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National security as a legitimate excuse to human rights restrictions

ABSTRACT

Subject of research: In a modern political discourse the idea of state security is strictly connected with human rights protection. This relation must inevitably lead to the conflict between the prerogatives of an individual and those of the state. Modern democratic states are considered to guarantee the security of their citizens. In the course of the evolution of the theory and practice of the politics this paradigm has often been modified. In a classic debate on the relations between human rights and the state security the question of the limitations of a state's intervention in the name of its internal security arises. At the global level the inclination of improvement and reinforcement of national security and control at the cost of liberties of citizens can be observed.

Purpose of the research: The issue has been analysed to indicate controversies between the prerogatives of an individual and those concerning the state.

Methods: The work is based on normative considerations and exegesis of legal resources and Strasburg rulings. The intermediate stage of the research involves doctrinal and axiological analysis.

Keywords: state security, human rights, limitation clause

1. Introduction

While analyzing the subject issue it seems important to realize some ambiguity concerning the scope of the concepts used in the title. From a linguistic point of view, the term restriction is synonymous with the

word "limitation", therefore, as R. Mizerski indicates, might well be used in with reference to any forms of human rights limitations (Gronowska, Jasudowicz, Balcerzak, Mizerski, 2010, p. 234). Similarly, the terms "national security (of a nation)" and "the state security (of a state)" are considered equivalent, although, to be accurate, they belong to different semantic categories (Rajchel, 2010, p. 135-148)[1]. However, for practical purposes, they can be both considered synonymous. Such a tendency is noticeable in Polish legal nomenclature, as S. Kozieł and others observe, and both terms are interchangeable in the Constitution (2011, p. 20). Both semantic categories are associated with protection of the public, common good. Having taken the terminology of international legal documents into account, for purposes of this article I use both terms synonymously.

In a modern political discourse national security is strictly connected with human rights protection which frequently results in discord between prerogatives of the individuals and those of a state. Democratic states are considered the guarantors of the security of their citizens. They safeguard the people from external and internal threats, and protect them from chaos and anarchy.

In course of the evolution of political theory and practice the abovementioned paradigm has been frequently altered. T. Hobbes assumed that natural freedom of a human being may be subject of limitations specified by state law. He wrote that the aim of establishing law is nothing else but limitations, without which peace would not exist. And the law was to limit the natural rights of people to ban them from hurting each other and to make them act together to defend themselves against enemies. (Hobbes, pub. 2010, p. 70). If no authority is established or it is not strong enough to safeguard the security, an individual will rely on his own a skills to defend himself against the others, and will be rightful in doing so. (2010, p. 88). Consequently, the core purpose of a state's authorities is the state sovereignty and safeguard the security of its people.

A totally different view was presented by J. Locke (pub. 2010, p 93) who claimed that' whoever has the legislative or supreme power of any commonwealth, is bound (…) to employ the force of the community at

[1] J. Rajchel defines 'national security' as a broader term, comprising a security of a state and internal/public security.

home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.' Inspired by the English Revolution the philosopher was a declared supporter of the limitation of a state sovereignty in favour of natural rights of each individual.

Almost 100 years later S. Staszic recognized the national defence a guarantor of civil rights and liberties. Therefore, the national defence must not even bear a slight resemblance to violating this freedom. As he observed in "A warning to Poland" (pub. 2010),'defence which overcomes the power of the whole nation , becomes the oppression of the nation and to sustain it shall not tolerate the freedom of man ,and deprives him of his personal property and demesne; these being violated there is nothing more left to defend; such defence, I say, is to become no other tool but this of violence, and the defence of tyranny'.

This long polemics concerning a search for the counterpoise between public security and public rights has inspired modern political legal and philosophical concepts. In a classic debate on the relations between human rights and national security the question of the limitations of a state's intervention in the name of its internal security arises. At a global level the inclination to reinforce national security and control at the cost of liberties of citizens can be observed. The aforementioned limitations must be precisely defined because, as Freeman writes, these provisions set the standards of good governance and demanding too much within the field of human rights protection may result in difficulty to counterpoint the criticism, which might diminish the power of their appeal. (2007, p.19). These rights should therefore equipoise other values. A presumption that they are more fundamental compared to other values would be dogmatizing them.

2. National security in the Constitution of the Republic of Poland and international law

In Polish legal system freedoms and rights of citizens may be subject to limitations, under the art. 31, par. 3 of the Constitution, which states that any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state

for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations must not infract the essence of the freedoms and rights. Broad construction is not applied to this provision, which derives not only from the very nature of this article but also reflects the intention of the legislator. The results of the limitation shall be proportional to the burden they cause to an individual.

The assertion has been legitimized by the Constitutional Tribunal which stated that the legislator may not impose such limitations that exceed a certain degree of onerousness in particular if they infringe the proportion between the degree of individual right infringement and the weight of the public interest, which is expected to be protected in this way. In these terms, prohibition of excessive interference guarantees the protection of individual rights and liberties (the ruling of 26. 04 1995, sign. K11/94, OTK 1995, p. 1 , sec. 12), yet the criteria of 'excessiveness' must be proportional because of the character of particular rights and liberties[2]. Additionally, the discussed provision particularly emphasises the criterion of "necessity in a democratic State", which signifies that each limitation on individual rights or freedoms must be, primarily, reviewed to meet the requirements of being 'necessary (The judgement of 12.01.2000. Sign: P 11/98K, OTK ZU 2000, no 1, sec 3); as to whether the same aim (effect) could have been achieved by other means, less burdensome for the citizen and, ipso facto, interfering less (more superficially) with their rights and freedoms.

The concept of national security as a necessary aim that allows the limitation of the aforementioned rights seems justified without question. As the Tribunal stated in the ruling of 25 November 2003, care for the common good of citizens not only indicates the need for citizens to bear burdens necessary to safeguard State security when independence is threatened, but also during times of peace. Safeguarding of the independence and integrity of the territory of the Republic of Poland also constitutes a justification for limiting constitutional rights and freedoms. (Judgement TK of 25.11.2003. Sign: K 37/02, OTK-A 2003, no 9, sec. 96).

[2] The principle of proportionality has been mentioned before in ruling of C. T. of 26. 01. 1993, U 10/92, OTK 1993, part. I, sec. 2.

The limitations associated with the security of the State are specified in the Constitution in art. 45 par. 2 (exceptions to the public nature of hearings), in art. 53, par. 5 (limitations to the freedom to publicly express religion) and art. 61 par. 3 (the limitation upon the right to obtain information on the activities of organs of public authority as well as persons discharging public functions). The aforementioned provisions do not disregard the principle of proportionality at least within the scope the their legislative contents do not overlap.

Similar concepts concerning the limitations to public rights were used in the International Covenant on Civil and Political Rights (ICCPR) and the Convention for the Protection of Human Rights and Fundamental Freedoms. The security of the State justifies the infringement of the following rights declared by ICCPR:

- Freedom of movement and to choose his residence, given to everyone lawfully within the territory of a State (art. 12 par. 3),
- The right of an alien lawfully in the territory of a State Party to the Covenant to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority (art. 13),
- The right of the press or the public to observe all or part of a trial (art 14, par. 1)
- The right to freedom of thought, conscience and religion (art 18 par 3),
- The right to hold opinions without interference (art. 19 par.2),
- The right of peaceful assembly (art. 21),
- The right to freedom of association with others (art 22 par. 2)

The limitations stated in the Covenant are quite general, which makes them blanket rules and enables legislators to apply them to different legislative content (Młynarska, Skotnicki, 1996, p. 107). To interpret limitation clauses The Economic and Social Council of the United Nations ratified on 28 September 1984 the document so called the Siracusa Principles. The principle no. 29 states that "national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force" (*The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* Doc E/CN.4/1985/4).

However, national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. The principle no. 32 underlines the risk of abuse when using the idea of national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against people. It states that the systematic violation of human rights undermines true national security and may jeopardize international peace and security, and a state responsible for such violation shall not invoke national security as a justification for such measures. Additionally, as S. Flacks points ((2011, 863-864), it is a state's responsibility to justify the act of the infringement of principles guaranteed under the Pact.

K. Wojtyczek remarks that the concept of national security within the interpretation of the Constitution is broader than the one shown within the Siracusa Principles (1999, p. 183). He observes that the security of the State may be invoked to justify the limitations upon human rights to protect the state's sovereignty and territorial integrity, even if the threat is only potential. It is quite remarkable that the Constitution of the Republic of Poland has not only adopted most of regulations of the international law concerning human rights , but it also comprises the provisions which standards exceed these of international agreements.

In ECHR the security of a state as a legitimate aim of the limitations appears in the following articles: art. 8, par. 2 (right to respect for private and family life), art. 10 par. 2 (freedom of expression) and art. 11, par. 2 (freedom of assembly and association). The last of the aforementioned articles additionally states it shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State[3]. According to

[3] Art. 11 of Human Rights Convention:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration

B. Latos (2008, p. 179) the literal meaning of the regulation implies that it is a specific, dual restriction which can be applied irrespective of the limitation proper.

A lot of controversy have arisen in European countries around the Prüm Treaty, signed on 27 May 2005 by Belgium, Germany, Spain, France, Luxemburg, Holland and Austria. The treaty establishes the rules concerning cross-border cooperation, particularly in combating terrorism and cross-border crime http://register.consilium.europa.eu/pdf/en/05/st10/st10900. en05.pdf). In 2007 Home Affairs Council ratified the decision of the Council on stepping up cross-border cooperation ,which implements some of the Treaty's provisions into the European legal framework[4].

The aforementioned provisions enable the exchanges of information with regard to: automated access to DNA profiles, dactyloscopic data and certain national vehicle registration data (Czapliński, 2006, p. 191-197; Graś, 2006). The convention authorises the transmission of personal data, of an individual being potentially a menace, because of major events and for the prevention of terrorist offences. The cooperation also contains provisions for the deployment of armed air marshals, i. e. police officers on flights between signatory states for maintaining security on board of aircrafts. The provisions of the treaty and the circumstances in which the document was created (Balzacq, Carrera, 2006, p. 115-136, in: Grzelak, 2009, p. 29) have been criticized by scholars as well as non-government human rights organisations.

3. Jurisdiction within the field of national security

The Strasbourg's jurisprudence concerning limitation clauses has been analysed by T. Jasudowicz, who remarks that the security of a Stare is invoked by respondent member states and referred to by the Tribunal,

[4] Especially the decision: Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. (OJ L 210 of 6.8.2008) and Council Decision 2008/616/JHA of 23 June 2008on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime (OJ L 210/12 of 6.8.2008).

alongside with a threat to territorial integrity and political sovereignty of a state, a safeguard of democratic system, a State secret, the operations to combat terrorism, political extremism or propaganda within the army or separatist propaganda, and espionage; also with reference to the protection of strictly confidential undertakings of civil service or military forces due to a particular armament project or military discipline, etc.(2012, p. 117).

The security of a state as a legitimate aim adopted in limitation clause, together with public security and territorial integrity of a state has been exposed for the jurisdiction since the Klass case of 1978. (*Klass and others v. Federal Republic of Germany*, claim no. 5029/71, ruling ECHR of 6. 09. 1978). The case involved defining the concept of the victim of a violation of the rights set forth in the Convention, and the grounds on which special measures, violating the right of privacy, can be applied by the empowered services (Rzepliński, 1995, p. 11–146). The Constitutional Court, as well as the Constitutional Commission beforehand, indicated that democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction (sec. 48). The Contracting States enjoy a certain discretion, which is not unlimited, though. The Court acknowledged being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it (sec. 49). In consequence, the Court recognized surveillance an admissible measures to safeguard the national security (sec. 59). At the same time the Court accentuated that it is in principle desirable to establish a supervisory body,(for instance judicial control) to prevent abuse. The Court took the same position in its judgement in the Chahal v. the United Kingdom case, recognising that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. (application no. 22414/93, ruling ECHR of 15.11. 1996, sec. 131). The Court affirmed that national security does not unable the right guaranteed in art. 3 of the ECHR in case of deportation or extradition.

However, the Court has not always recognized the postulate of the State security risk as justifying for a state's intervention. T. Jasudowicz (2012, p. 117) cites the case of Liu v. Russia of 2011. In section 87 of the judgement the Court remarked that even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require the measures affecting fundamental human rights to be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. (application no 42086, ruling ECHR of 26 07 2011).

As the case of *Al-Nashif v Bulgaria* exemplifies (application no 50963/99, ruling ECHR of 20.06.2002, sec. 123 and 124), the individual must be able to challenge the executive's assertion even where national security is at stake. Failing such safeguards, the police or other State authorities would be able to encroach arbitrarily on rights protected by the Convention.

National security has been the subject matter in the following cases: Hadjianastassiou v Greece (App No 12945/87, judgement of 16.12.1992), Observer (Observer and Guardian v. The United Kingdom, App no 13585/88, ruling ECHR of 26.11.1991.), or Vereiniging Weekblad Bluf (Vereniging Weekblad Bluf v. The Netherlands, App no 16616/90, ruling ECHR of 9.02.1995). The aforementioned cases are analysed by B. Latos, who concludes that State authorities must apply a vast range of measures to combat espionage and foreign intelligence since they may pose a threat to the stability of the State. The disclosure of information concerning the way national intelligence service operates may result in its inefficiency or even disorganisation. In confrontation with conventional law the necessity to combat espionage (acts) against national and public security or national integrity is often given priority (2008, p. 182-183).

National security was also invoked in the case of the claim by the relatives of the victims of the Katyn massacre (*Janowiec and Others v. Russia*, App no 55508/07 and 29520/09, ruling ECHR of 16.4.2012) against the Russian authorities that neglected proper investigations into the mass murders in Katyn. The applicants complained about degrading treatment on the part of the Russian courts that neglected the very fact of Katyn massacre in their statements. The investigations by the Chief Military Prosecutor's Office started in 1990 and discontinued in 2004. The Russian

Government refused to provide a copy of the decision to discontinue the investigation (of 21 September 2004) upon the summon of the Court on the grounds that transferring classified information to a foreign state or international organisation might pose a threat to the security of the State. The Russian government referred to Article 38 of the Convention[5] arguing that it did not prohibit them from withholding information which could impair State security (sec. 93). The Court did not acknowledge the argument since the decision thus related to a historical event, with most of protagonists being already dead, and it could not have touched upon any current police surveillance operations or activities (sec. 108).

The Court declined to apprehend the concern that transparent investigation into the crime committed by the previous totalitarian regime might pose a threat to national security of the present democratic state of Russia, especially having considered the fact that the Katyn atrocity had been recognised by the highest level political authorities an act by the soviet government. However, the Tribunal approved the notion that certain security considerations could have been accommodated with appropriate procedural arrangements, including a restricted access to the document in question under Rule 33 of the Rules of Court[6] and, *in extremis*, the holding of a hearing behind closed doors (sec. 110.) It is noteworthy that at no point in the proceedings did the Russian Government explain the exact nature of the security concerns which required classification of the decision in question, and even the identity of the authority which made the decision on its classification was far from clear. The Court, for its part, was unable to discern any legitimate security considerations which could have justified suppression of information contained in that decision from

[5] Art. 38 of the ECHR:
The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

[6] Rule no 33:
2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice. (J. L. 1993, no 61, 284/1)

public scrutiny. In 2013 The Grand Chamber sustained its assessment as to the absence of its temporal jurisdiction in respect of the procedural limb of Article 2 of the Convention to the merits of the case and the violation of article 3 of the Convention with regard to the majority of the applicants. It also stated that the Russian authorities failed to apply proportionality test concerning the alleged necessity to keep the information in possession of the Federal Security Service secret, and the public interest in a transparent investigation. (the Grand Chamber judgment of 21 10 2013 sec. 150). The Court held unanimously that Russia had failed to comply with its obligations under Article 38 of the Convention.

National security and State secrecy requirements might not be the excuses to fail the obligation to act in compliance with international law. The International Criminal Tribunal for the former Yugoslavia took a similar view in the case against Tihomir Blaskic. The Tribunal dismissed the claim by Croatia which invoked national security as the basis for the refusal to provide with certain evidence of military character, concluding that such a position would prevent the Tribunal from "fulfilling its Security Council-given mandate to effectively prosecute persons responsible for serious violations of international humanitarian law and thus, defeat its essential object and purpose". (*The Prosecutor v. Tihomir Blaškić,* Appeals Chamber judgment on the request of the Republic of Croatia for review of the decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR, 29.10.1997).

In the case of Janowiec and others v. Russia the European Court of Human Right in Strasburg was one of many international institutions that was unable to investigate the Katyn atrocity due to the claim of State security.

4. Conclusions

Globally, the paradigm of national security has contributed to the affirmation of a modern state and inspired a new concept in politics that aims at maximizing the security of a state at the expense of the liberties of an individual. It is possible due to the international cooperation, especially within the fields of combating terrorism and transnational organized crime. As a result, national security has gained the status of

a legitimate aim of limitation clauses infringing human rights. It is closely associated with the threat of State integrity, and consequently, the security of its people. It generates threats to the human rights and freedoms, and enforces new procedures and demands for State authorities to prevent serious risks. In this respect both impotence of a state that might result in a greater scale and severity of the threat, and excessive intervention, which might lead to violation of the human rights, are not advisable.

The necessity to safeguard the security of people has been also discussed internationally. The need to combating terrorism on an international scale enforced the excessive interference into the citizens privacy (Wieruszewski, 2008, p 20-21). National security has become the value *in se*, requiring a coherent legislative reference. The application of clauses requires to fulfil the following requirements: the adherence to law within the measures applied by a state's authorities, and the necessity of the limitations from the position of a democratic society.

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