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DISCLOSURE OF SENSITIVE NATIONAL SECURITY INFORMATION DURING CIVIL LITIGATION IN POLAND AND IN THE UNITED STATES

Abstract

The purpose of the article is to compare the American evidentiary rule of "state secrets privilege" with the Polish regulation of Article 248 § 1 of the Code of Civil Procedure. This issue, in particular, gains importance in the light of legal changes that occurred in the USA and most developed countries in the aftermath of the 11th September 2001 attacks and the so-called "war against terrorism". The author presents the genesis and evolution of the privilege, the history of its application, as well as doubts which it has aroused in terms of civil rights. The American solutions make up a point of reference for the Polish regulations of the Code of Civil Procedure. A dogmatic analysis of Article 248 § 1 of the Code offers a broad platform for discussions about its compliance with the Constitution of the Republic of Poland, as well as, noted legal loopholes in the law of civil procedure, in connection with the protection of classified information. The author underlines the fact that, after the regime transformation in Poland, the right to information gained the status of a public subjective right, but it had a very little impact on the shape of the civil process. He points to the implications of the fact that Polish legislators departed from the principle of objective truth in the process, for the sake of the principle of formal truth, commonly accepted in Western legal culture.

Keywords

civil process – limitations of evidence – classified information – state secrets privilege – access to public information

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INTRODUCTION

The subject developed refers to one of civil procedural law institutions. Because of the specificity of the subject of the regulation, the scope of presentation of this issue needs to go beyond the traditional field of procedural law. The question of the transparency of the actions of State authorities relates to a constitutional matter, as well as legal and political culture. For this reason, the comparison of the US evidentiary rule of “state secrets privilege” to Polish regulation of Article 248 § 1 of the Code of Civil Procedure¹ is an interesting issue of comparative law. The subject gains a special significance against the background of the legal changes that have occurred in the US in the aftermath of 11th September 2001 attacks and the so-called “war on terror”. Shortly after taking office, Barack Obama, the US President, announced a new approach to the issue of open administration. In his memorandum of January 2009, he announced “an unprecedented level of government openness”². Polish experience in this matter is equally dynamic and noteworthy. On the one hand, the regime transformation in Poland had it that the right to information gained the status of a public subjective right, on the other hand, the legislator departed from the principle of objective truth in the law of civil procedure, opting instead for the legal principle of formal truth commonly accepted in Western legal culture.

The seemingly ordinary evidentiary rule has its implications in the terms of the constitutional right to a fair trial, the right to public information, and also the issue of basing law on moral high grounds. The analysis of this matter may show how deep is the erosion of the community of political and legal values amongst European States and the United States of America.

¹ Act of 17.10.1964 Code of Civil Procedure, Dz.U. [Polish Journal of Laws] No. 43, item 296, as amended.

² Presidential Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (21.01.2009).

STATE SECRET PRIVILEGE

The United States is a country with a long and rich constitutional tradition, including also the issue of making available to the public information crucial to the State. Although the principle of openness cannot be found in the catalogue of basic norms of the US Constitution, there are such standards stipulated therein, which, among other things, compel Congress to disclose to the public the object of its debates. The extension of this type of duties to other sectors of authorities was possible, owing to the law-making activity of the supreme and appellate courts. In recent years, openness has become a value particularly strongly accented at the political level. However, we cannot forget that the US axiological approach to European standards in this area must remain within the framework allowed by the directives for the interpretation of the United States Constitution.

American civil litigation is characterized by the wide availability of all information held by the parties and third parties. At the request of the parties, anybody uninvolved in the process shall file all documents held and related to the case. US law “tolerates secrecy before the court extremely reluctantly”³.

One of the reasons for derogations from the principle of openness and the accessibility of documentary evidence in civil procedure is the information autonomy of each government branch, stemming from the principle of the separation of powers. The American courts and the legislator have limited access to the executive power’s inside information (the so-called “executive privilege”)⁴. In judicial proceedings,

³ P. Schlosser, *Problem wykrycia prawdy a prawo zachowania tajemnicy w procesie cywilnym Europy Zachodniej i USA* [The Problem of the Search for Truth and the Right to Secrecy in Civil Proceedings in Western Europe and the US], *Annales UMCS* 1982, sec. G, vol. 29, p. 88.

⁴ J.P. Carlin, *Walker v. Cheney: Politics, Posturing, and Executive Privilege*, *Southern California Law Review* 2002, vol. 76; K.A. Klukowski, *Making Executive Privilege Work: A Multi-Factor Test in an Age of Czars and Congressional Oversight*, *Cleveland State Law Review* 2011, vol. 59; M.J. Rozell, M.A. Sollenberger, *Executive Privilege and the Bush Administration*, *Journal of Law & Politics* 2008, vol. 24; A.K. Magid, *The Negative Executive Privilege*, *Stanford Law & Policy Review* 2009, vol. 20; M.W. Warnock, *Stifling Gubernatorial Secrecy: Application of Executive Privilege to State Executive Officials*, *Capital University Law Review* 2007, vol. 35; H. Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, *Iowa Law Review* 2007, vol. 92;

the executive power may withhold disclosure of the information, if that information has a particular importance to national security. In the field of civil procedure the information autonomy of the executive power manifests itself in the form of the precedent evidential standard known as *state secrets privilege*⁵. Under the state secrets doctrine, the United States may prevent the disclosure of information in judicial proceedings if “there is a reasonable danger” that such disclosure will expose military matters which, in the interest of national security, should not be divulged. Such a competence belongs exclusively to the government and therefore cannot be validly asserted by a private party in any civil litigation.

The precedent was established in the early 19th century⁶ but its first articulation in the modern analytical framework took place in 1953 in the case *United States v. Reynolds*⁷. The matter of *Reynolds* was as follows. A B-29 bomber, testing a secret electronic equipment crashed, killing six crew members and three civilian observers. The widows of the deceased civilians brought action against the United States under the Tort Claims Act seeking the production of the Air Force’s official accident investigation report. The Air Force opposed disclosure of the required documents, as the aircraft and its occupants were engaged in a “highly secret mission of the Air Force” at the time of the crash. According to the government, disclosure of the requested materials would “seriously hamper national security, flying safety, and the development of highly technical and secret military equipment”⁸. The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. When the Air Force refused, the district court ruled in favour of the plaintiffs on the issue of negligence; the court of appeals subsequently affirmed the district court’s ruling. The Supreme

J. Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, Maryland Law Review 2001, vol. 60.

⁵ A. Frost, *The State Secrets Privilege and Separation of Powers*, Fordham Law Review 2007, vol. 75.

⁶ One of the first references to it was in Aaron Burr’s treason trial from 1807 (*U.S. v. Burr*, 25 F. Cas. 30 (C.C.D.Va 1807)); see also Ch.F. Hobson (ed.), *The Aaron Burr Treason Trial*, Washington: Federal Judicial Center 2006.

⁷ *United States v. Reynolds* 345 U.S. 1 (1953), available at: <https://supreme.justia.com/cases/federal/us/345/1/case.html> [last accessed: 24.10.2015].

⁸ *Ibidem*.

Court reversed the decision and refined the application of the privilege by formalizing the procedural requirements for its invocation. The Court balanced national security matters with adherence to the rule of law and respect to the rights of individual litigants⁹.

There is a two-step procedure to be used when evaluating a claim of privilege to protect state secrets. First, “there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer”¹⁰. Second, “the court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect”¹¹.

In *Reynolds*, the Court also observed that “in each case, the showing of necessity which is made so that the plaintiff may have access to the information will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate (...) but where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail”¹². The rule was specified in *Ellsberg v. Mitchell* from 1983¹³. “When a litigant must lose if the claim is upheld and the government’s assertions are dubious in view of the nature of the information requested and the circumstances surrounding the case, careful *in camera* examination of the material is not only appropriate, but obligatory”¹⁴.

In the light of a successful claim of privilege, a court must decide either to dismiss a claim in its entirety or to allow the case to proceed with no consequences save those resulting from the loss of evidence. The correct decision is highly dependent upon the specific facts of a case. In *Reynolds*, the Court did not dismiss the claim, but remanded it and instructed the district court to provide the plaintiffs with the opportunity to pursue

⁹ J. Kalajdzic, *Litigating State Secrets: A Comparative Study of National Security Privilege in Canadian, U.S. and English Civil Cases*, SSRN eLibrary 2011, p. 209.

¹⁰ *Ibidem*.

¹¹ *Ibidem*.

¹² *Ibidem*.

¹³ *Ellsberg v. Mitchell*, 709 F.2d 51, 52 United States Court of Appeals, District of Columbia Circuit, available at: <http://law.justia.com/cases/federal/district-courts/FSupp/353/515/2344341/> [last accessed: 24.10.2015].

¹⁴ *Ibidem*.

their case without the privileged evidence. According to existing state secrets privilege jurisprudence the outright dismissal of a case usually takes place in three types of situations. The first is when a plaintiff cannot establish a *prima facie* case without the protected evidence. It means that the plaintiff cannot establish by the evidence he has at his disposal such a cause of action as to justify a verdict in his favour provided such evidence is not rebutted by the other party. Secondly, a case will also generally be dismissed where the privilege deprives a litigant of evidence necessary to establish a valid defence. The third situation that requires outright dismissal pursuant to the state secrets privilege is when the court determines that the “very subject matter of the case is a state secret”, and as a result, “litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets”¹⁵.

Invocation of the state secrets privilege is also possible even if the government is not itself a party to the suit in question. If the nature of the claim is such that the litigation could potentially lead to the disclosure of secret evidence, the government must itself intervene and assert the state secrets privilege. This possibility was confirmed in *Ellsberg v. Mitchell* from 1983¹⁶. “The result is simply that the evidence is unavailable, as though a witness had died, and the case will proceed accordingly, with no consequences save those resulting from the loss of evidence”¹⁷. Asserting the privilege by a court has merely deprived the plaintiff of certain evidence.

State secrets privilege is usually considered as a common law evidentiary privilege¹⁸. In *United States v. Nixon* from 1974, the Court articulated the doctrine’s constitutional dimension, observing that the state secrets privilege provides exceptionally strong protection because it concerns “areas of Article II duties in which the courts have traditionally

¹⁵ T. Garvey, E.C. Liu, *The State Secrets Privilege: Preventing the Disclosure of Sensitive National Security Information during Civil Litigation*, CRS Report for Congress, Washington 2013, pp. 5-6.

¹⁶ *Ellsberg v. Mitchell*, supra note 13.

¹⁷ *Ibidem*.

¹⁸ P. Aftergood, *An Inquiry into the Dynamics of Government Secrecy*, Harvard Civil Rights-Civil Liberties Law Review 2013, vol. 48, no. 2.

shown the utmost deference to Presidential responsibilities”¹⁹. Also in *Ellsberg* the court recognized concerns about the separation of powers: “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers”²⁰, but, as J.A. Crook observed “critical examination of the validity of the government’s claim of privilege necessarily required a difficult balance between the litigant’s need to present his case and the government’s need to protect the integrity of information related to national security”²¹. In the more recent *El-Masri* case, the court stated “although the state secrets privilege was developed at common law, it performs a function of constitutional significance, because it allows the executive branch to protect information whose secrecy is necessary to its military and foreign-affairs responsibilities”²².

In a post-9/11 world, the courts have found themselves faced with the challenge of hearing new cases, raising the issue of the state secrets privilege. The privilege arose mostly in cases concerning the government’s “extraordinary rendition” practices and challenges to the terrorist surveillance programme²³. The war on terrorism has been leading to numerous lawsuits in which national security programmes have been implicated²⁴.

The *El-Masri* case from 2007²⁵ might be used as an example. El-Masri was a German citizen of Lebanese descent. He alleged that he had been detained by Macedonian law enforcement officials in 2003 and then handed over to CIA operatives, who flew him to a CIA-operated detention facility in Afghanistan. He was held there against his will, but had also been mistreated in a number of other ways during his detention. El-Masri

¹⁹ *United States v. Nixon*, 418 U.S. 683 (1974), available at: <https://supreme.justia.com/cases/federal/us/418/683/case.html> [last accessed: 24.10.2015].

²⁰ *Ellsberg v. Mitchell*, supra note 13.

²¹ J.A. Crook, *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*, Albany Law Review 2009, vol. 72, p. 64.

²² *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), available at: http://www.nytimes.com/packages/pdf/world/20070303_MASRI.pdf [last accessed: 24.10.2015].

²³ Garvey, Liu, supra note 15, p. 5. See also V. Hansen, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus on the Task at Hand*, The North Carolina Journal of International Law & Commercial Regulation 2008, vol. 33.

²⁴ Kalajdzic, supra note 9, p. 209.

²⁵ *El-Masri v. United States*, supra note 22.

alleged that his detention and interrogation should be qualified as an “extraordinary rendition”, which means “the clandestine abduction and detention outside the United States of persons suspected of involvement in terrorist activities, and their subsequent interrogation using methods impermissible under U.S. and international laws”²⁶.

The United States interposed a claim of the state secrets privilege. The Director of the CIA explained why further court proceedings would create an unreasonable risk of disclosure of information, and spelled out why such disclosure would be detrimental to national security. El-Masri responded that the state secrets doctrine did not necessitate dismissal of his complaint, primarily because CIA rendition operations had been widely discussed in public forums.

The court resolved the matter by use of a three-part analysis. First, the court ascertained that the procedural requirements for invoking the state secrets privilege were satisfied. Second, the court decided that the information sought to be protected since it qualified as privileged under the state secrets doctrine. The ultimate question to be resolved was how the matter should proceed in the light of the successful privilege claim. Finally the court dismissed the proceeding because the circumstances made it clear that privileged information was so central to the litigation that any attempt to proceed would threaten disclosure of that information.

In *El-Masri* the court emphasized that “it is the court, not the executive, that determines whether the state secrets privilege has been properly invoked. In order to successfully claim the state secrets privilege, the executive must satisfy the court that disclosure of the information sought to be protected would expose matters that, in the interest of national security, ought to remain secret. Similarly, in order to win dismissal of an action on state secrets grounds, the executive must persuade the court that state secrets are so central to the action that it cannot be fairly litigated without threatening their disclosure. The state secrets privilege cannot be successfully interposed, nor can it lead to dismissal of an action, based

²⁶ Ibidem.

merely on the executive's assertion that the pertinent standard has been met"²⁷.

Both in American jurisprudence and worldwide, *El-Masri* raised concerns about the limits of unchecked executive privilege and an individual's right to judicial redress²⁸. The privilege was said to be overused by the executive branch to prevent disclosure of its own questionable, embarrassing, or unlawful conduct – particularly with respect to the “war on terror”. It could also destabilize the balance between protecting legitimate government secrets and the right to judicial redress of wrongs²⁹.

After a comprehensive analysis of relevant rulings in which state secrets privilege was invoked, Daniel J. Huyck made a following observation: “[b]ased on the government's success in asserting the privilege and the post-9/11 desire for secrecy, there is a significant incentive to invoke the privilege as a blanket protection over every item of potential evidence (documents and witnesses) concerning the claim. This incentive has the potential of effectively barring the courthouse doors for those who have suffered fundamental harms by the government. For example, dismissing *El-Masri's* claim based on the state secrets privilege blocks almost every formal channel for government accountability over the practice of «extraordinary rendition», and public accountability for any errors occurring within that program”³⁰.

²⁷ Ibidem.

²⁸ See B. Bernstein, *Over before It Even Began: Mohammed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, *Fordham International Law Journal* 2011, vol. 34; E.E. Bohannon, *Breaking the Silence: A Challenge to Executive Use of the State Secrets Privilege to Dismiss Claims of CIA Torture in Mohamed v. Jeppesen Dataplan, Inc.*, *University of Miami Law Review* 2011, vol. 65.

²⁹ See: Ch.D. Yamaoka, *The State Secrets Privilege: What's Wrong with It, How It Got that Way, and How the Courts Can Fix It*, *Hastings Constitutional Law Quarterly* 2007, vol. 37; M. Ziegler, *Pay no Attention to the Man Behind the Curtain: The Government's Increased Use of the State Secrets Privilege to Conceal Wrongdoing*, *Berkeley Technology Law Journal* 2008, vol. 23; H. Wells, *The State Secrets Privilege: Overuse Causing Unintended Consequences*, *Arizona Law Review* 2008, vol. 50; M.H. Page, *Judging without the Facts: A Schematic for Reviewing State Secrets Privilege Claims*, *Cornell Law Review* 2008, vol. 93.

³⁰ D.J. Huyck, *Fade to Black: El-Masri v. United States Validates the Use of the State Secrets Privilege to Dismiss “Extraordinary Rendition” Claims*, *Minnesota Journal of International Law* 2008, vol. 17, p. 458.

In view of mounting criticism, the administration of Barack Obama issued in September 2009 a new policy on the state secrets privilege in an attempt to ensure greater accountability in its assertion in litigation. According to the policy the privilege should be invoked only when necessary and in the narrowest way possible. The Attorney General's memorandum for heads of executive departments and agencies³¹ outlined several aspects of the new administrative process that increase accountability and oversight. Assertion of the privilege in litigation should be defended only when it is necessary to protect information, the unauthorized disclosure of which could be reasonably expected to cause significant harm to the national defence or foreign relations of the United States. The privilege should also be invoked only to the extent necessary to protect the national security. The Attorney General declared that the privilege is not to be invoked in order to conceal violations of the law, inefficiency, or administrative error, or to prevent embarrassment to a person, an organization, or an agency of the United States government, or to restrain competition. The policy requires the personal approval of the Attorney General prior to the invocation of the state secret privilege as well as providing periodic reports on all cases in which the privilege is asserted to the appropriate oversight Committees in Congress.

In the United States, there is ongoing debate over the reform of the state secrets privilege³². Some scholars recommended that Congress create a code for the judiciary to follow in cases involving the privilege³³. In 2008, two bills were advanced either in the House of Representatives

³¹ Attorney General Memorandum for Heads of Executive Departments and Agencies, *Policies and Procedures Governing Invocation of the State Secrets Privilege*, 23.09.2009, available at: <http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf> [last accessed: 24.10.2015].

³² A. Rapa, *When Secrecy Threatens Security: Edmonds v. Department of Justice and a Proposal to Reform the State Secrets Privilege*, *Seton Hall Law Review* 2006, vol. 37; E. Simpson, "Nothing is so Oppressive as a Secret": *Recommendations for Reforming the State Secrets Privilege*, *Temple Law Review* 2007, vol. 80; B. George, *An Administrative Law Approach to Reforming the State Secrets Privilege*, *New York University Law Review* 2009, vol. 84; R. Glasionov, *In Furtherance of Transparency and Litigants' Rights: Reforming the State Secrets Privilege*, *The George Washington Law Review* 2009, vol. 77.

³³ S.M. Ward, *The State Secrets Protection Act: Statutory Reform of the State Secrets Privilege*, *The Georgetown Journal of Law & Public Policy* 2009, vol. 7; R.M. Chesney, *Legislative Reform of the State Secrets Privilege*, *Roger Williams University Law Review* 2008, vol. 15.

or in the Senate, attempting to impose more stringent conditions on the invocation of the privilege by the President and requiring the Attorney General to report to Congress on cases in which the executive had asserted the State secret privilege in court. Nevertheless, Congress declined to implement legislative limits to the privilege, preferring instead to allow the judiciary to determine the limits via case law.

A class of claims in which judicial process is inadmissible are cases arising from agreements on secret service. This rule was created in the judgment of *Totten v. United States* from 1876³⁴. The Supreme Court affirmed the dismissal of an action for breach of a secret espionage contract, concluding that “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated”. The *Totten* rule was affirmed by the Supreme Court in *Tenet v. Doe* in 2005. The Court unambiguously decided that American jurisdiction courts are not competent to act in disputes on the performance of agreements related to espionage³⁵.

POLISH LAW

The legal bases for introducing evidential restrictions on the use of sensitive national security information in the civil process can be found in the Constitution of the Republic of Poland³⁶. In the Polish legal system, freedom of information and the right to public information make up subjective public rights guaranteed by the constitution. Thus, secrets and lack of openness with reference to public information intrudes

³⁴ *Totten v. United States*, 92 U.S. 105 (1876), available at: <https://supreme.justia.com/cases/federal/us/92/105/case.html> [last accessed: 24.10.2015].

³⁵ “We reverse because this holding contravenes the longstanding rule, announced more than a century ago in *Totten*, prohibiting suits against the Government based on covert espionage agreements”, *Tenet v. Doe*, 544 U.S. 1 (2005), available at: <https://supreme.justia.com/cases/federal/us/544/1/opinion.html> [last accessed: 24.10.2015]; see also H.L. McPherson, *Tenet v. Doe: Balancing National Security and Contracts to Spy*, University of Hawaii Law Review 2005, vol. 28.

³⁶ The Constitution of the Republic of Poland of 2.04.1997, Dz.U. [Polish Journal of Laws] No. 78, item 483, as amended.

into the sphere of constitutional rights and freedoms. The constitution also creates a standard of the right to public information and its potential restrictions. It is assumed on the grounds of the Polish constitutional solutions that the collision of interest protected by law, such as e.g. freedom and security will not lead in consequence to a full elimination of one of the values in conflict³⁷. The general clause expressed in Article 31 § 3 of the Constitution provides that any limitation of the exercise of constitutional freedoms and rights in a democratic state may be imposed only by statute, and only when necessary in a democratic state. The Constitution introduces the principle of proportionality and an exhaustive list of legitimate purposes, owing to which the access to information may be limited. Therefore, any limitation must remain within the scope defined by the Constitution and be proportionate to the purpose for which it was introduced. Article 61 of the Constitution grants to every citizen the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. It specifies the limitations upon the right justified as possible solely to protect the freedoms and rights of other persons and economic subjects, public order, security, or important economic interests of the State.

The constitutional premises of a refusal to disclose public information determine the boundaries for the legislator in limiting access to such kinds of information³⁸. One of the justifications for limiting access to public information is the need to protect classified information. In Poland, a modern system of classified information was established by statute in 1999. In 2011, a new legal act came into force. The Classified Information Protection Act of 5th August 2010 was aimed at regulating effectively

³⁷ Compare: the judgment of the Polish Constitutional Tribunal of 20.03.2006, K 17/05, *Orzecznictwo Trybunału Konstytucyjnego* [Decisions of Constitutional Tribunal] 2006, no. 3, item 30.

³⁸ A. Piskorz-Ryń, *Weryfikacja zgodności polskich ograniczeń jawności z Konwencją z Tromsø* [Compliance of the Polish Limitations of Access to Public Information with Tromsø Convention], [in:] G. Szpor, A. Gryszczyńska (eds), *Jawność i jej ograniczenia, Tom VI Struktura tajemnic* [Information Freedom and Its Limits, Vol. VI, Structure of Secrets], Warszawa: C.H. Beck 2014, p. 58; Freedom of Information Act of 6.09.2001 expounds on the right set out in Article 61 of the Constitution by stating that anyone has the right to obtain immediately public information, including current data regarding public issues, without any requirement that the requester prove a legal or non-legal interest. The act also imposes an explicit obligation on the specified state authorities to disclose information.

the protection of classified information in both the domestic and international spheres. The law protects only that information whose unauthorized disclosure would be detrimental to the State's interests, not any kind of private or organizational interests. By defining classified information, it has introduced a new standard, basing it on the extent of possible damage to the State's interests. Classified information is marked at one of four levels in descending order. "Top secret" causes an "exceptionally grave harm" to the State's legal interests in case of its unauthorized disclosure. It would threaten the independence, sovereignty, or territorial integrity of Poland, threaten the internal safety or constitutional order of Poland, threaten the foreign relations or activities of Poland, weaken Polish defence ability, or lead to the identification of intelligence officers or endanger their lives or the lives of protected-identity witnesses. Unauthorized disclosure of information classified as "secret" causes "grave harm" to the State's legal interests. "Confidential" causes "harm"; and "restricted" causes a deleterious effect on the ability of public organs or public organizational units to perform their duties³⁹.

In the 1990s, Polish civil procedure law went through deep reforms, and ideological and political revaluations. The principle of objective truth lost the function of the fundamental civil procedure rule, setting out the aims and functions thereof⁴⁰. Since that change, the aim of the process has been, similarly to that of Western European states⁴¹, the rendering of a lawful decision in a given case by the Court. The Court's discovery and recognition of the facts also serves this purpose. Objective recognition of facts is a crucial value, but at the same time one of the many values necessary to be taken into consideration in the process. In some cases, searching for the objective truth may be considered useless because

³⁹ A. Bodnar, I. Pacho, *Polish Law on Right to Information and Classification*, Analysis of Helsinki Foundation for Human Rights, May 2011, available at: http://www.right2info.org/exceptions-to-access/resources/publications/national-security-expert-papers/Bodnar_PachoPolishlawonclassification.pdf [last accessed: 20.08.2015].

⁴⁰ Compare K. Lubiński, *Głos w dyskusji* [Comment], [in:] T. Ereciński, K. Weitz (eds), *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego* [The Case-law of the Constitutional Tribunal and the Code of Civil Procedure], Warszawa: LexisNexis 2010, p. 270.

⁴¹ M. Taruffo, *Prawda sądowa i powoływanie się na fakty w postępowaniu cywilnym* [Judicial Truth and Invoking Facts in Civil Proceedings], *Studia Prawnicze* [Legal Papers] 1985, no. 3-4, pp. 255-267.

it does not serve the interests protected by law, set out by the substantive law⁴².

In spite of the mentioned changes, the legislator did not repeal all guarantees relating material truth. The Court still needs to watch over the correctness of the course of a process. The Court maintains the right to conduct the evidence necessary to resolve the case⁴³. The Court's role consists currently in encouraging the parties to file relevant allegations and to produce evidence to prove them⁴⁴.

On the other hand, in some cases the court needs to make concessions in favor of formal truth. In the mid-1990s, the principle of an active court, characteristic of the socialist legal process was replaced by the principle of adversarial proceedings in the modern sense. The current Article 3 of the Code of Civil Procedure is dedicated to the latter principle. It stipulates that "the parties and participants in proceedings are obliged to provide explanations as to the circumstances of the case and to submit evidence in accordance with good practice, and without concealing anything".

⁴² The issue of recognition of the truth in civil process belongs to most of the frequently discussed problems. Compare: Z. Resich, *Poznanie prawdy w procesie cywilnym* [Recognition of the Truth in the Civil Process], Warszawa: Wydawnictwo Prawnicze 1958; M. Waligórski, *Gwarancje wykrycia prawdy w procesie cywilnym* [Guarantees of the Detection of Truth in the Civil Process], *Państwo i Prawo* [State and Law] 1953, no. 8-9; O. Bogucki, *Teoretyczne aspekty zasady prawdy materialnej w nowym modelu postępowania cywilnego* [Theoretical Aspects of the Principle of Material Truth in the New Model of Civil Proceedings], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [Journal of Law, Economics and Sociology] 2000, no. 1; T. Pietrzykowski, B. Wojciechowski, *Równość, prawda i sprawiedliwość w procesie cywilnym. Rozważania na tle nowelizacji Kodeksu postępowania cywilnego* [Equality, Truth and Justice in Civil Process. Considerations on the Revision of the Code of Civil Procedure], *Ruch Prawniczy, Ekonomiczny i Socjologiczny* [Journal of Law, Economics and Sociology] 2000, no. 1; K. Knoppek, *Zmierzch zasady prawdy obiektywnej w procesie cywilnym* [The End of the Principle of Objective Truth in the Civil Process], *Palestra* [The Bar] 2005, no. 1; A. Jakubecki, *Naczelné zasady postępowania cywilnego w świetle nowelizacji kodeksu postępowania cywilnego* [Fundamental Principles of the Civil Procedure in the Light of the Novelisation of the Code of Civil Procedure], [in:] I. Ratusińska (ed.), *Czterdziestolecie Kodeksu postępowania cywilnego. Zjazd Katedr Postępowania Cywilnego w Zakopanem (7-9.10.2005)* [Forty Years of the Code of Civil Procedure. Meeting of Chairs of Civil Procedure in Zakopane (7-9.10.2005)], Kraków: Kantor Wydawniczy Zakamycze 2006.

⁴³ Article 232 of Polish Code of Civil Procedure: parties shall be obliged to present evidence in order to establish facts from which they derive legal consequences. The court may admit evidence which has not been presented by a party.

⁴⁴ T. Ereciński, *Komentarz do art.3 Kodeksu postępowania cywilnego* [Article 3 of the Code of Civil Procedure. Commentary], Lex Omega 2012.

The derogation from determining the truth in a process may be dictated by the protection of a public interest as well as of a justified individual interest. One of such values is keeping some information confidential⁴⁵. The sphere of cognition is limited by the substantive law⁴⁶. The Polish Code of Civil Procedure introduces evidential restrictions, among other things, with reference to the use of information of particular importance for the State.

Following the entry into force of the new Classified Information Protection Act, the code terminology related thereto has been unified. The most important provision from this point of view is Article 248 § 1 of the Code of Civil Procedure. It constitutes the Polish equivalent of the American *state secrets privilege*. According to the article, “each person shall be obliged to present, following a court order, within a determined time limit and in a determined location, a document which is in his possession and which constitutes proof of a fact of vital importance for the adjudication of a case, unless that document contains classified information”. The obligation to present a document refers also to a document in the files of a organ of public authority, and of any other organ of State⁴⁷. However, if it becomes apparent from the allegations of parties or from other circumstances of the case that the document contains such a secret, the Court shall not issue an order obliging it to be presented.

In the literature, the authors point to the vague wording of the provisions of the Polish Code of Civil Procedure, as well as their own divergent views of the doctrine in this area, which are a consequence of the vagueness⁴⁸. Current solutions are considered to be insufficient

⁴⁵ J. Preussner-Zamorska, *Zakres prawnie chronionej tajemnicy w postępowaniu cywilnym* [*The Scope of Legal Secrets in the Civil Proceedings*], *Kwartalnik Prawa Prywatnego* [Private Law Quarterly] 1998, no. 2, pp. 288, 294.

⁴⁶ *Ibidem*, p. 300.

⁴⁷ Article 248, K. Piasecki (ed.), *Kodeks postępowania cywilnego Tom I, Komentarze do artykułów 1-366* [*Article 248, Code of Civil Procedure, Vol. I, Commentaries to Articles 1-366*], Warszawa: C.H. Beck 2010, p. 1338.

⁴⁸ M. Leciak, *Tajemnica państwowa w zeznaniach świadka w polskim ustawodawstwie* [*State Secret in the Witness Testimony According to the Polish Law*], Toruń: TNOiK 2007, p. 93.

and changing them, expanding them, and making them more detailed is suggested, just as is done in criminal proceedings law⁴⁹.

Using the sensitive national security information in the process is linked with the issue of the openness of trials in a civil court, where such information would be used and there would be the possibility of questioning witnesses about the circumstances covered by the secret. In Polish law, the court is obliged *ex officio* to exclude the openness of the sitting, where the circumstances mentioned in Article 153 § 1 of the Code of Civil Procedure occur, i.e. when “classified information could be revealed”. A public dissemination of information from a closed court trial is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty of up to 2 years (Article 241 § 2 of the Penal Code⁵⁰).

According to Article 259 point 2 military personnel and civil servants who have not been released from the obligation to keep secret the classified information labelled as “confidential” or “restricted” may not act as witnesses, if their testimony could involve a violation of the obligation of confidentiality. This exclusion is independent of the will of the parties. It occurs *ex lege* and the court’s own motion is required to prevent such persons testifying. An exception applies if the military officials are released from secrecy. Military officials will mean both professional soldiers and others on whom such status has been conferred by law. The ban also includes former military officials⁵¹. In turn, the concept of “civil

⁴⁹ In the Polish Code of Penal Procedure, among other things, the distinction between classified information with the “top secret” status and “secret information” from “confidential” and “restricted information” was introduced. It is exclusively an authorized superior body that may release from the higher category secrets, but the Court or Prosecutor may release from the obligation to maintain the secrecy of confidential lower category information – Article 179 and Article 180 of the Code of Penal Procedure; compare: J. Misztal-Konecka, *Informacje niejawne w postępowaniu cywilnym* [Classified Information in Civil Proceedings], *Przegląd Sądowy* [Judicial Overview] 2012, no. 6, pp. 99-100.

⁵⁰ Act of 6.06.1997 Criminal Code, Dz.U. [Polish Journal of Laws] No. 88, item 553, as amended.

⁵¹ Article 259, Piasecki (ed.), *supra* note 47, p. 1354.

servant” is synonymous with the term of “public officer” as defined in Article 115 § 13 of the Penal Code⁵².

The consideration of the issue of evidential restrictions in Polish procedural law requires the noting of a broader axiological and systematic context of law in which these restrictions function. Poland participates in European legal culture where freedom of information is regarded as one of the conditions for the functioning of a democratic State⁵³. When interpreting the restrictions of freedom of information in Polish law, the participation of Poland in the European structures must shall be taken into account along with its being bound by international law and membership of the regional system of human rights protection within the Council of Europe. The Republic of Poland concluded also bilateral international agreements on the mutual protection of classified information with various countries, as well as NATO agreements on the protection of information from 1997 (ratified by Poland in 1999)⁵⁴ and on cooperation in the field of atomic information from 1964 (ratified in the year 2000)⁵⁵.

The minimum standards to which the members of the Council of Europe should adapt in terms of access to official documents are laid down by the Tromsø Convention opened for signature on 18 June 2009. Although it has not yet become an applicable law, it is testimony to the limits of compromise acceptable to all countries, participating in its drawing up within the Council of Europe⁵⁶. It is also the closure and crowning of the discussion on the scope of the right of access to public information, which has been in progress in the environment of European lawyers for many years. Three soft law recommendations

⁵² K. Flaga-Gieruszyńska, *Komentarz do art. 259 [Comment to Article 259]*, [in:] A. Zieliński (ed.), *Komentarze Kodeksowe; Kodeks postępowania cywilnego [Comments to the Codes; Code of Civil Procedure]*, Warszawa: C.H. Beck 2014, p. 510.

⁵³ A. Gryszczyńska, *Podstawy prawne ograniczeń jawności w Polsce [Legal Basis for Limiting the Freedom of Information in Poland]*, [in:] G. Szpor, A. Gryszczyńska (eds), *Jawność i jej ograniczenia, Tom VI Struktura tajemnic [Information Freedom and Its Limits, Vol. VI, Structure of Secrets]*, Warszawa: C.H. Beck 2014, p. 1.

⁵⁴ By a Treaty between the Parties of NATO on the Protection of Information, *Journal of Laws* no. 64, sec. 740.

⁵⁵ By a Treaty between the Parties of NATO on the Cooperation on Atomic Information, *Journal of Laws* no. 143 sec. 1594.

⁵⁶ Council of Europe Convention on Access to Official Documents.

issued by the Council of Europe and dedicated to this subject, starting from 1979⁵⁷ are proof of the importance of the issues in question.

According to the provisions of the Convention, each Party shall guarantee the right of everyone, without discrimination on any grounds, to have access, on request, to official documents held by public authorities. Article 3 introduces possible limitations to the right. They shall be set down precisely in law, be necessary in a democratic society, and be proportionate to the aim of protecting, e.g. national security, defence and international relations, and public safety. The notion of national security should be used with restraint. It should not be misused in order to protect information that might reveal a breach of human rights, corruption within public authorities, administrative errors, or information which is simply embarrassing for public officials or public authorities⁵⁸. Access may be limited with the aim of protecting public safety, for example “by prohibiting the disclosure of documents concerning the security systems of buildings and communications”⁵⁹. Referring to court proceedings, the Convention also accepts limitations of access in order to protect the equality of parties and the effective administration of justice. It ensures the equality of parties before domestic as well as international courts. Respecting the right to fair trial, the convention authorizes a public authority to refuse access to documents drawn up or received with respect to court proceedings in which it is a party⁶⁰.

SUMMARY

The legal solutions regarding access to public information adopted in the Polish Constitution are clearly modelled on European law and international human rights law. Our fundamental law established the right

⁵⁷ Council of Europe Recommendation No. 854 (1979) of the Parliamentary Assembly on Access by the Public to Government Records and Freedom of Information; Recommendation No. R (81) 19 of the Committee of Ministers on the Access to Information Held by Public Authorities; Recommendation Rec(2002)2 of the Committee of Ministers to Member States on Access to Official Documents.

⁵⁸ Explanatory Report to the Council of Europe Convention on Access to Official Documents (CETS No. 205).

⁵⁹ *Ibidem*, comment to Article 3, paragraph 1, sub-paragraph b.

⁶⁰ *Ibidem*, comment to Article 3, paragraph 1, sub-paragraph i.

to public information and restricted the ordinary legislator regarding its entitlement to limit this right. One example is the classification of information because of its importance to national security. The main legislation act governing the protection of classified information in Poland is the Classified Information Protection Act. In accordance with Article 4 sec. 2 of this act, “the rules of exemption from the obligation to maintain the confidentiality of classified information and the treatment of case files containing classified information in proceedings before courts and other authorities shall be governed by separate laws”. Such a law in civil proceedings is the Code of Civil Procedure. The solutions adopted in the code raise many doubts. The wording of Article 248 § 1, and therefore of the equivalent of the American state secrets privilege, has not changed significantly since the adoption of the Code in 1964. This provision does not take into account the political transformations nor, in consequence, the enactment of a new constitution with the right to public information, the rule of law, and to a fair and public hearing before court. Although the refusal of access to the document caused by its containing classified information constitutes a restriction on a subjective right granted by the Constitution, the Polish law of civil procedure does not contain mechanisms for the court to control the legitimacy of such a refusal. There are no good solutions to balance the interests of the parties in such a situation. The proportionality principle is replaced by process automatism of a zero-one nature. As a consequence of the invoking of it by any person holding a document, the fact that it contains classified information results in an absolute prohibition of making the document available in the process.

Neither does the Code indicate who may apply for the exemption from secrecy of a witness and which entities are entitled to such exemption, what should guide the releasing authority, and whether this decision could be appealed against. Each of the identified deficiencies is a legal loophole in essence. Nor are there any regulations regarding covert interrogation records or the rules for access to the file of the case whose openness was excluded⁶¹.

⁶¹ Leciak, *supra* note 48, pp. 376-378.

Polish doctrine has not undertaken to a sufficient extent the issue of restrictions on taking evidence from a document in a civil lawsuit in connection with the protection of classified information. The number of papers on this subject is very insignificant, compared to the vast literature dedicated to the issue of the use of the state secrets privilege in the USA.

Despite the fact that American democracy is characterized by a focus on openness and the accessibility of information, their right to information has never had such a legally binding and universal character as in European states. In the United States, the rights of citizens in this area are primarily the product of case law and doctrine. The law allows concealment of information. In a civil suit, the executive power can benefit from the state secrets privilege which, effectively raised, brings in consequence the exclusion of certain evidence from the proceedings. The *rationale* for such an understanding of secrecy and executive power privilege in the process stems from the principle of the separation of powers and the information autonomy of each government branch.

The relationship between the judiciary and the executive segments in the context of state secrets was explained in the *El-Masri* case. According to the American constitution, the courts are authorized to decide cases and controversies. But, as the court noted in reference to the judiciary, “we would be guilty of excess in our own right if we were to disregard settled legal principles in order to reach the merits of an executive action that would not otherwise be before us – especially when the challenged action pertains to military or foreign policy⁶²”.

The time of the so-called war against terror was a period of particular activity of executive authorities in the field of state secrets privilege⁶³. As one of the commentators said in the early years of the twenty first century, a shift from a society where information is distributed on the basis of the “right to know” to one where information is distributed on the basis

⁶² *El-Masri v. United States*, supra note 22.

⁶³ See also P. Aftergood, *National Security Secrecy: How the Limits Change*, Social Research 2010, vol. 77, no. 3; L.K. Donohue, *The Shadow of State Secrets*, University of Pennsylvania Law Review 2010, vol. 159; P. Aftergood, *Reducing Government Secrecy – Finding What Works*, Yale Law & Policy Review 2009, vol. 27.

of the “need to know”⁶⁴ began in the United States. Critics of that situation indicated that the rising rate of secrecy within an elected US government started undermining the legal, political, and cultural traditions of that government. The changing of the information policy introduced during the Presidency of Obama has given rise to a recognition that in recent years the United States has moved closer to European standards in terms of access to public information.

The task of the legal doctrine is the critical analysis of both changes in legal regulations as well as the treatment of secrets by the courts. In addition to the formal-dogmatic analysis, the discourse on disclosure exemptions in the United States is enriched by addressing the issue in terms of a dispute over the acceptable level of executive interference with civil rights, such as, in particular, the freedom of speech, the freedom of the press, or the right to a fair trial. A similar trend of considerations should be shared by Polish doctrine. Claims involving the state secrets privilege create a tension between two distinct public interests. One is preventing public harm that comes from the disclosure of certain documents, the other consists in preventing the frustration of justice⁶⁵.

⁶⁴ T. Gup, *Nation of Secrets: the Threat to Democracy and the American Way of Life*, New York: Doubleday 2007, p. 9.

⁶⁵ Huyck, *supra* note 30, p. 451.

