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THE RIGHT TO PRIVACY VERSUS STATE SECURITY – A CONFLICT OF CONSTITUTIONAL VALUES

General remarks

The issues discussed in this paper entail the resolution of the conflicts of constitutional values: state security versus the right to privacy. The author has set an objective to determine how the conflict of the two values: state security and the protection of individuals' rights to privacy should be resolved, and which criteria are decisive for determining which of these rules takes precedence over the other. It is an important and difficult issue, as both values have their legal basis in the Constitution of the Republic of Poland[1]. They are both equally important, and the resolution of the conflict always results in the restriction of one of the values.

In order to provide answers to the above question, it is first necessary to define the legal nature of both values, and whether state security and the right to privacy may be regarded as legal principles. The notion of "legal principle" was widely discussed in the literature on the subject[2], hence the analysis in this paper is limited to the discussion of the essence and the characteristic features of legal norms which are considered to be legal principles.

The real conflict between the analysed rules may take place, among others, as part of the statutory tasks performed by law enforcement authorities, such as wire-tapping or video surveillance. Operational and investigative actions performed by authorised bodies constitute a significant limitation of the legal protection of private life, guaranteed under Art. 47 of the Polish Constitution, and the freedom and secrecy of communication, stipulated in Art. 49 of the Polish

[1] Constitution of the Republic of Poland of 2 April 1997 r. (Dz.U. 1997, no. 78, item 483).

[2] K. Osajda, *Znaczenie zasad prawa dla wykładni prawa (na przykładzie prawa cywilnego)* [in:] *Teoria i praktyka wykładni prawa*, ed. P. Winczorek, Warszawa 2005, pp. 261–281; J. Oniszczuk, *Zasada prawa – teoria i praktyka konstytucyjna*, "Zeszyty Naukowe Wyższej Szkoły Handlu i Prawa im. R. Łazarskiego w Warszawie. Prawo" 2004, no. 9, pp. 21–46; W. Pogasz, *O legitymowaniu zasad prawa*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1987, no. 2, pp. 123–135.

Constitution[3]. In this sense, there is a natural antinomy between state security and the privacy of individuals, and between personal liberties and state interference[4]. As D. Szumiło-Kulczycka aptly noted, there are two values indispensable for a dignified and satisfying human life. One of them is freedom, and the other is security. One cannot exist without the other: security without freedom equals bondage, and freedom without security is no more than chaos and the sense of being lost. The more freedom, the less security, and the more security, the less freedom[5].

Society is surely inclined to give up a part of its freedom in exchange for security. Such a concession is an element of a social contract. However, it is a challenge to define the mutual boundaries of compromise between freedom and security. To what extent can individuals resign from their right to freedom in favour of common security, and to what extent can the state withdraw from the implementation of its security policy with a view to ensuring the required extent of freedom?[6]

The notion, division, legal nature and meaning of legal principles

Polish legal commentaries do not include a uniform legal definition of "legal principles". K. Osajda defines legal principles as norms which form part of the positive normative system and which, through their presence in a legal system and with their special role to play, affect the development of other norms in the course of deciding on their content at the systemic interpretation stage[7].

In the literature on the subject, attempts have been made to define the legal principles and they mostly refer to indicating certain characteristic features, their significance and the special role which the principles play in the legal system. Three basic properties of legal principles are widely indicated, and they include: 1) binding legal force; 2) precedence over other norms in the legal system, and 3) the special role in the legal system (social significance)[8].

As regards point 1, binding legal force is expressed in the fact that a given principle is expressly stated in a legal text, or can be derived from such text[9].

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[3] T. Gardocka, *Ustawa antyterrorystyczna a wolności konstytucyjne* [in:] *Pozyskiwanie informacji w walce z terroryzmem*, eds. P. Herbowski, D. Słapczyńska, D. Jagiełło, Warszawa 2017, p. 85.

[4] D. Szumiło-Kulczycka, *Między ochroną prywatności a bezpieczeństwem – uwagi na tle orzecznictwa ETPCz i TSUE* [in:] *Pozyskiwanie informacji w walce z terroryzmem*, eds. P. Herbowski, D. Słapczyńska, D. Jagiełło, Warszawa 2017, p. 68.

[5] D. Szumiła-Kulczycka, *Między ochroną…*, p. 68.

[6] M. Nowikowska, *Czynności operacyjno-rozpoznawcze a prywatność jednostki – uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, "Kontra" 2019, no. 1, p. 32.

[7] K. Osajda, *Znaczenie zasad…*, p. 267.

[8] Z. Ziembiński, *Moc wiążąca "zasad prawa"* [in:] S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe*, Warszawa 1974, p. 53.

[9] *Ibidem*, p. 54.

As regards point 2, the precedence of legal principles may be demonstrated by a higher position in the hierarchy of a legal system, for instance, by including them in the constitution. The qualification of a given norm as a legal principle might be facilitated by the position of a legal act which includes such a norm in the hierarchy of the sources of law, and its position within the structure of a given legal act, e.g., whether it is placed at the beginning or in the final part of such a legal act[10].

As regards point 3, social significance is indicated as the third constitutive property of legal principles, as a given norm can be considered to be particularly important for a specified group of people. The significance of principles is expressed in the fact that they are particularly vital from a certain point of view. This mainly involves the social significance of a given principle. The special role of legal principles in a given legal system may be demonstrated in the direction of legislative activities or the in the marking out of a direction of the application of laws and the interpretation of its provisions[11].

The aforementioned properties allow for the understanding of the nature and importance of legal principles in legal systems, and facilitate the explanation of the notion.

So-called constitutional principles are vital from the point of view of the issues discussed in this paper. It is widely acknowledged that they are legal norms included in the Constitution which are characterised by special importance and significance in relation to other constitutional norms and the entire legal system, and they mark out the directions for interpreting and construing the other norms in the legal system[12]. Z. Zawadzka was right to note that "special emphasis is placed on the vital role of these principles – they govern the most significant state-system issues and fundamental human rights and liberties, they constitute the basis for the interpretation of Acts in line with the constitution, and affect the construction of other norms by way of systemic interpretation"[13]. These principles are also referred

[10] S. Wronkowska, *Sposoby formułowania "zasad prawa" w tekstach prawniczych i ich interpretacja jako norm postępowania* [in:] S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa*…, p. 96.

[11] See more: M. Korycka, *Zasady prawa*, "Jurysta" 2007, no. 8, p. 4; S. Wronkowska, *Charakter prawny klauzuli demokratycznego państwa prawnego (art. 2 Konstytucji Rzeczypospolitej Polskiej)* [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, ed. S. Wronkowska, Warszawa 2006, pp. 118–119; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2004, p. 43; T. Zalasiński, *W sprawie pojęcia konstytucyjnej zasady prawa*, "Państwo i Prawo" 2004, no. 8, p. 21; M. Kordela, *Formalna interpretacja klauzuli demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego* [in:] *Zasada demokratycznego państwa prawnego w Konstytucji RP*, ed. S. Wronkowska, Warszawa 2006, p. 140.

[12] M. Granat, *Konstytucyjne zasady ustroju. Pojęcie "zasad naczelnych"* [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2008, p. 104; Z. Witkowski, *Wybrane zasady ustroju Rzeczypospolitej* [in:] *Prawo konstytucyjne*, ed. Z. Witkowski, Toruń 2009, p. 61.

[13] Z. Zawadzka, *Wolność prasy a ochrona prywatności osób wykonujących działalność publiczną. Problem rozstrzygania konfliktu zasad*, Warszawa 2013, p. 87.

to as cardinal rules, as certain guiding ideas of the Basic Law, the most fundamental rules characterised by special significance. They determine the nature of the state system and on the system of its powers, they refer to the liberties and rights vested in individuals, and are characterised by a higher degree of importance[14].

To sum up the above deliberations, it can be stated that the legal norms which guarantee the right to privacy and state security under Polish constitutional laws, as discussed in this paper, are constitute part of the axiology of the principles of the system with the unquestioned status of: the principle of a democratic state (Art. 2 of the Polish Constitution – "The Republic of Poland is a democratic state justice that implements the principles of justice") and human dignity (Art. 30 of the Polish Constitution – "The inherent and inalienable dignity of man is the source of human and civil freedom and rights. It is inviolable, and its respect and protection is the responsibility of public authorities"). Ensuring state security as an element of the state's axiology is, on the one hand, a task of the state, broadly understood public authority, and, on the other hand, a constitutional value. It can be stated, that the principle of a democratic state has properties that distinguish it from other norms, i.e. it has binding legal force, takes precedence over other legal norms and is characterized by a special role in the legal system. The direction of interpretation and implementation of this value is, of course, determined by the axiology of the rule of law.

The right to privacy is, on the one hand, the right of the individual, and, on the other hand, the obligation of the state (public authority) to provide the individual with the necessary guarantees in the implementation of the right to privacy in the process of both law making and application. The right to privacy is undoubtedly a component of the principles of the rule of law and human dignity.

Right to privacy as a constitutional value

The concept of the right to privacy as a personal interest subject to legal protection comes from the American "right of privacy" doctrine[15]. In Poland,

[14] W. Zakrzewski, *Podstawowe wolności, prawa i obowiązki człowieka i obywatela* [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2008, p. 163.

[15] S. Stalla-Bourdillon, J. Phillips, M.D. Ryan, *Privacy vs. Security*, New York–Dordrecht 2014, p. 7; A. Etzioni, *Privacy in a Cyber Age. Policy and Practice*, New York 2015, p. 101; A.W. Bradley, K.D. Ewing, *Constitutional and administrative law*, Harlow 2003, p. 451; I. Loveland, *Constitutional Law, Administrative Law, and Human Rights. A Critical Introduction*, Oxford 2006, p. 654; W.B. Lockhart, Y. Kamisar, J.H. Choper, S.H. Shiffrin, *Constitutional law and liberties. Cases – comments – questions*, St. Paul Minnesota 1991, p. 430; R.A. Smolla, *Privacy and the First Amendment Right to gather news*, "Georgia Washington Law Review" 1999, p. 1106; A.D. Morton, *About newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-paparazzi legislation*, "University of Pennsylvania Law Review" 1999, s. 1447; R.M. O'Neil, *Privacy and press freedom: Paparazzi and other intruders*, "University of Illinois Law Review" 1999, s. 706.

A. Kopff was the first to put forward a thesis that the sphere of private live belongs to the personal interests of individuals and is subject to protection under the provisions of the Civil Code. According to him, the sphere of private life constitutes personal interests which includes everything that, "due to the justifiable isolation of individuals from the society at large, is aimed at an individual's mental and personal development and the maintenance of the social position the individual has reached"[16].

The right to privacy was laid down *expressis verbis* in Art. 47 of the Polish Constitution, in accordance with which everyone has the right to the legal protection of their private and family life, their honour and good reputation, and to decide about their personal life. Under this provision, everyone is guaranteed the right to the legal protection of their private life. Pursuant to the Polish Constitution, privacy has been assigned two meanings. From a comprehensive perspective, it is understood as the freedom from interference in the spheres unavailable to other persons and the freedom to decide about one's life, views, and convictions, while in the narrower sense, it is equivalent to the right to decide about the range of personal information to be disclosed to others[17]. The right to privacy also constitutes one of the personal interests whose protection is guaranteed under Art. 23 and 24 of the Civil Code[18].

The analysis of the provisions of the Polish Constitution demonstrates that, in addition to Art. 47, the right to privacy is guaranteed under a number of other complementary provisions. For example, under Art. 51(1), no one can be obligated to disclose their personal information otherwise than as provided in Acts – so-called right to information autonomy. This provision guarantees the protection of data and information concerning citizens – individuals – and the freedom to keep confidential any information which, in the view of such persons, belongs to the sphere of their private or intimate life. Any exceptions from the principle of information autonomy may be provided only where it is necessary in a democratic state of law, and subject to stringent formal and substantive rules in line with the principle of proportionality[19].

Similarly, under Art. 53(7) of the Polish Constitution, it is indicated that no one can be obliged by public authorities to reveal their world views, religious convictions or religious affiliation. According to the literature on the subject, the broadly understood right to privacy also includes parents' rights to bring up their children in line with their convictions (Art. 48 of the Polish Constitution), and to

[16] A. Kopff, *Koncepcja praw do intymności i do prywatności życia osobistego. Zagadnienia konstrukcyjne*, "Studia Cywilistyczne" 1972, no. XX, pp. 32–33.

[17] J. Sieńczyło-Chlabicz, Z. Zawadzka, M. Nowikowska, *Prawo prasowe*, Warszawa 2019, p. 239.

[18] The Civil Code, consolidated text of Dz.U. 2020, item 1740 as amended.

[19] M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych*, "Kwartalnik Prawa Prywatnego" 2002, no. 1, p. 234.

ensure moral and religious upbringing and education in line with their convictions (Art. 53(3) of the Polish Constitution). It should be noted that the right to privacy is also expressed in the inviolability of housing premises, allowing searches only in circumstances and under the procedures provided by laws, as specified in Art. 50 of the Polish Constitution, and the secrecy of correspondence[20].

In Polish case law, the right to privacy is defined as information autonomy[21], which is understood as the right to independently decide about the sphere in which individuals wish to remain anonymous, and to what extent they consent to the provision of their personal data to third parties[22]. It is the individual that specifies the range of the events from their life which may be disclosed to third parties[23].

State security as a constitutional value

Security is an interdisciplinary notion. We can assume that security is a principal need of humans and social groups, and their most important goal at the same time[24]. It is also a value whose provision is the core obligation imposed on public authorities. It is ranked above various socio-economic, historical and cultural aspects of the activities performed by individuals and the state. According to R. Kuźniar, it is a primaeval and existential need of individuals, social groups, and ultimately, states. It is not only about survival or integrity, but also about safe development which contributes to the enrichment of individual or national identity[25].

Security is usually defined both as a state (the sense of security achieved by a given entity) and a process (the provision of security to a given entity). As W. Kitler aptly noted, the state has so far been the most refined form of securing the needs of humans (individuals) and social groups in the sphere of security[26]. In the context of security, it is the state that must oversee external security and internal order. State security concerns the security of its institutions and organisations,

[20] Resolution of the Constitutional Tribunal of 20 June 2005, case file no. K 4/04, OTK 2005, no. 6, item 64; K. Chałubińska-Jentkiewicz, M. Nowikowska, *Bezpieczeństwo informacji w cyberprzestrzeni*, Warszawa 2021, p. 94.

[21] Resolution of the Court of Appeal in Białystok of 20 September 2018, case file no. I ACa 379/18, Lex no. 2574866.

[22] Resolution of the Court of Appeal in Poznań of 13 November 2018, case file no. I ACa 1140/01, "Wokanda" 2002, no. 11, p. 46.

[23] Resolution of the Court of Appeal in Warszawa of 29 July 2014, case file no. VI ACa 1657/13, Lex no. 1537498.

[24] J. Stańczyk, *Współczesne pojmowanie bezpieczeństwa*, Warszawa 1996, p. 18.

[25] R. Kuźniar, *Po pierwsze bezpieczeństwo*, "Rzeczpospolita" of 9 January 1996.

[26] W. Kitler, *Bezpieczeństwo państwa a bezpieczeństwo narodowe* [in:] *Aspekty prawne bezpieczeństwa narodowego RP. Część ogólna*, eds. W. Kitler, M. Czuryk, M. Karpiuk, Warszawa 2013, p. 18.

its defined territory, and its population subject to state powers. State security entails the maintenance of order within the state community, and the assurance of internal and external safety. This is a task entrusted to public authorities[27].

There is no doubt that the protection of citizens' security belongs to the principal tasks of the state. The legal basis of this obligation is Article 5 of the Polish Constitution, in which it is stated that "the Republic of Poland shall guard the independence and inviolability of its territory, and ensure freedom, civil and human rights and liberties, as well as the security of its citizens".

The provision of Art. 5 of the Polish Constitution entrusts to the Polish state the task of ensuring security to its citizens, which is of particular importance in contemporary times. It is stressed in the literature on the subject that the security of citizens should not be treated as equivalent to that of state security, although the two notions are interrelated. If state security is endangered, so is the security of citizens. It might happen that the security of citizens is jeopardised, but state security would not show any signs of a threat. Therefore, it can be assumed that threats to the security of citizens might include, for instance, the actions of other citizens which are not directed against the state itself. The state is obliged to ensure security to citizens in their mutual relationships. The need to ensure state security can legitimise the restriction of constitutional rights and liberties vested in citizens.

The notion of security as referred to in Art. 5 of the Polish Constitution should be understood in broad terms as a state which gives a sense of confidence and stability and a guarantee of its protection. This includes not only military security, but also security in legal, substantive, social and environmental terms.

This means that the state is obliged to take preventive actions aimed at protecting its citizens. One such task is the protection of individuals against criminal activities. As regards counteracting crime, proactive operations play a particularly significant role here. State services, each in line with their statutory powers, collect information with a view to taking appropriate action, before a specified event occurs. State services, whose nature, mission and operating procedures are aimed at effectively preventing and responding to threats disrupting the normal functioning of the state and society, include authorities listed in the so-called police legislation. The core of the legislation is composed of the following services: the Police, the Fire Service, the Military Police, the Internal Security Agency, the Intelligence Agency, the Central Anti-Corruption Bureau, the Military Counterintelligence Service and the Military Intelligence Service, the National Revenue Administration, and the State Protection Service.

A significant share of the problems concerning the acquisition of information about crimes, as part of the obligation to ensure state security by police bodies, is related to their classified operations, referred to as operational and investigative

[27] K. Chałubińska-Jentkiewicz, M. Nowikowska, *Prywatność, tożsamość, bezpieczeństwo*, Warszawa 2020, p. 19.

activities. It should be stressed here that a lot of these actions interfere with the rights and liberties of citizens, including, in particular, the right to privacy. Therefore, a conflict occurs between the performance of tasks by special services and the right to privacy vested in individuals.

Polish legislators have accounted for a situation which creates the legal basis for taking action which can formally be classified as a prohibited act. Such entitlements are called justification[28]. There is no doubt that the justification for actions performed as part of special entitlements or professional duties includes operational and investigative activities related to acquiring information.

Methods for resolving the conflict of constitutional values

The rules for restricting the rights and liberties of individuals – citizens – were defined in Art. 31(3) of the Polish Constitution. Pursuant to this provision, the limitations in the sphere of exercising constitutional liberties and rights can be established only under Acts, and only where it is necessary in a democratic state for its security or public order, or for the protection of the environment, health and public morality, or the liberties and rights of other persons. Such restrictions may not infringe the essence of liberties and rights.

The state system legislator listed security as one of the prerequisites for restricting the right to privacy. In a judgment of 29 June 2001[29], the Constitutional Tribunal found that Art. 31(3) provides cumulative prerequisites for the admissibility of restrictions on the exercise of constitutional rights and liberties, and the boundaries of interference with constitutional rights and liberties are determined in line with the principle of proportionality and the essence of specified rights and liberties. "The fact that the restrictions may be introduced only where it is necessary in a democratic state, gives rise to the obligation to consider whether the regulation being introduced is able to produce the expected results, whether such regulation is necessary for the protection of the public interest it refers to, and whether the effects of the regulation being introduced are proportional to the burdens imposed on the citizens".

The state system legislator considered state security as one of the values justifying the possibility to restrict liberties and rights. The protection of individuals' liberties and rights is immanently related to the provision of "security" and

[28] See: B. Opaliński, *Ochrona Policji* [in:] B. Opaliński, M. Rogalski, P. Szustakiewicz, *Ustawa o Policji. Komentarz*, Warszawa 2020, Legalis; B. Guziński, *Ochrona Policji* [in:] *Ustawa o Policji. Komentarz*, eds. K. Chałubińska-Jentkiwicz, J. Kurek, Warszawa 2020, Legalis; P. Jóźwiak, J. Terlega, *Wybrane zagadnienia odpowiedzialności funkcjonariuszy Policji za przekroczenie granic kontratypu działania w ramach uprawnień i obowiązków związane z nielegalnym uzyskiwaniem informacji* [in:] *Pozyskiwanie informacji w walce z terroryzmem*, eds. P. Herbowski, D. Słapczyńska, D. Jagiełło, Warszawa 2017, pp. 105–106.

[29] Case file no. K 23/00, OTK ZU 2001, no. 5, item 124.

"public order". It is not possible for the rights holders in general to fully exercise their liberties and rights in the event of the preventive elimination of potential (external or internal) threats or repressive actions once such threats occur. Given such an approach, from the legislator's perspective, it is desirable to ensure security which is equated to the circumstances with no threats to the existence of the state as a whole and for its democratic system.

The notion of "security" must be, to a large extent, related to the protection of the common good – the Republic of Poland. From the perspective of the protection of individuals' rights and freedoms, the notion of state security used in the wording of Art. 31(3) of the Polish Constitution is comprehensive in that it includes all references to the notion (security) in the Polish Constitution, i.e. the security of citizens (Art. 5), environmental security (Art. 74), and state security (Art. 26). This is owing to the fact that the provision of security must directly or indirectly involve the top-down interference with the sphere of liberties and rights vested in individuals. It should be stressed that, in each instance of legislative interference, it is necessary to substantiate that the protected liberties and rights "are not noticeably ranked lower than the liberties and rights which are subject to interference"[30].

Privacy, understood as the right to live one's own life, planned according to one's own will, with external interference limited to the required minimum, most of all refers to personal life, and is sometimes called "the right to be left in peace". With regards the right to protect private and family life, honour and good reputation, and to decide about one's personal life, the Polish Constitution provides for the prohibition of state interference with individuals' private lives, but also imposes positive obligations on the state. This also means that, as part of its obligations, including those related to the provision of security, the state may impose various responsibilities on an individual – citizen[31].

Due to the fact that both principles – the right to privacy and state security – are stipulated in the Polish Constitution as the highest ranked legal acts, state security and the right to privacy take precedence over any other legal norms. They constitute the legal basis for the powers provided under other norms, and mark the direction of the state's legislative activities. The overriding nature of these norms is expressed not only in their inclusion in the legal act with the highest rank in the hierarchy of sources of law, but also in the significance of the obligations arising from the norms, characterised by a strong axiological justification[32].

The right to privacy vested in individuals is a legally protected interest which might be threatened as a result of the authorised bodies' performing operational and investigative activities. It should be noted that the admissibility of

[30] M. Jabłoński, *Ograniczenie konstytucyjnych wolności i praw osobistych w czasie trwania stanów nadzwyczajnych*, "Przegląd Prawa Administracyjnego" 2016, no. 3782, p. 182.

[31] K. Chałubińska-Jentkiewicz, M. Nowikowska, *Prywatność, tożsamość*…, p. 19.

[32] Z. Zawadzka, *Wolność prasy*…, p. 68.

restricting rights and liberties was set out in Art. 31(3) of the Polish Constitution which states that "the limitations in the sphere of exercising constitutional liberties and rights can be established only under Acts, and only where it is necessary in a democratic state for its security or public order, or for the protection of the environment, health and public morality, or the liberties and rights of other persons. Such restrictions may not infringe upon the essence of liberties and rights". In a judgement of 29 June 2001[33], the Constitutional Tribunal found that Art. 31(3) provides cumulative prerequisites for the admissibility of restrictions on the exercise of constitutional rights and liberties, and the boundaries of interference with constitutional rights and liberties are determined in line with the principle of proportionality and the essence of specified rights and liberties.

The call for resolving the conflict of principles in line with the principle of proportionality, first and foremost, constitutes an instruction addressed to the legislator, which, while adopting legal regulations, should make sure that the right proportion is maintained between the objective to be achieved and the value of a given right or liberty which is to be restricted for that purpose. The principle of proportionality is most often applied at the vertical plane, i.e. in relationships between the individual and the state. The resolution of the conflict belongs to the responsibilities of the legislator who determines which principle should be given priority while introducing specified legal regulations. Thus, the legislator defines the hierarchy of the principles in a specified sphere of legal relationships. Specific legal regulations do not always give a full and exhaustive answer to the questions about the preferred principles, and in many cases, they do not provide a resolution but only an interpretation of the guidelines instead[34].

If there is no model method for resolving the conflict of constitutional values in the legal system, a problem might occur in respect of the court's legitimate powers to decide about the importance of constitutional values in an abstract manner, and to define the rules for resolving conflicts of constitutional rights. It is possible for a court to resolve a conflict of constitutional right where the application of a mechanism used for comparing conflicting constitutional values is capable of producing an explicit and unquestionable result. Notwithstanding whether the process for comparing conflicting constitutional values is the expression of the law-making activities of courts, or whether it is integrated in the process of applying and interpreting laws, the courts guard the protection of the constitutional rights vested in individuals, in line with the rule of precedence of the Polish Constitution. In the literature on the subject, it is assumed that the addresses of Art. 31(3) of the Polish Constitution are not only the representatives of the legislative power, but also of the judiciary. This means that the courts may not allow any interference with constitutionally protected rights and liberties which would

[33] Case file no. K 23/00, OTK ZU 2001, no. 5, item 124.

[34] Z. Zawadzka, *Wolność prasy*…, p. 71.

violate the rule of proportionality in a broad sense. It should be borne in mind that the imperative of proportionality, in its strict sense, requires the maintenance of a properly measured proportion between the extent of interference with a constitutional right or liberty, and the importance and extent of putting into effect a constitutional value which substantiates any interference. Since the rule set out under 31(3) of the Polish Constitution is addressed to courts in the process of applying and interpreting laws, in the circumstances of conflicting constitutional rights, which are an integral part of judicial operations, there are no legal obstacles preventing courts from conducting the process of comparing conflicting constitutional values in line with the rule of proportionality in its strict sense.

Any potential breach of the rule of proportionality is determined based on three criteria: a) usefulness – deciding whether the legal regulation being introduced may result in reaching the expected objective; b) necessity in a democratic state – demonstrating the necessity of the legislator's interference with the sphere of liberties and rights, in particular in relation to the interest whose protection has been the premise for the restriction; c) proportionality in its strict sense – deciding whether the imposed restrictions (extent and range of interference) are proportional to the achieved objectives and benefits, or the objectives or benefits to be achieved in the future[35].

Statutory restrictions may not infringe upon the essence of liberties and rights. It should be remarked that the notion of the "essence" of liberties and rights has not been defined in Polish legislation. Moreover, the legislator does not provide any additional guidelines about the understanding of the term. It is asserted in the literature on the subject that the "essence of rights" is the existence of a durable and unchanging value which is completely independent of accompanying circumstances. It is also assumed that the "essence" may be changeable and it should be defined each time on the basis of existing facts and legal status at a given place and time[36]. It seems justifiable to adopt the second of the aforementioned concepts. It is necessary to define the essence of a specific liberty or right during the resolution of a dispute which is aiming to define whether such specific essence has been infringed.

As M. Jabłoński aptly noted, "in order to determine the essence of a right or liberty, it is necessary to search, within each of the rights and liberties guaranteed under the Constitution, for certain content which is of primary significance (the core) and whose restrictions would result in the elimination of such rights and liberties, and the so-called additional elements (the external layers) which are expressed and modified in various ways without destroying the identity of a given right or liberty"[37].

[35] M. Jabłoński, *Ograniczenie konstytucyjnych*…, p. 179.

[36] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2008, p. 443; M. Jabłoński, *Ograniczenie konstytucyjnych*…, p. 180; K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 150–151.

[37] M. Jabłoński, *Ograniczenie konstytucyjnych*…, p. 180.

The prohibition to infringe upon the essence of a given right is aimed at preventing excessive interference in the content of the right in a way which would lead to such infringement. It has been recognised that there is a certain minimum scope of the content of each right, the removal of which would be equivalent to the elimination of the right itself[38]. It was clearly highlighted by the Constitutional Tribunal in its judgment of 19 December 2002, in which it was stated that the range of the restrictions may not thwart the essential components of a given subjective right, resulting in the elimination of its actual contents and in the transformation of the right into a provision which only appears to be a right. Such circumstances give rise to the infringement of the essence of the rights and its core contents, which is inadmissible under the Constitution[39]. The essence of the right is also violated where any legal regulations make it impossible to exercise the right, although it has not been officially repealed[40]. The Constitutional Tribunal proved that the prohibition of infringing the essence of rights and liberties should not be limited to the negative aspect of the rule, which imposes the obligation to moderate restrictions. It is also vital to place emphasis on the positive aspect, through the identification of the essence of each right and liberty[41]. It should be noted that this core is always identified by taking into account specific circumstances, it is not always possible to determine, in an abstract manner, the elements of the contents which guarantee the existence of a given liberty or right[42].

To sum up the above deliberations, it can be stated that the following three elements can be listed as part of the rule of proportionality:

- the need to restrict the sphere of applying one of the principles due to the protection of another (preferred) value,
- the admissibility of restriction only insofar as it is necessary to fulfill an objective consisting in the protection of the preferred value,
- the inadmissibility of applying the types of restrictions which may result in the elimination or breach of the essence of the principle which gives way to the preferred one[43].

This standpoint seems to be confirmed by the judicial practice of the European Court of Human Rights in Strasbourg. It should be remarked that the Court in Strasbourg formulates only general directives which legislators should follow

[38] A. Łabno, *Ograniczenie wolności i praw człowieka na podstawie art. 31 Konstytucji III RP* [in:] *Prawa i wolności obywatelskie w Konstytucji RP*, eds. B. Banaszak, A. Preisner, Warszawa 2002, p. 707.

[39] Resolution of the Constitutional Tribunal of 19 December 2002, case file no. K 4/04, OTK 2002, no. 7, item 97.

[40] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2008, p. 443.

[41] Resolution of the Constitutional Tribunal of 12 January 1999, case file no. P 2/98, OTK 1999, no. 1, item 2.

[42] A. Łabno, *Ograniczenie wolności*…, p. 708.

[43] M. Jabłoński, *Ograniczenie konstytucyjnych*…, p. 179.

to avoid potential allegations in relation to the breach of the essence of rights or liberties. As a rule, the legislator is obliged to refrain from actions which would introduce an actual prohibition to exercise a given liberty, but also from actions which would result in the excessive limitation of a given liberty.

Summary

The above analysis allows for the conclusion that state security and the right to privacy are constitutional values. This values are of a directional nature, as they indicate the objectives which state authorities should pursue in the legislative process, and as part of interpreting and applying laws.

It is worth stressing that the right to privacy versus state security constitute part of the axiology of the principles of the system with the unquestioned status of: the principle of a democratic state and human dignity. Both values were expressly set out in the provisions of the Polish Constitution, and take precedence over other norms in the legal system, arising from the position of the Constitution in the hierarchy of the sources of law, and play a significant role in the legal system. They specify the values which we should strive towards. The principles mark the direction of the interpretation of law, contributing to the harmonisation of legal order through ensuring the uniform application of law.

The right to privacy vested in individuals is associated with the category of entitlements whose objective is to confirm to every individual a guarantee of unrestrained development, free of any illegitimate actions in the form of external interference, both on the part of the state and other citizens, which constitutes the essence of the right. As regards the resolution of the conflict of values, it is vital to apply the optimisation rule which obliges its addresses to provide a specific state of affairs to the greatest extent possible. In the event of a conflict between ensuring state security and protecting privacy, it would be necessary for courts to take every effort to come to a decision under which the conflicting principles will be observed, in the highest possible extent, in relation to both of the values. It should be stressed that the state system legislator decided to ensure the legal protection of the right to privacy as a "positive" right, by imposing on state authorities the obligation to take action to secure the sphere of the private life of individuals, which makes privacy a right, not a liberty. The state is not only prohibited to interfere with individuals' private life, but also, in the event of infringement, it also has the task to take measures with a view to eliminating both the infringement itself, and its consequences.

The general rules and conditions for restricting liberties and rights vested in individuals were laid down by the legislator in Art. 31(3) of the Polish Constitution. The basic rule which must be fulfilled to legitimise interference within

the sphere of guaranteed individuals' liberties and rights is the principle of the exclusivity of Acts. The statutory completeness requirement refers to legal regulations which are repressive to citizens, in particular penal law. In addition to the rule of exclusivity, it is necessary to take into account the rule of proportionality. In the context of restricted rights vested in individuals, the objective is to stress that the adoption of specific statutory solutions may not exceed a certain degree of nuisance and in consequence it cannot constitute excessive interference with the sphere of values (liberties, rights)[44]. It is also stressed that it is necessary to maintain the right proportions between the scope of interference (restrictions), "and the rank of the public interest which is to be subject to protection". The decision is left to the legislator, and only then to the authority appointed to control the constitutionality of laws, the Constitutional Tribunal, and courts, at the stage of the application of laws.

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[44] *Ibidem*, p. 178.

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Summary

The dynamic development of technology has led to significant changes in the concept of right to privacy. Currently, it is primarily a virtual space in which we communicate with each other using computers, phones and tablets connected by a network. Cyberspace protection has now become one of the most frequently discussed security-related topics. This article describes the conflicts of two values expressed in the Polish Constitution: state security versus the right to privacy. It is important how the conflict: state security and the protection of individuals' rights to privacy should be resolved, and which criteria are decisive for determining which of these rules takes precedence over the other.

Keywords: state security, conflict of principles, right to privacy, constitutional principle

PRAWO DO PRYWATNOŚCI A BEZPIECZEŃSTWO PAŃSTWA – KONFLIKT ZASAD

Streszczenie

W artykule poruszono problematykę rozstrzygania konfliktu dwóch podstawowych wartości konstytucyjnych, mianowicie bezpieczeństwa państwa i prawa do prywatności. Jest to zagadnienie ważne i trudne, ponieważ obie wartości znajdują oparcie w Konstytucji RP i stanowią wartości równocenne, a rozstrzygnięcie konfliktu prowadzi zawsze do ograniczenia jednej z tych wartości. Autorka stawia sobie za cel ustalenie, w jaki sposób powinien być rozstrzygany konflikt zasad: bezpieczeństwo państwa a ochrona prywatności jednostki i jakie kryteria decydują o pierwszeństwie jednej z tych zasad i której. Społeczeństwo niewątpliwie skłonne jest zrzec się części swojej wolności w zamian za bezpieczeństwo. Ustępstwa te są tzw. elementem umowy społecznej. Wyzwanie natomiast stanowi ustalenie wzajemnych granic ustępstw pomiędzy wolnością a bezpieczeństwem. Na ile od jednostki można oczekiwać zrzeczenia się praw do wolności w imię bezpieczeństwa wspólnego, i odwrotnie – na ile można odstąpić od realizacji polityki bezpieczeństwa, aby zapewnić konieczny zakres wolności jednostce.

Słowa kluczowe: bezpieczeństwo państwa, konflikt zasad, prywatność, zasada konstytucyjna