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Constitutional Right of Citizens to Know about the Activities of Public Authorities from the Perspective of Selected Aspects of the Protection of Classified Information

Keywords: Constitution, civil rights, politics, limitation of public transparency, classified information, state security

Słowa kluczowe: konstytucja, prawa obywatelskie, polityka, ograniczenie jawności publicznej, informacje niejawne, bezpieczeństwo państwa

Abstract

The implementation of the constitutional right of citizens to obtain information about the activities of state authorities, in particular, in the sphere of state security, causes many problems resulting from the application of the Act on the Protection of Classified Information. The measures adopted in the Act, promoting the rights of the community at the expense of the rights of individuals, pose a risk of its instrumental use for political purposes. The reduction of the above-mentioned risk may be supported by a minor correction of the regulations in force, as postulated by the author of the article, which includes an increase in external supervision over the marking of materials containing information intended for protection, which does not undermine the grounds for restricting the transparency of public activities, permitted by the international law and by the Constitution of the Republic of Poland, and required from the perspective of public safety. The conclusion is that it is difficult to be optimistic about this area due to the observed re-

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luctance of the ruling elites to voluntarily abandon the tools that give them an advantage in public communication.

Streszczenie

Realizacja konstytucyjnego prawa obywateli do wiedzy o działalności organów władzy publicznej z perspektywy wybranych aspektów ochrony informacji niejawnych

Realizacja konstytucyjnego prawa obywateli do uzyskiwania informacji o działalności organów państwa, szczególnie w sferze jego bezpieczeństwa, nastrocza wiele problemów będących następstwem obowiązywania Ustawy o ochronie informacji niejawnych. Przyjęte w niej rozwiązania, promując prawa wspólnoty kosztem praw jednostek, stwarzają ryzyko jej instrumentalnego wykorzystania w celach politycznym. Redukcji powyższego zagrożenia, może sprzyjać postulowana przez autora artykułu niewielka korekta obowiązujących w tym zakresie norm, obejmująca zwiększenie zewnętrznego nadzoru nad oznaczaniem materiałów z informacjami przewidzianymi do ochrony, która nie podważa jednocześnie podstaw, dopuszczalnych w prawie międzynarodowym i w Konstytucji Rzeczypospolitej, a wymaganych z perspektywy bezpieczeństwa państwa, ograniczeń jawności działalności publicznej. W konkluzji rozważań stwierdzono, że trudno w tym obszarze o optymistyczne prognozy, z uwagi na obserwowaną niechęć elit rządzących do dobrowolnego pozbycia się narzędzi gwarantujących im przewagę w komunikowaniu publicznym.

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The protection of information about the possessed resources supporting national security is the key issue for each state. Protection of information, systematically arranged and implemented in an appropriate manner, is not only capital but also an element of subjective advantage in international relations².

² S. Topolewski, *System ochrony informacji niejawnych*, [in:] *Ochrona informacji niejawnych. Teoria i praktyka*, eds. M. Kubiak, S. Topolewski, Siedlce 2013, pp. 25–35; P. Pruszyński, *Ochrona informacji niejawnych trwałym elementem w budowaniu bezpieczeństwa państwa*, [in:] *Ochrona informacji niejawnych w zapewnieniu bezpieczeństwa narodowego. Przeszłość, terażniejszość i przyszłość*, ed. J. Sobczak, Katowice 2014, p. 69; J. Marszałek-Kawa, D. Plecka, *Dictionary of Political Knowledge*, Toruń 2019.

The consequence of the laws adopted in this respect is the restriction, permitted by the provisions of the Constitution of the Republic of Poland, of the freedoms and rights of individuals to obtain and disseminate information about the activities of public authorities, invoking state security and public order, protection of the environment, health, public morality or the freedoms and rights of others³. In this former area of restrictions, the primacy of community rights over the rights of individuals is emphasized by the Act on the Protection of Classified Information⁴. The Act gives the entities enforcing it a large margin of discretion in assigning appropriate classification markings to the information which consequently cannot be made public. This way, it is possible to conceal from the society, in an effective and long-term manner, offenses committed by the ruling elites that could otherwise threaten the stability of the official authority. This formal and legal privilege is followed by a concern about the objectivity of state authorities that may use the aforementioned Act, practically uncontrolled by external and independent institutions, to achieve political goals by referring to the security of the community. The following deliberations focus on the analysis of the risks arising from the above-mentioned premises related to the excessive restriction of the constitutional principle of transparency and the subjective rights of individuals, as well as define proposed measures increasing external supervision in this regard, hindering instrumental activities of executive authorities⁵.

Transparency, from the perspective of law and administrative sciences, is inextricably linked with the consequences of actions, motivated by legal norms, of people who, by regulating citizens' access to information, determine the processes of implementing the values promoted by the legislature. Depending on their objectives, such actions may be considered positive, if they involve the intention of transparency, openness, and honesty, or negative when they entail masking, preventing access, manipulating transparency and pub-

³ Art. 31(3) of the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. 1997, item 483, as amend.); I. Lipowicz, *Konstytucyjne prawo do informacji a wolność jednostek*, [in:] *Wolność informacji i jej granice*, ed. G. Szpor, Katowice 1997, pp. 12–13.

⁴ Act of 5 August 2010 on the Protection of Classified Information (*Ustawa o ochronie informacji niejawnych*) (Dz.U. 2019, item 742, consolidated text).

⁵ S. Zalewski, *Dylematy ochrony informacji niejawnych*, Katowice 2009, pp. 20–21; P. Żarkowski, *Rola państwa w zapewnieniu bezpieczeństwa i ochrony informacji*, [in:] *Oblicza informacji niejawnych*, eds. M. Kubiak, S. Topolewski, Siedlce-Warsaw 2015, pp. 71–73.

licity. According to Professor Aniela Dylus, this area of axiological disputes between the law and the values is defined by three types of conflicts. The first one is between equal rights of different entities. The second one is between the different rights of different legal entities. And the third one, which prevails from the perspective of these scientific considerations, is “between the rights of legal entities and certain obligations of state authorities obliged to guarantee citizens their rights”⁶. In respect to the latter type of conflict, we can point to the inevitable and unsolvable disputes between the freedom of speech, which allows for obtaining and disseminating information about the activities of public authorities, and the state’s obligation to guarantee public safety and order. In this hardly definable area of constant debate, there is a risk of violation of fundamental rights of individuals and abuse of power motivated by particular interests, justified by the discretionarily assessed state of security of the community or by the arbitrarily defined *raison d’état*.

In a democratic rule of law, citizens’ access to information about the activities of the state may be limited on several levels: complete and unconditional, complete and conditional, incomplete and unconditional, incomplete and conditional, and the complete lack of such access⁷. The fundamental principle, however, is the transparency of public life, which is related to the right of citizens to obtain information about the activities of public authorities, emphasized in Article 61 of the Polish Constitution⁸. It can be limited only by the law when it is necessary for the security of the state or public order, or the protection of the environment, health, and public morality, or the freedom and rights of other people⁹. Therefore, such a limitation must be directly correlated with existential and reasonably assessed threats to the duration of the community and with the possibility of its stable and unhindered development. In the case of limiting the knowledge about the activities of the state, the concept of *raison d’état* is invoked, reminding of the superiority of

⁶ A. Dylus, *Aksjologiczne podstawy jawności i jej ograniczenia. Perspektywa etyki politycznej*, [in:] *Jawność i jej ograniczenia*, ed. G. Szpor, vol. II, *Podstawy aksjologiczne*, ed. Z. Cieślak, Warsaw 2013, p. 22.

⁷ Z. Cieślak, *Aksjologiczne podstawy jawności. Perspektywa etyki politycznej*, [in:] *Jawność i jej ograniczenia*, vol. II, ed. G. Szpor, *Podstawy aksjologiczne*, ed. Z. Cieślak, Warsaw 2013, p. 9.

⁸ Art. 61 of the Constitution of the Republic of Poland.

⁹ Art. 31(3) of the Constitution of the Republic of Poland.

the state over the particularisms of groups and individuals, and the requirement to protect the basic values forming its foundation is emphasized¹⁰. It should be a synthesis of the two values underlying the rights of the individual and the rights of the community, consolidating the society, indicating the necessity to limit the transparency in the case of occurrence of certain conditions related to public security¹¹. In practice, a reference to *raison d'état* often is abused by the ruling elites for their political purposes and it is a problem that requires constant public attention¹².

The implementation of the constitutional right of citizens to obtain information about the activities of state authorities, in particular in the sphere of public safety, causes many problems resulting from the application of the Act on the Protection of Classified Information. The Act establishes flexible links between the security classification markings (levels) and potential harm to the state's security or interests. And so: the "top secret" marking (level) indicates unauthorized disclosure that could cause exceptionally grave prejudice to the Republic of Poland, the "secret" marking – serious harm, and the "confidential" marking – harm. The last marking, "restricted", defines the areas of protection of information the unauthorized disclosure of which could have a detrimental effect on the performance by public authorities or other organizational units of tasks in the area of national defense, foreign policy, public security, observance of civil rights and freedoms, justice, or economic interests of the Republic of Poland¹³. Information provided by other countries or international organizations (NATO, EU, others) based on relevant agreements is marked with Polish equivalents of classification markings.

Security classification level is assigned by a person authorized to sign or mark a document based on an assessment of potential damage and the risk of its occurrence. The latter combines the probability of occurrence of an unde-

¹⁰ C. Maj, *Teoretyczne aspekty racji stanu*, [in:] *Racja stanu, historia, teoria, współczesność*, ed. E. Olszewski, Lublin 1989, p. 31; A. Rzegocki, *Racja stanu a polska tradycja myślenia o polityce*, Kraków 2008, pp. 219–331.

¹¹ R. Zapart, *Polityka a ochrona informacji niejawnych. W poszukiwaniu nadrzędnych wartości w państwie w obliczu zewnętrznego zagrożenia*, [in:] *Informacje prawnie chronione – wybrane zagadnienia*, ed. S. Topolewski, Siedlce 2019, pp. 194–195.

¹² A. Dylus, op.cit., p. 48.

¹³ Art. 5 of the Act on the Protection of Classified Information; I. Stankowska, *Ustawa o ochronie informacji niejawnych*, Warsaw 2014, pp. 32–38.

sirable event and its consequences for the security of the state or its interests. Optionally, such a person may not only classify the document but also mark it appropriately, define the time limit (date or event) for maintaining its protection or adjust the level of such protection. Change of classification or declassification is possible only upon written consent of the person who has assigned it, or their superior, and only if the conditions for protection cease to exist. At least once every five years, similarly as in the institutions of the European Union, the legislature obliges processors of classified information to review it to verify whether the conditions for its protection still exist. Data that may lead to the identification of persons performing operational and reconnaissance activities under the law and supporting Polish services in this area, as well as information obtained from other countries or international organizations, if the conditions for its disclosure provide so, is protected indefinitely¹⁴. As regards the review of decisions on the classification of information, the legislature gives supervisory and decision-making powers to the Internal Security Agency (ABW), and, if the latter is a party concerned, to the Prime Minister (PRM)¹⁵. Other external audit institutions (including the Supreme Audit Office and parliamentary committees) and the judiciary are excluded. Since its enactment in 2010, the current legislation has raised serious interpretation doubts resulting from its vague wording. These concerned, for example, a departure from the previously applicable annex facilitating the marking of information requiring protection. Excessive flexibility of the newly adopted measures has been criticized, pointing to a persistent problem related to a certain freedom of interpretation and the lack of a transparent protection mechanism¹⁶. In this context, arguments have been raised that the lack of unambiguously defined rules in this respect may, on the one hand, lead to an excessively broad declassification, which might consequently endanger the state security and, in the event of classification not justified by the circumstances, limit the constitutional principle of transparency and the

¹⁴ Article 7 of the Act on the Protection of Classified Information.

¹⁵ S. Hoc, *Ustawa o ochronie informacji niejawnych. Komentarz*, Warsaw 2010, pp. 98–100.

¹⁶ I. Stankowska, *op.cit.*, p. 37; A. Smykła, *Zmiany w przepisach dotyczących ogólnych zasad systemu oraz klasyfikowania informacji niejawnych*, *Ochrona informacji niejawnych. Poradnik praktyczny dla osób i instytucji przetwarzających informacje niejawne*, ed. Z. Nawrocki, Emów 2011, pp. 118–121.

civil rights and freedoms¹⁷. However, the legislature has not taken the above arguments into account, leaving a great deal of flexibility in the application of these provisions.

In the light of the applicable regulations, access to materials classified at appropriate levels is associated with the fulfillment of certain conditions, including: a guarantee of secrecy confirmed by an appropriate document (security clearance from “confidential” level upwards or a certificate in the case of a “restricted” level), holding a specific position, and performing necessary activities related to this position¹⁸. Thus, even where the legitimate public interest is invoked, for example by journalists, it is not possible to disclose information until the grounds for the original decisions on its protection cease to exist. The rights of the entities responsible for these decisions are related to the process of estimating the risk of occurrence of possible negative consequences of specific interpretations being the basis for the classification. Apart from the general wording of the provisions of the Code of Administrative Procedure, the generally applicable legal norms do not obligate state authorities to use specific methods of substantive assessment of the premises, which makes the external control of institutions responsible for civil rights and transparency of public administration practically impossible. Since the legislature leaves such a large scope of arbitrariness in the assessment of the need to protect information, there is room for possible abuses from the perspective of the constitutional principle of transparency and public communication. The use of this formal and legal advantage by the state authorities responsible for the protection of classified information may have consequences that are destructive to a democratic state and may result in the abandonment by individuals interested in public affairs, including journalists, of the will to disclose information, be it the most inconvenient for the ruling elites¹⁹. The probability of occurrence of such situations is increased by the lack of access to the resources protected by the Act on the Protection of Classified Information and the lack of possibility to challenge the decisions on classification or refusing declassification before an arbitrator independent of the executive

¹⁷ Art. 61 of the Constitution of the Republic of Poland.

¹⁸ Art. 6(1) of the Act on the protection of classified information.

¹⁹ R. Zapart, *Niebezpieczeństwo politycznego wykorzystania ustawodawstwa o ochronie informacji niejawnych*, “Polityka i Społeczeństwo” 2019, No. 3(17), p. 128.

power. As a result, in the case of matters related to public authorities, it is in their particular interest not to introduce civic supervision, not only over an individual classified document but also over periodic, legally required, cyclical review of classified materials. Each disclosure that is inconvenient from their perspective may be of fundamental political importance for the future of the ruling elites. The legal measures currently in force allow the citizens to hold them accountable only in ethical and moral terms. It is worth emphasizing, however, that in cases of an objectified threat to the state security, this does not exclude a cross-party agreement for indefinite or long-term protection of information.

One of the measures that could contribute to limiting the instrumental use of the Act on the Protection of Classified Information for purposes not related to real threats to the state would be its amendment, enabling an independent and external body associated with the legislative authority to finally assess the legitimacy of maintaining the relevant classification levels. A respective motion could be considered by the Parliamentary Committee for Special Services, which, in the light of the currently applicable measures, gives opinions on draft normative acts regulating the activities of secret services subordinate to the executive power, gives an opinion on the direction of their activities, and reviews annual reports, including those concerning suspected irregularities in their activities and violations of the law, and the provisions of the Act on the Protection of Classified Information²⁰. However, in the context of the latter, the Committee does not have a statutory delegation to irrevocably resolve the conflict between the two values: state security and the constitutional principle of transparency, which remains the domain of state authorities, that is the executive. Imposing an excessive burden on it as well as the domination of members of the ruling majority in it would be a certain disadvantage, although its decisions could concern exhaustively listed issues and be taken by a qualified majority, taking into account the stance of the parliamentary opposition, and thus the responsibility for the consequences of the decision made. Each of the solutions, also relating to the protection of classified information required for state security, strengthens the

²⁰ Annex to the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – Regulations of the Sejm of the Republic of Poland (M.P. 1998 No. 44, item 618 as amended).

constitutional principle of transparency in public life and the balance between the rights of the community and the rights of individuals, as well as the civic control over public authorities, which is desirable in a democratic rule of law.

Transparency in a democratic rule of law is of fundamental importance for the political culture, for which it is the guardian of decency in public life and of transparency of the legislative and executive powers, as well as a barrier to their possible abuses and a tool supporting the disclosure of undesirable social processes. The implementation of the constitutional right of citizens to obtain information about the activities of state authorities, in particular, in the sphere of state security, causes many problems resulting from the application of the Act on the Protection of Classified Information. The limitations of disclosure imposed by its provisions, including the lack of objective external control and judicial contestability of decisions of state authorities, pose a risk of its instrumental use by the ruling elites for purposes serving their particular political interests. However, in a matter so complex and important for the state, it is difficult not to accept the primacy of community rights over individual rights, which does not mean that it is not worth focusing on solutions reducing risks in this respect. The appropriate balancing of the aforementioned powers on the normative level may contribute to increasing citizens' trust in the ruling elites and reduce the risk of politically determined actions in this area. Obtaining a consensus on the above-mentioned proposal to increase the powers of the legislative authority is highly problematic due to the lack of interest of the executive in supporting projects limiting its current statutory privileges.

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