Intelligence Agency and their counterparts in other competence acts, such information can be released:

– at the request of the prosecutor or a court, submitted in order to prosecute a prohibited act, which is a crime or a misdemeanor, effect of which is death, or in order to conduct personnel security clearance procedure on the basis of the Act on the Protection of Classified Information;

– at the request of the prosecutor or a court based on reasonable suspicion of an offence prosecuted by the public prosecutor in connection with performing operational and intelligence activities/tasks.

[12] See: M. Leciak, *A state secret and its protection in the substantive criminal law and in criminal trial*, Toruń 2009, p. 326; B. Kurzępa, *A possibility to use information from a police agent in the criminal trial*, „Wojskowy Przegląd Prawniczy" („A Law Military Review") 2003, no. 1, p. 26; K. Lidel, J. Mróz, *Relieving a policeman of professional secrecy in criminal matters*, „Jurysta" 2006, no. 5, p. 24–25 et seq.; Z. Młynarczyk, *A state secret and Professional secrecy and operational and intelligence activities*, „Przegląd Sądowy" („Judicial Review") 1993, no. 3, p. 42 et seq.

[13] Constitutional Tribunal in its sentence of 14 December 1999 (SK 14/98, OTK 1999/7/163)

In this situation a threats catalogue for special services to take an interest in while performing *inter alia* operational and intelligence activities is a non-specified catalogue. What is more, this is a typical case of vague terms in legislation which can create essential interpretation doubts during application of the law. In practice such situation can and very often does create a fundamental question about special services competence in a particular case and hence it calls into question the legality of actions taken. The question is particularly important in case of operational and intelligence activities taken by special services. As far as on the investigative stage of the proceeding certain arrangements about facts are available due to a criminal practice, in so far operational and intelligence activities take place with limited knowledge about the case. And this makes it very difficult to assess whether the situation/case has really much to do with threats to state's security, external security, constitutional order or economic security of the state[14]. Not to mention the question whether such behavior (events) can be qualified as offences already on this stage.

From this perspective operational competences of special services appear to be a universal tool. Officers can use them while fighting criminal activities as well as during counterintelligence or informative activities, not investigative. In both cases operational and intelligence activities are to establish facts about events which disturb the normal functioning of the state (and society) because of their social harmfulness. Gathering information about such facts can also be done in investigative activities but they can be realized by special services (ABW and AW only) during preparatory proceedings (investigation) exclusively. But before it happens, i.e. preparatory proceedings is initiated[15], in everyday practice of special services establishing facts is an effect of operational and intelligence activities. These activities can be performed as a general rule before or in parallel to investigation in progress, they can be continued even after the investigation is terminated[16]. Decision on which competence to use and on which stage is determined every time by the need of an efficient action and this mostly depends on the nature and severity of the case.

---

indicates that „(…) using by the legislator vague notions or general clauses is not synonymous with giving for an interpreter an absolute and uncontrolled discretion on the interpretation of such terms and on the contrary it obliges the organ practicing the law to a particular diligence (…)".

[14] Article 5.1(1) and article 6 of the Act on the Internal Security Agency and Intelligence Agency; article 2 of the Act on the Central Anticorruption Bureau; Article 5.1(4) of the Act on the Military Counterintelligence Service and Military Intelligence Service.

[15] According to Article 303 of the Code of Penal Proceedings factual grounds for preparatory proceedings is reasonable suspicion of perpetration of a criminal offence, to be understood as sufficiently reliable information on an event or effect which are accompanied by the circumstances creating the likelihood of violation of criminal regulations. Opening a preparatory proceedings is a confirmation that factual grounds exist. Opening a preparatory proceedings follows as a general rule the issuing a formal decision to start preparatory proceedings (investigation). See: T. Grzegorczyk, *Code of Penal Proceedings and the Act on Key Witness. Commentary*, 5th edition, Warszawa 2008, p. 642.

[16] See: T. Grzegorczyk, J. Tylman, *Polish Penal Proceedings*, Warsaw 1998, p. 560–561.

It is worth emphasizing that in the area of combating crimes operational and intelligence competences are in the same line with investigative powers in competence acts. Even more. In legal provisions the operational and intelligence activities are indicated before the latter ones what may suggest their prime role ("proposing role") also in this area of special services activity. This aspect has been properly reflected in one of the competence acts provisions which unequivocally show the key (first-rate) role of operational and intelligence competences in combating crimes. Article 13.1(1) of the Act on the Central Anticorruption Bureau (CBA) states that officers of the Bureau perform (…) *operational and intelligence activities in order to prevent crimes, to identify them and to detect them* and after that (…) *if there is a reasonable suspicion of crime (the officers) perform investigative activities to prosecute the alleged offenders*. The legislator, as it seems, wants to stress that operational activities of special services have not only informative role but also just as much detective, preventative and probative[17]. This is why in some definitions of operational and intelligence activities in the law doctrine it is assumed that they are to detect in particular, not only to gather information on threats[18].

All these editorial endeavours in competence acts are a conscious reference to an age -old thesis that secret operational activities of special services are the very essence of their activity in security area. This is so, irrespective of whether it is at the moment a monitoring of potential or real threats or it is to detect offences and to gather evidence on criminal activity. After all, both contribute to state security and eventually that is what special services are for.

3. Constitutional limits of special services interference into the rights of the individual

Another thing is that while performing operational and intelligence activities for ensuring the state security special services do interfere at the same time into rights and freedoms of individuals. This is a next important issue connected to the substance and nature of operational competences. This is a matter which can arouse suspicion of a possible conflict between the application of their competences by special services and respect for human rights. Indeed it is closely related to the question of range and limits of the state's interference into a sphere of man's freedom (rights and freedoms of individuals). Preserving individuals freedoms requires a fine line in law which a state cannot cross (intrude). This is not up for discussion though that both individual's rights as well as state's administration competences must be based on constitution or regulations[19]. This is a question of certain standards among contemporary democratic countries.

---

[17] See: A. Taracha, *Operational and intelligence activities (forensics and evidential aspects)*, Lublin 2006, p. 25.

[18] See: A. Taracha, *Range of operational and intelligence activities under law enforcement legislation*, in: *Course of action and the situation of criminal law reform*, Lublin 1995, p. 103; S. Hoc, *Aspects of criminal responsibility for espionage*, Warsaw 1985, p. 340.

[19] See: M. Piechowiak, S*ubordination of the State to the Individual and to Human Rights as a Central Idea of Poland's Constitution of 2 April 1997: A Goal or an Achievement?*, „Przegląd Sejmowy" 2007, no. 4, p. 65 et seq.; W. Skrzydło, *Political system of the Republic of Poland in the 1997 Constitution*, Zakamycze 2002, p. 84.

In the doctrine this potential (or maybe real?) conflict between operational activity of special services and human rights protection has always been observed[20]. Nevertheless, it has always been stressed that it can happen both in democratic countries as well as in dictatorial regimes[21]. The problem is a nature of special services operational activity itself, that is on the one hand its highly classified nature and on the other the required efficiency. So, it could be said even that there is a conflict between two principles in special services operational and intelligence activities, namely the conflict between the principle of effectiveness and the principle of humanity. The principle of effectiveness means that special services main task is to detect and neutralize threats (offences) and to be able to do it the services need to have proper (quite broad) competences and powers. The second principle requires from special services (…) *respect for human dignity and respect and protection of human rights regardless of nationality, origin, social condition, political or religious beliefs*[22].

It should be added that the aforementioned principles are only particular constitutional solutions which are a sign of a process called in the doctrine "positivisation" of human rights[23]. Within the process there is a certain area for individuals in a state, which can be interfered by the state administration or by other entities following a mandate given only by law. It is a constitution that guarantees individuals the possibility to use their basic rights and freedoms. Because the rights and freedoms are enlisted in the constitution they are given an essential character. This character comes from the fact that the rights and freedoms of an individual shall be considered as of initial or primary status. In this situation the main task of the state is to protect "natural" rights and freedoms of individuals[24]. It is not acceptable to abolish the rights although they can be restricted. The possibility of any restrictions should be treated as an exception to the rule, not the other way round. The scope of such restrictions cannot be too excessive because the state stops being a guarantor of human freedoms then and becomes an usurper.

These assumptions in the Constitution of the Republic of Poland of 1997 are expressed in a number of ways although all of them come down to the fact that the topic of human rights and freedoms and their protection are the subject of a separate chapter in the Polish Constitution. Its title: *Freedoms, rights and obligations of an*

[20] See: T. Widła, *Right to privacy and operational and intelligence actvivity*, „Prawa Człowieka. Humanistyczne Zeszyty Naukowe" („Human rights. Humanistic – Scientific Fascicles") 1997, no. 4, p. 89.

[21] „Special services, no matter whether in democratic countries or in dictatorships, have to collect information about threats if their task is to take care of the security. The opponent uses often illegal methods. It gives the services serious arguments in demanding specific powers". Quotation from A. Zybertowicz; statement for Rebelia.pl, the Internet portal published on 10 January 2012; source: rebelya.pl/post/618/tak-nas-podsuchuja-raport-o-tym-jak-panstwo-ogr.

[22] See: Article 13 (4) of the Act on the Central Anticorruption Bureau.

[23] See: P. Tuleja, *The normative content of human rights in constitutional acts of the Republic of Poland*, Warsaw 1997, p. 9.

[24] More in: S. Wronkowska, *A concept note on the rule of law in Polish political and legal literature*, in: *Polish discussions on the rule of law*, S. Wronkowska (scientific ed.), Warsaw 1995, p. 75 et seq.

individual and a citizen and in the structure of the Constitution this chapter follows directly Chapter 1 describing political system in Poland. This indicates that the topic of rights and freedoms follows the most important matters which a constitutional act may contain.

Among the provisions of this chapter there are two which deserve particular attention, it is Article 30 and Article 31 of the Constitution. They relate to the philosophy of human rights which the constitutional legislator addresses including the rules and criteria (grounds) of limiting the rights. In the Article 30 of the Constitution inalienable human dignity as a source of human rights and freedoms is acknowledged. There is also an injunction in the provision of the Article 30 for public authorities to respect it, secure it and not to violate it. It is a deliberate reference to legal and natural concepts which results in some consequences. First, an individual cannot waive their dignity and the rights and freedoms deriving therefrom. Second consequence means a prohibition of any restrictions on the human rights and freedoms from other entities or public authorities[25]. It is obvious that it is a general principle from which the Constitution may contain some exceptions.

A clear catalogue of these reasons is enclosed in the Article 31(3) of the Constitution. Its provision indicates that in the Polish legal system State interference in the rights and freedoms may take place only under specific conditions.

One of them is a category of legal regulation which can introduce such restriction on the rights and freedoms. In Poland it is the act which is the source of universally applicable law just after the Constitution[26]. The requirement that the restrictions on the human rights and freedoms were enclosed in an act means that such competences belong to legislative authority (in Poland Sejm and Senat). The act is a result of legislative process which obligatory involves both parliamentary organs (Sejm and Senat). For such important issue as human status in the country it is vital that organs involved in the legislative process have a mandate to govern from the society via direct and universal suffrage[27].

The second condition refers to the grounds on which the legislator can restrict human rights and freedoms. According to Article 31(3) of the Constitution it is possible in a democratic country only to protect some basic social interests. They are listed as follow: state security, public order, natural environment, health and public morality, rights and freedoms of other people. All these interests are treated as certain social values which can be put by the public authorities before an interest of an individual in situations that present risk to their safety.

---

[25] See: W. Skrzydło, *Constitutional catalogue of rights and freedoms*, in: *Constitutional rights and freedoms in Poland*, *General Principles*, vol. 1, M. Chmaj, L. Leszczyński, W. Skrzydło, A. Wróbel (ed.), Zakamycze 2002, p. 57.

[26] According to the Article 87(1) and (2) of the Constitution a source of common law in the Republic of Poland are the following: the Constitution, acts, ratified international agreements, regulations and local laws on the territory of competent local authorities to issue them.

[27] See: W. Skrzydło, *The Constitution of the Republic of Poland. Commentary*, 7th edition, Warsaw 2013, p. 45.

The last sentence of the Article 31(3) presents the third condition and it is an additional clause. It says that restrictions of human rights and freedoms cannot affect the essence of them. As one may think "the essence" can have at least two meanings. First, it is natural limits of human freedoms which are freedoms of other people. Second, it is a certain feeling of human security – the individual's conviction that there will be no State's interference in their rights and freedoms which would not be provided for by the law[28].

Operational and intelligence activities are not explicitly listed in the Constitution as permitted restriction of human rights. In spite of this, according to the Constitutional Tribunal[29] they are anchored in the frames of general restrictions formulated in the Constitution. After all, some provisions of the Constitution refer to ordinary acts. This also applies to the situation in which the Constitution proposes that ordinary act shall determine "the cases and the way" of human rights and freedoms restrictions (Article 49 and Article 50) or the possibility of such restrictions is introduced (Article 51(3)). Apart from that, as stated before, Article 31(3) of the Constitution formulates a general rule of maintaining proportionality in applying potential restrictions of constitutional rights and freedoms in case there were some restrictions planned in ordinary acts (no matter of its subject). What is more, going beyond the proportionality of the restriction will be decisive for the assessment that the restriction was excessive and therefore unconstitutional.

Classification of operational and intelligence activities makes them vulnerable to abuse[30]. Public security is a value which, in principle, justifies the restriction of human freedoms so it requires proportionality of acceptable infringement in the name of security protection and a proper control system to keep this proportionality in practice. Otherwise, means of this security protection in the form of legal operational activity pose a risk to these freedoms in themselves. It will be so when restrictions are arbitrary, disproportionate to the potential risks or they are (*de jure* or *de facto*) excluded from a democratic supervision. The Constitutional Tribunal has stressed many times that while preparing provisions which interfere deeply into people's privacy the legislator has to take under consideration not only the principle of certainty and facts but also consider the proportionality of the applied measures. It is not enough that applied measures promote purposes intended, enable to achieve goals or are convenient for authorities who are to use them in order to achieve goals. Operational activities can be justified that much as long as their own goal is to defend values of a democratic coun-

[28] Declaration of the Rights of Man and of the Citizen of 26 August 1789. Article 2 enclosed probably the shortest catalogue of human rights and freedoms. There were liberty, property, resistance to oppression and also security. Security was meant as a certain state in which an individual can achieve his/her objectives with no fear but also as a state of being free from an arbitrary State interference into his/her life. Simultaneously, it stated that the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. In this sense one may say that liberty means doing all that does not any harm to others.

[29] See: Judgement of 12 December 2005, Case Number K32/04.

[30] See: *The National Security Bureau Analysis on the proposals of changes in the legislation concerning surveillance to guarantee constitutionally protected rights*, Warsaw 2010, p. 8.

try. It is therefore not enough that the applied measure is appropriate, useful, cheap or easy to handle by authorities[31].

In this case, it is vital to establish that operational and intelligence activities in a democratic state cannot lead to erosion of the foundations of the country which are human dignity on the one hand and lack of arbitrary decisions or actions of the authorities on the other hand. It should be pointed out, however, that the rule requires an effective supervision preventing from excesses. It is permitted even serious violation of the privacy in accordance with a democratic state standards but it must be accompanied by procedural guarantees that it will not lead to human dignity violation during surveillance[32].

Taking the constitutional matters into consideration all the issues related to operational and intelligence activities should be regulated in acts (an act). This corresponds with an assumption that all activities performed by special services and operational and intelligence activities in particular are the implementation of competences and powers given by the respect competence acts. It means that these competences and powers are a kind of legal frames in which operational and intelligence activities should be performed and by which special services can interfere in human rights and freedoms. And in this meaning the competences and activities of the officers create legally-based entity fitting into legal basis for special services. This means that the assessment of such activity shall take place not only through its effects (effectiveness) but also whether it falls within the framework of competences granted to special services.

All of that goes together and makes it justified to propose a complex legal regulation of operational and intelligence activities (either in various competence acts or in one complex act). On the one hand, it would enable to draw a precise line of possible interference into human rights and freedoms with the letter of the law. On the other hand, adoption of such an act would assure legal security for officers which seems to be crucial when it comes to effectiveness of state services performing operational and intelligence activities for state security. Lack of clear legal rules concerning operational and intelligence activities does complicate the matter. Unfortunately, up to now such complex regulation has not been carried out, despite of several counts of attempted pieces of legislation by the Parliament as well as government[33].

4. Non-statutory frames of special services interference in human rights

At this state, i.e. lack of formal legal regulation of forms and methods of the operational work, only some of the operational and intelligence activities are in-

[31] See: Rationale of the Constitutional Tribunal Judgment of 3 October 2000, K.33/99.

[32] See: The Constitutional Tribunal Judgment in case K32/04.

[33] See: Parliamentary Print No 1570 of 26 January 2007; Parliamentary Print No 353 of 7 February 2008. Because there is no continuation of the Polish Parliament works at the end of parliamentary term the project of an act on operational and intelligence activities was not proceeded in the 7th tenure of the Parliament (2011–2015). During its 4th tenure (2007-2011) the government appointed a special inter-ministerial panel to produce a draft of an act on operational and intelligence activities.

cluded in legal acts. Nevertheless, one should be added, apart from those operational and intelligence activities indicated directly in legal acts, officers take other activities as well which are not directly mentioned in legal acts (competence acts). These activities, performance of which relates to "ways, methods and forms", are not regulated in competence acts but in instructions issued by the heads of special services. Each competence act gives the competent body power to issue such instructions. It is said that through instructions the heads of services (…) *establish ways, methods and forms of performing the activities* (…) *to the extent that they are not covered by other legislation*[34]. The provisions give no directions on which tasks these instructions may concern, nor which activities should be regulated. And that means that through such instructions also "ways, methods and forms of operational and intelligence activities" can be defined. There are no restrictions in this respect in competence acts. And it is obvious that instructions issued by heads of services to define "ways, methods and forms" of operational activities cannot change legal arrangements adopted in this field.

In this context, it is worth adding one more remark. Well, it is hard to tell, whether such instructions may contain provisions divergent or even contrary to legal regulations in practice. The reason is that such instructions concerning "ways, forms and methods" of operational and intelligence activities are classified documents and therefore not published openly. It results from the provisions of the Act on the Protection of Classified Information[35] and partly from the competence acts. According to these provisions information (documents) shall be classified secret if its unauthorized disclosure results in grave damage to the state (…) *by hindering performance of operational and reconnaissance activities carried out in order to ensure state security or pursue perpetrators of crimes by services or authorized institutions*[36]. Furthermore, special services are obliged to (…) *protect measures, forms and methods of actions*[37]. It is clear from the above that documents (normative legislation) containing information important from the operational ability point of view and operational and intelligence work efficiency should be classified. This is a practice nowadays that official journals of special services, in which normative acts issued by their heads are published, do not contain instructions on "ways, forms and methods" of operational and intelligence work.

---

[34] See: Article 19(3) of the Act on the Internal Security Agency and Intelligence Agency; Article 10(3) of the Act on the Central Anticorruption Bureau; Article 20(3) of the Act on the Military Counterintelligence Service and Military Intelligence Service.

[35] See:: Article 5(1.5)(1.6), Article 5 (2.4) and Article 5(3.4) of the Act of 5 August 2010 on the Protection of Classified Information (Journal of Law 2010, no. 182, item 1228).

[36] See: Article 5(2.4) of the Act of 5 August 2010 on the Protection of Classified Information; see also S. Hoc, *The Act on the Protection of Classified Information. Commentary*, LexisNexis, Warsaw 2010, p. 89–96.

[37] See: Article 35(1) of the Act on the Internal Security Agency and Intelligence Agency; Article 24(1) of the Act on the Central Anticorruption Bureau; Article 34(1) of the Act on the Military Counterintelligence Service and Military Intelligence Service.

At the same time one should be aware of the fact that in a democratic state as the Republic of Poland[38] such solution may give rise to doubts and controversies. Generally speaking, they come from a belief that interference in human rights and freedoms in a democratic country is a last resort and if it has to be done then it has to have a legal basis[39]. And it is not only theoretical assumptions resulting from the concept of a democratic country but above all current constitutional arrangements. In view of these arrangements state's interference in human rights and freedoms may take place only if some constitutional conditions are fulfilled (Article 31(3) of the Constitution). This applies also to a situation in which state authorities shall use operational and intelligence activities. Although they are not mentioned in the Constitution as allowed interference in human rights but according to the Constitutional Tribunal they fall in restrictions listed in Article 31(3) of the Constitution[40]. Fundamental restrictions regard a category of a legal regulation based on which such interference in human rights can happen. According to Article 31(3) of the Constitution of the Republic of Poland it must be a legal act which is second source of a common law following a constitution.

One more topic goes along with this subject. According to Article 87(1) and Article 87(2) of the Constitution of the Republic of Poland there is a closed catalogue of sources of the common law[41] which norms contain legally binding for citizens and which may give grounds to legal interference in human rights. What is important here, instructions issued by the organs of the central government administration (for example instructions of the heads of special services) do not belong to such normative legislation, i.e. they do not belong to the sources of the common law. Instructions of the heads of services are of internal nature which means that they may be addressed only to their subordinate structures (officers and workers of special services). In no case they can be addressed and pose any obligations on the persons from outside the services. And what is more important here, they cannot serve as a basis for any formal decisions (activities) towards citizens and other entities[42]. In such constitutional circumstances reconciling the competences of the heads of special services to determine "ways, forms and methods" of operational and intelligence activities through classified instructions becomes problematic.

---

[38] According to Article 2 of the Constitution of the republic of Poland of 2 April 1997: "Republic of Poland shall be a democratic state ruled by law and implementing principles of social justice".

[39] See: W. Sadurski, *Law before a court. A study of constitutional courts in postcommunist countries of Eastern Europe*, Warsaw 2008, p. 362 et seq.; W. Skrzydło, *Constitutional catalogue of human rights and freedoms*, in: *Constitutional rights and freedoms in Poland. General Rules*, vol. 1, M. Chmaj, L. Leszczyński, W. Skrzydło, A. Wróbel, Zakamycze 2002, p. 57; S. Wronkowska, *A concept note of a rule of law in Polish political and juridical literature*, in: *Polish discussions about a rule of law*, S. Wronkowska (scientific ed.), Warsaw 1995, p. 75 et seq.

[40] See: Judgment of the Constitutional Tribunal of 12 December 2005, Case No K 32/04.

[41] According to the Article 87(1) and (2) of the Constitution of Poland of 2 April 1997 the sources of the common law in Poland are: the Constitution, acts, ratified international agreements, regulations and local laws on the territory of competent local authorities to issue them.

[42] See: Article 93(2) of the Constitution of 2 April 1997.

Without getting much into an assessment whether classified instructions of the heads of services are constitutional, one needs to be stressed. In case there is no legal (complex) regulation concerning operational and intelligence activities, a catalogue of operational competences stays open. With one important reservation that this catalogue is treated as a whole legal framework for special services to perform operational and intelligence activities. Both regulated in competence acts and in classified instructions issued by the heads of special services. However, if we look at this topic exclusively from a perspective of legal solutions, the catalogue of operational competences of special services seems to be a complete catalogue (closed). In reality this is not so because this catalogue can be supplemented (extended), as presented analysis of competence acts shows, through the instructions issued by the heads of special services (the organs of the central government administration).

Conclusions

Competence acts on which operational and intelligence activities of special services are based, have some major drawbacks. In general, it can be put down to some basic points.

The crucial problem is an open catalogue of operational and intelligence competences (activities) officers may perform. The way this topic has been presented in competence acts makes it impossible to indicate a closed list of operational competences. Nevertheless, the heads of special services can supplement this catalogue with next "ways, forms and methods" of an operational work taking advantage of the competence acts.

Consequently, and this is a second major problem, regulation on the level of an unpublished instruction such matter as forms of special services activities must raise serious doubts of constitutional nature. This law-making activity by the heads of special services tends to widen *de facto* the possibilities of actions for special services and to give them next "non-statutory" competences making it easier to interfere in human rights and freedoms like for example right to privacy and freedom. Meanwhile, according to the Article 31(3) of the Constitution such interference can happen only through the act passed by the Parliament (members of parliament acting in the name of all citizens – the Nation). So, operational work of officers (soldiers) of special services on the basis of instructions issued by the heads of services may be exposed to charges of acting on the basis of unconstitutional provisions, ergo illegal actions.

The third issue that may arouse some suspicions is currently applicable ban on making information on the operational and intelligence activities available outside, i.e. outside special services. Generally speaking, information on "the detailed rules and forms of operational and intelligence activities" and on "the measures and methods used in connection to the operational and intelligence activities" and in some cases also information on the effects of such activities, are subject to legal ban on making them accessible. And this may cause some concerns about the abuse of powers by special services which is secret.

In these circumstances the only solution which would allow to dispel any ambiguity concerning the scope, rules and basis for operational activities is adoption of the law which would regulate comprehensively operational and intelligence activities. It ought to be linked to *a sui generis numerus clausus* (closed catalogue) of the operational powers of special services.

On the one hand, it would enable the unification of operational and intelligence activities and draw under the law the precise line of possible interference in human rights and freedoms. On the other hand, adoption of such a law would contribute to ensure legal security of the officers which is crucial as far as effectiveness of state services performing operational and intelligence work is concerned.

Abstract

The author in his article analyses the problem whether in the law making process, on the basis of which operate Polish special services, constitutional rights of citizens are respected. He addressed operational powers of special services as well from the respective competence acts which enable stat's interference into freedoms and rights of citizens due to general social and state interest. In constitutional provisions regarding freedoms and rights of citizens (Article 31.3 of the constitution of 2 April 1997) there has been indicated the area in which public authority organs and other entities can interfere (solely on the basis of legal authorization) in order to ensure security for citizens, public order or environment protection, health, public morality, and freedoms and rights of other people.

The author described, inter alia, the nature of operational powers of special services on the basis of the law in force, including the meaning of these powers for an effective implementation of actions designed for the services, as well as the constitutional and non-statutory frames for possible interference into rights of citizens.

Keywords: internal security, freedoms and rights of citizens, competence acts, special services, operational powers of special services.