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Special services and human rights – selected issues in the field of service management

Abstract
This article is devoted to the issue of Human Rights in Special Services. The intention of the author is to bring closer the need for control over the services, especially in the context of observing human rights as a universal paradigm of individual freedom as well as other rights, which are related to every interference of power in the personal sphere of human rights. The material analyzed in this context the problem of management of special services and the ongoing monitoring of their observance of human rights. The result of the analysis is conclusions regarding the reactivation of issues related to human rights, especially in the training process of officers of the services.

Keywords: special Services, management, coordination, Human Rights, crime, terrorism, intelligence, political control, personal data.

Both issues related to the operation of special services as well as the broadly understood human rights system have already been repeatedly the subject of scientific research and public debate.[1] In spite of numerous publications, there is a relatively

[1] E.g. P.Chodak, Zarządzanie w służbach specjalnych – Nadzór, kontrola i koordynacja realizowana przez Koordynatora Służb Specjalnych, Journal of Modern Science, 2/29.2016, s. 283-306; M. Kołodziejczyk, Prawa człowieka vs Bezpieczeństwo w XXI. Trudne dylematy. Zeszyty Naukowe WSFiP Nr 1/2014, s. 36-60; Służby specjalne, policyjne i skarbowe a prawa człowieka – standardy konstytucyjne i międzynarodowe oraz kierunki niezbędnych zmian legislacyjnych, [w:] pod red. B. Grabowska-Moroz, A. Petryka, Helsińska Fundacja Praw Człowieka, Warszawa maj 2016; D. Laskowski, Prawne podstawy funkcjonowania służb specjalnych z perspektywy potrzeb obronnych państwa, Obronność. Zeszyty naukowe 2(10) 2014, s. 59-75; M. Bożek, Sejmowa kontrola działalności służb specjalnych i jej ograniczenia wynikające z ustaw kompetencyjnych. Zarys problemu na tle uwarunkowań normatywnych, Studia IuridicaLublinensia 20, 2013, s. 47-68.

underdeveloped number of scientific and expert studies regarding the study of human rights in these specific institutions whose task is generally to protect order and legal order. This is significant not only because of the importance of a broad legal and social category that creates human rights, but above all, the specificity of the services. These services operate not only in a way that is significantly different from other state institutions, but are subject to permanent changes, both in formal and legal way regarding the organizational, personnel and task framework, and above all the philosophy of operation as well as the methods used by them.

They are distinguished from other institutions of the state, not only by the nature of the tasks performed for the purpose, which is worth recalling again: ensuring security in the national and external dimension, but above all, because ofthe hidden way of work, which make that their work effects as well as methods of action are special. It is this quality that determines that special services should be subject to specific forms of control both by state authorities and non-governmental organizations, due to legal forms of action that directly and directly undermine human rights and freedoms.

Currently, when observing the activities of the services in the context of spurious information that reaches the public space and confronting it with the definitional meaning of the term human rights, one should consider how the observance of human rights is understood by their officers. Human rights are, of course, one of the basic concepts used in legal transactions. In the dictionary sense law means: "freedom, means of protection and benefits, which, all people should be able to demand from the society, in accordance with currently accepted freedoms"[2]. Here, the moral right to demand of respect for human rights is emphasized.here.According to L. Henkin, human rights are the rights of individuals living in society, which is supposed to oblige them to realize claims arising from these rights. They are supposed to haveuniversal character and belong to all people living in every society. They are also of a basic nature and do not need to be substantiated by reference to any other rights. This does not mean, however, that human rights are absolute, they can be subject to restrictions, but only in exceptional predetermined cases and according to specific procedures and not at any discretion[3].

[2] Encyclopedia of Public International Law, vol. 8, Human Rights and the Individual in International Law. International Econonic Relations, Amsterdam-New York-Oxford 1985 North-Holland, s. 268.

[3] L. Henkin, The age of rights, New York 1990, Columbia University Press, 2-5.

Their basic character in accordance with the material criterion determine that fundamental rights are the most important from the point of view of the interests of citizens and the state, necessary to guarantee other civil rights regarding the basic areas of the individual's social life as a person and citizen. Human rights are, therefore, a minimum of the rights that an individual is entitled to, a minimum without which he would not be able to exercise other rights. They are also fundamental because the state, while striving to achieve various socially important goals, can't omit these rights[4].

Human rights regulate the relations between an individual and the state, its organs and officers exercising authority at various levels[5]. This is called a vertical impact of these laws. There is a dispute over the horizontal operation of human rights – that is, whether human rights are also directly applicable in relations between people. The concept of horizontal action of human rights is recognized and accepted in many western countries. In Polish case-law, however, it has not found a greater reflection[6].

In the context of operation of special services, their activities should be confronted with the basic functions of human rights. According to Osiatyński, human rights should fulfill three functions and all of them have a guarantee and protection character. The first function is to protect the freedom of the individual against its violation by the state, the second – the need to create a state the possibility of realizing the rights of the individual and the third – to protect the individual's rights and freedoms from violation by others[7]. Therefore, when talking about human rights in connection with the activities of special services, the first of these functions should be considered. When discussing it, one should state that human rights play the role of a shield which role is to protect the individual, and especially his/her freedom, from the state. The essence of the state is to exercise power, regardless of whether it is just power for power (person or group), or is it to implement such tasks as ensuring internal and external security of the state, or realizing the common good or achieving other goals organized by the state. State, fulfilling its tasks, uses instruments it has chosen. Its essence is the possibility of applying coercion. Even the state counted among the most just countries, is always stronger than the individual obliged to obey law it issues..However, coercive

[4] W. Skrzydło, Polskie prawo konstytucyjne, Lublin 2003, p. 159.
[5] Ibidem p. 155.
[6] W. Osiatyński, Wprowadzenie do praw człowieka, www.hfhr.pl, access: 01.06.2018
[7] Ibidem.

power can be abused. When state acts as an arbitrator, there is the possibility of arbitrary decisions taken by its official.

What's more, state decisions are made by specific people who can be guided by their own interests, people who are hardly unaffected by their own subjective judgments, prejudices and emotions. They may misuse or abuse their power. That is why there is a need to protect the individual against the state and people in power on his behalf.

Protection of an individual against the danger of abuse of power can take many forms. One of them is limiting the ability of the state and officials to interfere in certain spheres of human life. The individual's freedom, such as, for example, personal freedom, freedom of conscience and religion, freedom of assembly, freedom of association, freedom of movement and freedom of management serve this purpose. Freedoms are a kind of shield that is supposed to protect the individual against the greater strength of the state. They protect the autonomy of the individual and prevent the state from interfering with the sphere of individual freedom. It should be added that human rights protect not only against unjust that an authority can inflict on the individual. They also protect the individual against violations of its autonomy by the authority pursuing its vision of the common good or public policy objectives[8].

As was mentioned earlier, the problem of human rights in the activities of special services has been repeatedly addressed. In the theory and practice of human rights the real issue of the so-called Mccain turned out to be a real milestone, when in 1988 in Gibraltar British SAS soldiers killed three members of the IRA suspected of preparing a bomb attack. This incident and subsequent judgment of the European Court of Human Rights, which stated violation of art. 2 of the European Convention on Human Rights, caused the need to seek new legal solutions in the field of special services, but also put a new question about the acceptable limits of justified state interference in the sphere of civil rights and freedoms. It seems that this judgment was important to the European legal culture and the activities of the services[9].

This judgment undoubtedly affected the activities of Polish police and special services and was reflected in the training programs of individual services. He was, for example, discussed at the officer's course of the Prison Service. It should be

[8] Ibidem

[9] A. Rzepliński, Wyroki Europejskiego Trybunału Praw Człowieka w Strasburgu. Sprawa Mccan i inni przeciwko Zjednoczonemu Królestwu. Wyrok – z dnia 27 września 1995 r. from:www.kryminologia.ipsir.edu.pl/ access: 1.05.2018 r.

noted that during the creation of the foundations of the democratic Polish state after 1989 and system transformation (also regarding police and special services) to the issue of human rights in the context of service activities, the importance is high. On the other hand, as time passed, until the present day, the mutual relation of human rights to broadly understood security became almost universal – and thus treated without proper validity and often omitted at all.A good example of such a state of affairs has become the problem of supervision over special services in Poland. Its model and the legal provisions that constitute it, may be a factor hampering the full implementation of human rights. At the moment, this is not about deliberately defined actions of the state directed against this law, but about certain inconsistencies and deficiencies in the systemic model that may prove sufficient to cause damage to freedoms and civil rights.

There are currently 5 special services in Poland. In art. 11 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, the legislator introduced the subject definition of special services. Accordingto this provision, the special services are: the Internal Security Agency (ABW), the Foreign Intelligence Agency (AW), the Military Counterintelligence Service (SKW), the Military Intelligence Service (SWW) and the Central Anticorruption Bureau (CBA[10]). To co-ordinate the activities of these services, a constitutional body was established in the form of the Minister-Member of the Council of Ministers of the Coordinator of Special Services.

On November 18, the Prime Minister signed theRegulation regarding the detailed scope of activities of the Minister-Member of the Council of Ministers Mariusz Kaminski – Coordinator of Special Services (hereinafter the Regulation)[11]. Exercising supervision over special services is undoubtedly one of the most important administrative and factual tasks in the state. The manner of appointing the Minister-Coordinator itself does not raise any serious comments here, it seems that issued on the basis of art. 33 para. 1 point 1 and 2 of the Act of 8 August 1996 on the Council of Ministers, the Regulation meets formal and legal requirements[12]. However, large reservations should be made regarding the

[10] C.t.. Dz. U. 2002 r. nr 74, poz. 6776 – with later d.

[11] Dz. U. z 2015 r., poz. 1921, with later d,. changed then Rozporządzenie Prezesa Rady Ministrów z dnia 13 grudnia 2017 r. w sprawie szczegółowego zakresu działania Ministra-Członka Rady Ministrów Mariusza Kamińskiego – Koordynatora Służb Specjalnych; Dz. U. 2017, poz. 2332.

[12] C.t.Dz. U. z 2012 r. poz 392 and – 2015 poz. 1064.

pointing name and surname of the Minister-Coordinator for in the case of his dismissal from the office, the services will probably not be left without supervision, while for the full legal authorization of his successor, it will be necessary to develop a new regulation. The lack of such regulations alone may therefore pose a threat to civil rights and freedoms, as the competences of the previous Minister (of course, if the current model is left behind) must be transferred to another person. Therefore, this wording should be considered not very fortunate, especially in the case of a long period of legislation. This may give rise to specific legal consequences.

Irrespective of the above observation, it should also be noted that referred legal act is not complete and the Minister's competences were also specified in the previously mentioned Act on the Internal Security Agency and the Foreign Intelligence Agency, the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service[13] and the Act of 9 June 2006 on the Central Anticorruption Bureau[14]. In addition, the Minister Coordinator implements a package of tasks under the Act of 5 August 2010 on the protection of classified information. In the Polish legal system, such a division of competences does not constitute something special, while on such an elementary issue as the observance of human rights by state institutions, grouping in one legal act all of its competences would be desirable. Especially in a situation when it is not complete and does not contain even the explicit obligation to inform the Prime Minister and members of the Council of Ministers about the activity and actions of special services. Of course, it is difficult to claim that such an information obligation towards the Prime Minister is not met, but for the sake of transparency and mutual relations in the government administration, it should be directly expressed. Analyzing the contents of this legal act, it is impossible to get the impression that the Special Services Coordinator, in the scope of his duties, takes over the function of managing the services, not control and, as a rule, coordinating.This is evidenced by the wide range of its competences, which seems to go beyond institutional supervision and coordination. His tasks include: supervision and control over the activities of special services, coordination of services, support of the Council of Ministers in shaping the main directions of the government's policy regarding the operation of services – §2 of the Regulation.

[13] C.t. – Dz. U. z 2017 r. poz. 1978).

[14] C.t..Dz. U. z 2017 r., poz. 1993 with later d.

The activity of the Minister Coordinator on the basis of the Regulation referred above take on features of a specific exclusiveness, judging from the provisions concerning, for example, the issue of human rights in special services already addressed in this study. First of all, the legislator should be given the opportunity to reflect the existence of the problem of mutual relations between human rights and the activities of services in the text of the Regulation. According to §3.3. the tasks of the Minister Coordinator in the scope of control of the operation of special services include "analyzing and assessing the application by the special services of powers enabling interference in the rights and freedoms of man and citizen, in particular by virtue of the powers specified in art. 27-29 of the Act of 24 May 2002 on the Internal Security Agency and the Foreign Intelligence Agency, art. 31-33 of the Act of 9 June 2006 on the Military Counterintelligence Service and the Military Intelligence Service and art. 17-19 of the Act of June 9, 2006 on the Central Anticorruption Bureau.

The references of the Internal Security Agency and Intelligence Agency Acts, Military Counterintelligence Service and Military Intelligence Service as well as the Central Anti-Corruption Bureau referred to in the Regulation apply broadly to operational and intelligence activities carried out by special services. Activities are the most invasive forms of service activity and can realistically harm human rights. Their improper use (i.e. without proper political and judicial control) leads to a violation of human rights by a straight path.

Therefore, the application of special supervision by the management body over the use of operational and intelligence activities is undoubtedly an element that should safeguard civil rights and freedoms – also human rights. On the other hand, it is a pity that this guarantee function was limited only to analysis and evaluation, and not to the level of control before applying these measures. They are carried out by other bodies, but the Minister Coordinator himself could perform an additional role in this system, for example in relation to the personal data protection system.

Based on §6.9 of the Regulation, the Minister has the right to read the information of the plenipotentiary for control of processing of personal data by the Central Anticorruption Bureau about the violation of the provisions of the Act of 9 June 2006 on the Central Anticorruption Bureau and the regulations on the protection of personal data. Additionally, pursuant to §6.10, read and express opinions on annual reports submitted by the plenipotentiary for control of processing of personal data by the Central Anticorruption Bureau.

The issue of personal data protection is the second, in addition to the above mentioned operational activities, which is subject to particular interest of the Minister of Coordinator due to the possibility of threat to civil rights and freedoms. Unfortunately, in this particular case, they are limited to only one service which is the Central Anticorruption Bureau. Existing legal regulations (Article 22 (1) of the Act on the Central Anti-Corruption Bureau) authorize the CBA to obtain information, including classified information, collect it, check it and process it. The consent expressed by the legislator extends also to sensitive personal data within the meaning of art. 27 sec. 1 of the Act of 29 August 1997 on the protection of personal data, without the knowledge and consent of the persons concerned (Article 22a paragraph 1 of the Act on the Central Anticorruption Bureau). The only condition in accordance with the principle of the purpose of personal data processing (collection of personal data should be made for marked, legitimate purposes and not processed further than these purposes) and the principle of adequacy (the administrator should only process such they are necessary due to the purpose of their collection, the relevance of data should be assessed at the moment of collection) is the performance of tasks by the Central Anticorruption Bureau defined in art. 2 para. 1 of the CBA Act. The office for the performance of its tasks can obtain data free of charge from data sets maintained by public authorities and state or local government organizational units (Article 22a paragraph 2 of the Act on the Central Anticorruption Bureau).

What is worth emphasizing, it is the legal possibility of processing personal data without the knowledge and consent of the persons they concern. This significant interference in the system of personal rights and freedoms requires special guarantees provided, among others, by efficient internal control institutions. The protection of personal data in the Central Anticorruption Bureau is based on two principles: 1. Responsibility of the personal data administrator, which remains the Head of the Central Anticorruption Bureau. 2. Autonomous supervision system based on the control apparatus of theplenipotentiary for control of processing of personal data by the Central Anticorruption Bureau (hereinafter: the personal data representative), whose autonomy is guaranteed by the Act on the Central Anticorruption Bureau, including a special mode of appeal from the function.

The aforementioned plenipotentiary is a special institution that other services do not have (eg. ABW, SKW, AW, Police, Prison Service) and it is specially fixed not only in the structure of the Bureau organization, but also in the special services system, constituting a model example of the independence of the

services from the world of politics and giving a real opportunity for the CBA to comply with constitutional civil rights and freedoms. The proxy for personal data in the Central Anticorruption Bureau is obviously not the same as the institution of the plenipotentiary for the protection of classified information. First of all, they operate on the basis of different legal acts (the Act on protection of classified information and the Act on the Central Anticorruption Bureau), but above all, the personal data representative at the CBA supervises the compliance of processing personal data collected by the CBA with the provisions of the Act on personal data protection . And the plenipotentiary for protection of classified information, who reports directly to the head of the organizational unit, is responsible for ensuring compliance with provisions on the protection of classified information. It is the specific form of subordination of the personal data representative that is one of the elements shaping his independence and guaranteeing the effectiveness of his function.

The Minister Coordinator is therefore the body that analyzes the protection of personal data in the Central Anticorruption Bureau. Due to the aforementioned fact that the proxy institution only exists in the CBA, it is a very limited supervision, which is therefore concentrated exclusively in one special service. It may surprise that having almost a model solution successfully operating in the CBA, which for years has built its own autonomous system of personal data protection, coexisting with the national order of personal data protection, no action was taken. The Minister Coordinator is, after all, entitled to create similar or to duplicate thisone existing in the Central Anticorruption Bureau. Therefore, monitoring the observance of human rights in the field of personal data protection is very illusory – limited to only 1 out of 5 special services. This is particularly important, for example from the point of view of the new personal data protection system based on the GDPR, applicable from 25 May 2018.[15] Popularly referred to as the General Regulation on the Protection of Personal data, it is directly applied in every EU country. Detailed description of its use in Poland, so-called new act on the protection of personal data – Act of 10 May 2018 on the protection of personal data, in art. 6. 2 exempts all Polish special services from the use of the GDPR.[16]

[15] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).Dziennik Urzędowy Unii Europejskiej L 119 4 maja 2016

[16] Dz. U. z 2018 r. poz. 1000.

Therefore, on the basis of the provisions of the Act expressed in art. 175 and the Act on the Central Anticorruption Bureau, only this service conducts institutionalized protection of personal data based on its own system. From the point of view of the functioning of the services, this is probably a convenient solution, but other circumstances may imply specific threats for entities and natural persons cooperating with the services even at the level of business transactions – public procurement or providing certain services to the services – such as training activities. These entities, unlike services, are forced to use the GDPR. Hence, at the interface of mutual civil law relations, there is a duality of the legal relationship, and this can give rise to specific threats also to the rights and freedoms of natural persons.

Analyzing the legal possibilities of the Minister of the Coordinator's actions it is difficult to indicate directly his competences and duties related to the protection of human rights. Traces of concern for basic civil rights and freedoms can be found in many provisions of the Regulation. Bearing in mind that special services are an institutional part of the national legal order, the Coordinator of special services must respect civil rights and freedoms when carrying out his duties. This is of course a presumption that can't be violated, if only because the Republic of Poland is a democratic state with large freedom traditions. Therefore, what is worrying is not the philosophy of special service regulations (and even the shortcomings mentioned in a small part), but the quality and manner of respecting human rights, and sometimes even their understanding.

These are not empty claims. Returning to the tasks and activities conducted by the Minister Coordinator, it should be mentioned that his service will be provided by the Chancellery of the Prime Minister (§8 of the Regulation). "The College for Special Services operates at the Council for Ministers, hereinafter referred to as" the College", as an advisory and consultative body for programming, supervising and coordinating the activities of the Internal Security Agency, AW, Military Counterintelligence Service, Military Intelligence Service and Central Anticorruption Bureau, hereinafter referred to as" the services special "and actions taken for the protection of national security of the Police, Border Guard, Military Police, Prison Service, Government Protection Bureau, Customs Service, tax offices, tax chambers, fiscal control authorities, financial information authorities and reconnaissance services of the Armed Forces of the Republic of Poland.[17] The College in

[17] Art. 11 Ustawa z dnia – 24 maja 2002 o Agencji Bezpieczeństwa Wewnętrznego i Agencji Wywiadu (Dz.U. 2018 r. poz. 730)

the light of the content of art. 12 of the Act on the Internal Security Agency and the Foreign Intelligence Agency does not deal with the analysis of the observance of human rights by special services and other state services cooperating with them. What is interesting, however, is the fact that both the College and the Minister Coordinator operate within the structure of the Department of National Security of the Chancellery of the Prime Minister. Department of National Security."[18]

The mere fact of organizational and substantive support for both the Minister of Coordinator and the College for Special Services should not cause controversy. The merits of the operation of these institutions is the same and the real proximity of organizational solutions certainly affects the good performance of duties. However, it is anxious to point out that the organization of the management of special services is prepared organisationally by one department of the Chancellery of the Prime Minister. The question arises whether this organizational unit is sufficient to provide work in the field of service coordination. Or rather, it should not be dealt with by a separate unit in the rank of an independent ministry, so as to ensure real monitoring of the organization and operation of services also in the area of observance of civil rights and freedoms.

Considering the activities of Polish special services in the context of their observance of human rights in their current activities, when analyzing legal acts regulating their functioning, it is difficult to form a direct critical and objective evaluation. These provisions partially normalize the necessity of civil rights and freedoms by the services, but it is impossible to resist the impression that they do so chaotically and selectively, raising the problem only when it is absolutely necessary.

It is impossible to resist the impression that there is no systematic approach to controlling and monitoring the observance of government-based human rights services. This is evidenced by the missing elements in legislation as well as the current practice of the operation of services, which is not mentioned in this text, but it is known to the careful observers of public life in Poland.

[18] www.kprm.gov.pl access: 03.03.2018.

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