



## Transformation of State Security and Intelligence Services in Poland – A Job Still Unfinished

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**Abstract:** Since 1989, the Polish intelligence sector has been undergoing a democratic transformation which has turned into a continuous institutional change. In the process, the old communist services were abolished and new ones established in parallel with setting up executive and legislative oversight structures. But while the intelligence institutions and the oversight structures, on the whole, meet democratic standards and do not appear to threaten the constitutional system or citizens' rights in any systemic way, the more recent developments in the sector demonstrate that democracy in Poland has not in fact been consolidated. The state proved incapable of forming any dependable and effective model of control over the security sector in the sense of exercising both political guidance and democratic oversight. The intelligence services and some security institutions continue to enhance their prerogatives in the realm of covert operations, democratic control mechanisms are not sufficiently effective, and the issues of the communist past continue to be a disruptive factor. Under the circumstances, it is hard to single out good practices; rather, one should speak of lessons learned.

**Keywords:** intelligence oversight, judicial control, civil watchdogs, post-communist transition, transformation, Poland.

### The Lonesome Transformation in Poland

After the fall of communist systems in 1989-1990, the reforms of civilian and military security services in the emerging democracies of Central Eastern Europe were imminent. Introducing democratic control was one of the most significant transformation challenges, not the least because the very concept was unfamiliar to politicians and political scientists alike. But while there was abundant liter-

ature on the theory and practice of past democratic transformations of civil-military relations, the theory of security sector reform was just emerging, and the post-communist transitions turned to be its main testing ground.

In Poland, the post-1989 democratic reforms of the military enjoyed strong external institutional and financial support: lectures by prominent politicians and academics visiting the country, foreign fellowships available to Poles, and networking activities available and funded within the framework of Partnership for Peace throughout the 1990s. Above all, the reforms supported the ultimate political goal—full-fledged membership of Poland in NATO—and the democratic control over armed forces was a *sine qua non*.

No such backing was available to the reformers of post-communist security and intelligence services. The history of security sector reforms could not provide much background knowledge or tools for introducing intelligence oversight. There was no external, NATO-like institution that could propel reforms in anticipation of future political gains. Moreover, the security services had traditionally been the mainstays of communist power, enveloped deep in secrecy and notorious for oppressing opposition activists. More importantly, the fall of communist systems did not immediately lead to the collapse of those secret structures in Poland, nor did it instantly cut off the functionaries from their covert resources. Hence the incumbent democratic governments, still weak and besieged by political and economic problems, were reluctant to move in aggressively and to formally abolish the communist security services in their entirety, fearing possible consequences. The approach to the security sector was initially lenient and took place in several small steps, thus involuntarily laying the foundations for a number of future problems. This cautious approach might have also contributed to the lack of clarity in the institutional design of the sector and power overlaps characterizing the post-communist security and intelligence services in Poland.

## Conceptual Problems

Conventionally, there is a clear distinction between intelligence-gathering responsibilities, typical of intelligence services, and policing/ law enforcement functions, characteristic for the police, border guards, and customs. This distinction is reflected in the literature on the subject, for example, the toolkit for intelligence oversight published by DCAF.<sup>1</sup> Unfortunately, the Polish civilian services have never even come close to such a clear-cut division of tasks. Despite several conceptual and legislative attempts to clarify the division, the post-communist intelligence services have never let go of their policing and law enforcement prerogatives. Many experts have criticized the lack of clarity in this respect

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<sup>1</sup> Hans Born and Gabriel Geisler Mesevage, "Introducing Intelligence Oversight," Tool 1 in *Overseeing Intelligence Services. A Toolkit*, ed. Hans Born and Aidan Wills (Geneva: DCAF, 2012), [https://www.dcaf.ch/sites/default/files/publications/documents/Born\\_Wills\\_Intelligence\\_oversight\\_TK\\_EN\\_0.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/Born_Wills_Intelligence_oversight_TK_EN_0.pdf).

over the years. Both functionaries<sup>2</sup> and academic researchers<sup>3</sup> have stressed overlaps of tasks and powers between the security and intelligence services and pointed to the purely arbitrary distinction drawn between them, lacking conceptual premises.

The duty to gather, analyze and share intelligence is not a distinctive feature of the intelligence sector in Poland since similar duties are performed by several other security institutions in their respective fields. Law enforcement duties cannot be treated as an indicator of the type of service either due to the overlaps and similarities between security and intelligence services. The same is true for the right to carry out covert and intrusive surveillance operations vested in several agencies in Poland.<sup>4</sup> So the fact that any given agency is authorized to interfere covertly with private property or use intrusive surveillance techniques does not place this agency in the intelligence sector in Poland.

Since the conceptual lines of division are so blurred, the only way to identify and delineate the intelligence sector is by following the practical approach taken by the executive authorities and reflected in the wording of the laws, both existing and projected. The laws point to five currently existing services as the so-called “special services,” i.e., representing the intelligence sector. These are:

1. Internal Security Agency, in Polish *Agencja Bezpieczeństwa Wewnętrznego, ABW*, i.e., civilian counterintelligence;
2. Foreign Intelligence Agency, in Polish *Agencja Wywiadu, AW*, responsible for the information gathering abroad;
3. Central Anticorruption Bureau, in Polish *Centralne Biuro Antykorupcyjne, CBA*, the main organ for monitoring the implementation and effectiveness of countercorruption regulations and investigating breaches of legal provisions in that respect, mostly (but not exclusively) concerning companies and public entities or state functionaries;

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<sup>2</sup> See the interview with the former functionary of the Internal Security Service ABW and former Head of Foreign Intelligence Service AW, Col. Grzegorz Małecki at <http://www.defence24.pl/plk-grzegorz-malecki-panstwo-musi-byc-swiadome-rol-i-istoty-swoich-sluzb-wywiadowczych-wywiad>. He voiced similar concerns about the lack of clarity in the functions of the Polish intelligence services in conversations with the author.

<sup>3</sup> Among the academics, the most notable right-wing analyst of security and intelligence sector reform is professor Andrzej Zybortowicz from Toruń University. He published numerous articles and books on the transformation, mostly critical of the conceptual approach to the reforms. See, i.e. “Chory rdzeń państwa” (“The Sick Core of the State”), interview with prof. Andrzej Zybortowicz, *Rzeczpospolita daily*, April 26, 2004.

<sup>4</sup> Beyond the intelligence sector, the power to use covert surveillance techniques has been vested in several other security services in Poland: Police, including Central Investigative Bureau, Border Guards, Customs Services, Military Police and Treasury Intelligence, each in its respective field. The last of these is subordinated to the Ministry of Finance and criticized by some for its very extensive covert competencies. Despite this fact and the very name implying the function of intelligence gathering, the service is not considered as part of the intelligence sector.

4. Military Counterintelligence Service, in Polish *Służba Kontrwywiadu Wojskowego, SKW*, responsible for counterintelligence in Poland and protection of military operations abroad;
5. Military Intelligence Service, in Polish *Służba Kontrwywiadu Wojskowego, SWW*, in charge of military intelligence and covert operations abroad.

## Security and Intelligence Sector under the Communist Regime

In terms of institutional design, the security and intelligence sector in the final stage of the communist regime in Poland was relatively simple. The civilian part was composed of the main police force called People's Militia (*Milicja Obywatelska, MO*), the intelligence service called Security Service (*Służba Bezpieczeństwa, SB*) and several minor police-like formations with anti-riot functions. Legally, all those services were covered by one bill<sup>5</sup> and were subordinated to the Minister of Interior. However, the real subordination was along political lines, as the Minister of Interior was always a high-ranking member of the Central Committee of the Communist Party. In the late 1980s, the Security Service (*SB*) numbered 24.3 thousand functionaries and had over 90 000 agents registered as secret operatives. *SB* was tasked with safeguarding the internal and external security of the state; however, the term 'security' was mainly understood in terms of political compliance. Therefore, the Service was primarily engaged in surveillance of the political opposition both in Poland and abroad.

Regarding the military sector, the post-WW2 military intelligence was organized into separate structures within the MoD. Before 1990, by order of the Minister of National Defense of November 15, 1951, the military intelligence was embedded in the Ministry of National Defense structures as the Second Directorate of the General Staff of the Armed Forces, subordinated to the Minister. Military intelligence officers were part of the repressive political apparatus of the communist regime. However, their focus was more abroad, especially concerning the Vatican policies and opposition emigrants in Europe. Additionally, military intelligence was a statutory intermediary in the Polish foreign arms trade and controlled the state-owned company CENZIN, tasked with the sales of armaments. It was a highly profitable source of operational funds and one that often bordered on criminal activity. Additionally, military intelligence operatives were often placed in management positions in Polish foreign trade companies, which resulted in several criminal affairs in the later period of transformation.

From 1957 until 1990, counterintelligence was embedded in the Ministry as the Military Internal Service, responsible for counterintelligence but also for political compliance of the military and hence was much despised by the members of the Armed Forces at large. There was no separate legal bill to regulate its func-

<sup>5</sup> Ustawa z 31 lipca 1985 r. o służbie funkcjonariuszy Służby Bezpieczeństwa i Milicji Obywatelskiej Polskiej Rzeczypospolitej Ludowej.

tioning; instead, their structures and functions were regulated by the minister's internal orders.<sup>6</sup>

## **Transformation of the Civilian Intelligence Services**

Reforms of civilian and military intelligence services in post-communist Poland did not follow the same paths. In the civilian sector, the old communist Security Service *SB* managed to survive the first (partially) free elections of June 4, 1989, and the inception of the non-communist government. Former members of the opposition were dragging their feet in taking over the Ministry of Internal Affairs. Initially, the Ministry of Internal Affairs remained within the purview of the high-ranking communist regime representative, General Czesław Kiszczak, and his officers, while the security service *SB* continued to function largely unhindered. Consequently, the first reorganization of communist security services was introduced by the very communist general and mainly served to facilitate the process of concealing the crimes and abuses of the communist service from the new government. The first non-communist Deputy Minister of Internal Affairs, Krzysztof Kozłowski, was appointed on March 7, 1990. Ultimately, the last communist representatives left the government in July 1990. Only then the opposition really took over internal affairs and initiated the post-communist transformation in the civilian security sector. Unfortunately, the timespan between the creation of the non-communist government in the autumn of 1989 and the takeover of the internal affairs in March 1990 gave the communist functionaries plenty of time to destroy or remove to private lockers a considerable part of the archives. It was a reason why many former opposition activists claimed that the communist security services were offered impunity which became a source of many political troubles in the years to come.

At the outset of reforms, there were plans to establish a parliamentary commission to investigate the communist Security Service crimes and make them known to the public. Such an extraordinary parliamentary commission was set up early on after the free elections of June 1989, perhaps too early, because it failed to deliver substantial results.

### ***Milestone # 1: Bill of April 6, 1990, Creating the First Post-communist Civilian Intelligence Service***

On April 6, 1990, the parliament adopted a ground-breaking set of reforms initiating the democratic transition of the civilian security sector. The package included the following acts:

- Bill on the Post of the Minister of Internal Affairs;
- Bill on the Police;

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<sup>6</sup> Jan Bodakowski, "Służby specjalne (wywiad, kontrwywiad, безпеka) PRL," *Salon 24*, October 5, 2010, <https://www.salon24.pl/u/jan-bodakowski/235906,sluzby-specjalne-wywiad-kontrwywiad-bezpieka-prl>.

- Bill on the Office for State Protection, in Polish *Urząd Ochrony Państwa*, UOP.

Based on art. 131 of the Bill on the Creation of the State Protection Office *UOP*,<sup>7</sup> the old Security Service *SB* was formally abolished, and all former functionaries were discharged from service. Subsequently, based on Resolution # 69 of the Council of Ministers (government) of May 21, 1990, the former members of the communist services *could* apply for work in the newly created Office for State Protection *UOP* or the new Police, pending a positive outcome of the vetting process by the special governmental commission.<sup>8</sup> The process is commonly known as “the verification of the functionaries of the Security Service *SB*.” All former officers were given the application forms and had to submit their applications until July 4, 1990. Only officers under 55 were eligible to apply; anybody over 55 was automatically retired. The same verification procedure was mandatory for the candidates to the Office for State Protection and the Police. It was a matter of an individual decision whether the candidate applied. The commission declined applications in cases when an officer was suspected of brutal surveillance and persecution of former opposition activists, a member of the senior leadership of the Security Service before 1989, or known for alcohol abuse. Anybody who was disqualified could first appeal to the same regional commission that took the original decision and then to the Central Vetting Commission. The subsequent decision of the latter was final and binding.

The verification was conducted in July and August 1990. 14,5 thousand former functionaries of the communist Security Service *SB* submitted their applications and underwent the vetting procedure. This number amounted to approximately 60% of the former staff of the communist service. Of those, 10,439 people were assessed positively. It is worth noting that only 8,681 officers were positively appraised at the first round of verification; the remaining staff was qualified as a result of their successful appeal. Importantly, a positive decision of the commission did not equal automatic acceptance in any of the new services. The ultimate decision was to be taken by the respective regional commanders of the Police and the Chief of UOP.<sup>9</sup>

As consequent events demonstrated, many of those officers should not have been positively appraised. The rather weak hold of the former opposition on the Ministry of Interior, their limited knowledge of the field or the archives, and the haste could all account for the imperfect vetting process. Therefore, it is not sur-

<sup>7</sup> Ustawa z dnia 6 kwietnia 1990 r. o Urzędzie Ochrony Państwa.

<sup>8</sup> Resolution No. 69 of the Council of Ministers of 21 May 1990 on the procedures and conditions for the admission of former Security Service officers to serve in the Office of State Protection and other organizational units subordinate to the Minister of Interior and to employ them in the Ministry of the Interior.

<sup>9</sup> Rafał Leskiewicz, “Formalno-prawne aspekty powstania Urzędu Ochrony Państwa,” in *Urząd Ochrony Państwa 1990-2002* (Warszawa: Agencja Bezpieczeństwa Wewnętrznego, 2015), 53-79.

prising that the process was criticized as insufficient in delivering justice.<sup>10</sup> The acceptance of so many former regime officers into the new service was also the primary source of distrust that many former opposition activists demonstrated towards the post-communist intelligence sector, although often the accusations were not supported by documentation.<sup>11</sup>

### **The First Postcommunist Intelligence Service UOP, 1990-1996**

The new Office for State Protection *UOP* was formed within three months following the passing of the founding Bill of April 6, 1990. By the decision of the Minister of Internal Affairs, UOP initially numbered 5,522 officers, organized in one central structure in Warsaw and 14 regional offices. The Office for State Protection was subordinate directly to the Minister of Internal Affairs and was on a par with other security services, such as the Police, Border Guards, Firefighters, or Office for Government Protection. It was a two-in-one structure – UOP was responsible for intelligence and counterintelligence functions, and the division of duties was purely internal. The Chief of Service was appointed by the Prime Minister upon the motion of the Minister of Internal Affairs and following the positive opinion from the Political Advisory Committee to the Minister of Interior. Effectively, the Chief of UOP was one of the closest collaborators of the Minister, and any vital information would be passed on via the Minister to the Prime Minister and elsewhere.

The Bill of April 6, 1990, defined the scope of duties of the new intelligence service in a rather traditional way, protecting state security and the constitutional order. More specifically, UOP was responsible for:

- surveillance and monitoring of threats to national security, defense, sovereignty, integrity, and international position of the state;
- preventing and detecting crimes of espionage and terrorism and other crimes against the state security as well as prosecuting the perpetrators;
- protection of classified information, monitoring as well as preventing any breaches of such information;
- gathering intelligence and preparing analyses essential for national security and sharing information with the highest state authorities and the central administration.<sup>12</sup>

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<sup>10</sup> Antoni Dudek, *Reglamentowana Rewolucja. Rozkład Dyktatury Komunistycznej w Polsce 1988-1990* (Warszawa, 2009).

<sup>11</sup> See Andrzej Zybortowicz, *W Uścisku Tajnych Służb. Upadek Komunizmu i Układ Postnomenklaturowy* (Warszawa, 1993).

<sup>12</sup> Zarządzenie nr. 39 prezesa Rady Ministrów z dnia 4 lipca 1990 roku w sprawie szczegółowego określenia zadań oraz struktury organizacyjnej Urzędu Ochrony Państwa, in *Historyczno-prawna Analiza Struktur Organów Bezpieczeństwa Państwa w Polsce Ludowej (1944-1990)*. *Zbiór studiów*, ed. A. Jusupović and R. Leśkiewicz (Warszawa, 2013), 305-307.

The first intelligence service in democratic Poland can be defined as essentially a counterintelligence service with a mixture of intelligence gathering and policing functions, working in new structures but banking on knowledge and, to a degree, on procedures derived from the old communist service.<sup>13</sup> The founders of the democratic intelligence service lacked the knowledge or experience to propagate intelligence-gathering missions or even to aptly use and share the acquired intelligence.<sup>14</sup> Article 11 of the Bill on *UOP* only stated that the Office is under obligation to inform the Prime Minister and the Minister of Internal Affairs about any issues *essential to the security of the state*.

Figure 1 presents the structure of the central Office for State Protection in the years 1990-1996.

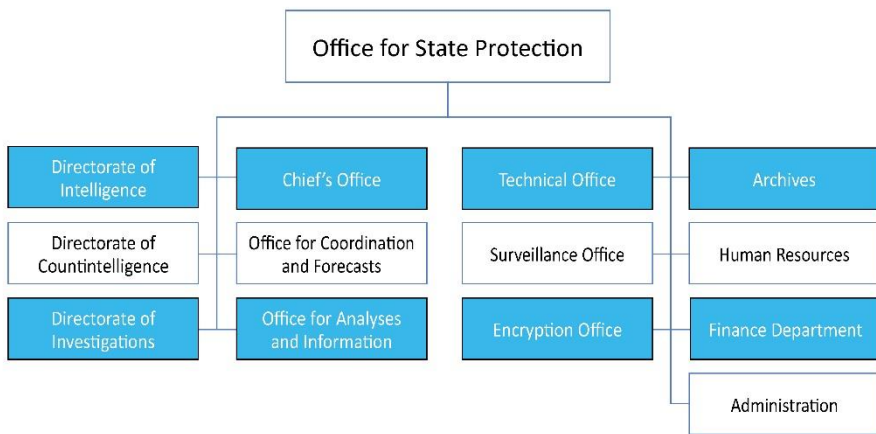


Figure 1: Structure of the Central Office for State Protection, 1990-1996.

***Milestone # 2: Reorganization of the Office for State Protection, 1996. Nascent Executive Oversight of the Intelligence Service***

In 1996 came the first democratic reform of the security sector in post-communist Poland. The reform was the corollary of the changing security situation both in Poland and in the region. With the fall of the last communist regimes in Central and Eastern Europe and the onset of technological revolution came the era of organized crime transcending borders and challenging traditional security structures. Another incentive for the change was purely internal. It concerned the growing power of the Ministry of Internal Affairs, which was quickly becoming

<sup>13</sup> See Andrzej Misiuk, "Cywilne Służby Specjalne w Polsce po 1989 r. Próba Refleksji," in *Urząd Ochrony Państwa*, 41-50.

<sup>14</sup> In some private interviews, former UOP officers remembered the cases when the government politicians demanded that the cases of theft of expensive alcohol from their studies be investigated, insisting that it falls within the purview of special services.



ing a supreme security institution with the powers of control over all the law enforcement, police, and intelligence services and hardly controllable itself.

Based on those premises, the parliament introduced a package of legislative changes. Regarding the Office of State Protection *UOP*, three important changes were introduced.<sup>15</sup> First, its scope of duties and responsibilities was substantially amended. Secondly, the service became directly subordinated to the Prime Minister. The Chief of *UOP* was now accountable to the Prime Minister. Last but not least, to aid the supervisory function of the Prime Minister, a special advisory and consulting institution was established within the structure of the Prime Minister's Office, called "College for Intelligence and Security Services."<sup>16</sup> This was the first such institution dedicated to the oversight of the intelligence sector in Poland. Despite its inherent limitations and deeply political character, it contributed to the development of executive oversight practice in Poland.

In the aftermath of the legislative change, the responsibilities of the Office of State Protection shifted further away from classic intelligence-gathering towards investigative and counterterrorist functions, keeping intact the counterintelligence and classified information protection duties. A number of new investigative functions were added to the scope of duties of *UOP* in the field of economic crimes, adding to the already existing overlap between the Police, undergoing similar reforms at that time.<sup>17</sup> Namely, the reformed *UOP* was now responsible for:

- conducting reconnaissance and countering threats to national security, defense, sovereignty, integrity, and the international position of the state;
- preventing, countering, and disrupting acts of espionage and terrorism;
- preventing, detecting, and investigating economic crimes, including corruption, and prosecuting their perpetrators;
- conducting surveillance, investigating, and countering transnational crimes, including the illegal production, possession, and sale of weapons, ammunition and explosives, narcotics, psychotropic drugs, and nuclear and radioactive materials and prosecuting their perpetrators;
- protection of classified information, including encryption of classified and sensitive information, exchanged between governmental institutions;

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<sup>15</sup> Ustawa z dnia 8 sierpnia 1996 r. o zmianie ustawy o Urzędzie Ochrony Państwa z 6 kwietnia 1990 r., Dz.U. 1996, No. 106, poz. 496.

<sup>16</sup> The exact translation of the name of the institution from Polish would be "College for Special Services." That corroborates all the terminology-related problems in defining the meaning of "security sector" in Poland. The services commonly called 'intelligence' in most democratic countries, in Poland acquired the name 'special,' initially by habit, only to be incorporated later in the language used in legislative acts.

<sup>17</sup> Misiuk, "Cywilne służby specjalne w Polsce," 46-47.

- information and analyses.

In the aftermath of the changes, the Office started to widely employ covert methods of surveillance, investigation, interception of communication, etc. Also, after 1996 UOP was undergoing constant internal structural changes.<sup>18</sup> The seemingly never-ending internal transformations were accompanied by personnel reassignments and relocations and were perceived by most intelligence officers as disruptive to professional conduct.

### ***Milestone # 3: Dissolution of the Office for State Protection UOP and Establishment of Separate Civilian Intelligence and Counterintelligence Agencies***

The last few years of the workings of the Office for State Protection were wrought with controversies and marked by increasing politicization of the service. The biggest scandal came at the end of 1995, when the then Chief of UOP, Andrzej Milczanowski, gave a speech at the Lower Chamber of the Parliament (Sejm) and publicly accused the Prime Minister in office, Mr. Józef Oleksy, of being the Russian spy nicknamed *Olin*. A huge political scandal followed, with Mr. Oleksy stepping down (though not immediately). Still, the Prime Minister denied being the spy and a subsequent investigation failed to produce unquestionable evidence of such activities.<sup>19</sup>

The Olin scandal instilled deep distrust of UOP in post-communist political forces. Another major reform of the intelligence sector followed the scandal. In 2001, the post-communist coalition won the election and formed a Government. Subsequently, on May 24, 2002, the parliament adopted the new Bill on the creation of the Internal Security Agency, *ABW* and the Intelligence Agency *AW*.<sup>20</sup> Thus, the Office for State Protection *UOP* was by a counterintelligence service (*ABW*) and the entirely new foreign intelligence service (*AW*). In theory, the goal was to separate counterintelligence and internal security duties from foreign intelligence. Hence *ABW* was to be the main institution responsible for the protection of the internal security and constitutional order in Poland. Its range of activities was very similar to that of its predecessor *UOP*:

- protection of national integrity, sovereignty, and independence, and countering threats to national defense;
- detection, surveillance, and countering the threats of espionage and terrorism;
- detection, reconnaissance, and countering economic crimes;

<sup>18</sup> The series of internal structural transformations were introduced by the resolutions of the Prime Minister of December 6, 1996, August 19, 1998, May 12, 1999, and April 9, 2001. In 2002 the service was disbanded.

<sup>19</sup> "Wszystkie służby III RP. Od UOP przez WSI do ABW i SKW," [wiadomosci.dziennik.pl/polityka/artykuly/559825,sluzby-iii-rp-historia-powstanie-uop-abw-wsi.html](http://wiadomosci.dziennik.pl/polityka/artykuly/559825,sluzby-iii-rp-historia-powstanie-uop-abw-wsi.html).

<sup>20</sup> Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu, Dz.U. 2002 nr 74 poz. 676.

- surveillance and investigation of acts of corruption by public functionaries, posing a threat to national security;
- investigation and prevention of illegal sales of weapons and ammunition, the proliferation of WMD, drugs, and transnational crimes of similar nature;
- protection of classified information;
- gathering and analyzing information vital for protecting internal security and constitutional order and sharing it with relevant government institutions.

The new Intelligence Agency numbered 1,000 people and was designed as an intelligence service of a more traditional outlook, tasked with the protection of external security of the state and gathering, analyzing, and sharing intelligence with relevant institutions on issues essential to the national security and international position of Poland as well as its economic and defense potential. Further to this, the AW was responsible for:

- reconnaissance of external threats to the sovereignty, integrity, and security of the state;
- protection of diplomats, diplomatic institutions, and Polish representatives working abroad from the activities of foreign intelligence services;
- provision of encrypted communication between Polish diplomatic institutions abroad and relevant institutions in Poland;
- reconnaissance of international terrorism and transnational organized crime;
- reconnaissance and countering of illegal international sales of weapons, ammunition, WMD, drugs, etc.;
- gathering of intelligence on international hot spots, conflicts, and crises abroad that may affect national security;
- electronic counterintelligence.

Both newly created services were subordinated directly to the Prime Minister. However, the change aimed not only to reform the scope of duties and prerogatives of the civilian intelligence sector but, perhaps, and equally importantly, it was a political act of retaliation against the now-defunct UOP post-communist politicians perceived as inimical and prejudiced. Soon after the new Bill came in force, the newly appointed Chief of ABW, Andrzej Barcikowski, hastily discharged 420 former UOP officers.<sup>21</sup> The redundancies were mainly for political reasons.

The final act of the intelligence sector reform of 2002 took place four years later under the successor right-wing government with the creation of the third and so far last civilian intelligence service, the Central Anticorruption Bureau (in Polish, *Centralne Biuro Antykorupcyjne*, CBA). The law was adopted on June 9,

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<sup>21</sup> "Porządki po Nowku," interview with Andrzej Barcikowski, *Trybuna*, July 2, 2002.

2006.<sup>22</sup> CBA is responsible for monitoring, surveillance, detection, investigation, and countering corruption and bribery among public functionaries (whose list has constantly been growing since then) and for investigating and countering economic crimes that may cause substantial financial loss to the State Treasury, local government budgets or public finances. In parallel, those duties were withdrawn from *ABW*, albeit not completely. *CBA* was created in a form resembling a police force, without the internal system of ranks typical for other services, with the police-like investigative and covert surveillance powers, and with the type of mission that would invite controversies in any democracy due to its potential edge against opposition parties. It numbers slightly over 800 functionaries, mostly deriving from the Police or investigative directorates of *ABW*.<sup>23</sup> Not surprisingly, it was not long before such controversial operations were made known to the public in the form of scandalous, covert operation against former President Aleksander Kwasniewski (unsuccessfully) aimed at detection of his secret funds, as well as arresting the opposition party local government politician Beata Sawicka who was later acquitted of charges by the court.

#### ***Prospective Milestone # 4: Projected Reform of the Civilian Intelligence Services Sector, 2018***

Despite seemingly never-ending reforms, politicians continue to express their dissatisfaction with the intelligence services in Poland. With the radical right-wing government now in power in Poland, the next round of reform was announced. The government adopted the project for an amended bill on *ABW* and *AW* to transform the sector again.<sup>24</sup>

Paradoxically, in organizational terms, the project partially puts the sector back into the 1990s, as it plans to subordinate the Internal Security Service *ABW* back to the Minister of Internal Affairs. The reform will also disrupt the institutional design of the intelligence sector as the Intelligence Agency *AW* will continue to be subordinated directly to the Prime Minister. It is not clear at the moment where the Central Anticorruption Bureau *CBA* would go. Furthermore, the College for Special and Intelligence Services will be abolished, and the new Committee of the Council of Ministers (i.e., the Government) for the Security of the State will be created to replace the College. It will have a similar composition and advisory role as the College; however, its controlling powers will be more limited.

Also, given the projected law, the overlap in the scope of duties of services will only grow. According to the project, *ABW* will be in charge of investigating financial/ corruption crimes exceeding 16 mln PLN (3.8 mln Euro). Effectively, *CBA* will be reduced to investigating lesser corruption and financial crimes, below

<sup>22</sup> Ustawa z dnia 9 czerwca 2006 r. o Centralnym Biurze Antykorupcyjnym Dz. U. z dnia 23 czerwca 2006 r.

<sup>23</sup> See Marek Henzler, "Etaty i budżety służb specjalnych," <https://www.polityka.pl/tygodnikpolityka/kraj/1500287,1,etaty-i-budzety-sluzb-specjalnych.read>.

<sup>24</sup> See <https://mswia.gov.pl/pl/aktualnosci/11902,Rzad-przyjal-projekty-ustaw-o-ABW-i-AW.html>.

the 16 mln PLN threshold. Furthermore, ABW will be assigned to pursue the most serious economic crimes, acts of organized crime, illegal sales of drugs, weapons, and WMD proliferation. Those activities should be carried out in coordination with the Police and other security institutions. At the same time, lesser crimes in this domain will be passed over to CBA, the Police, and the remaining institutions of the security sector.

## **Transformation of the Military Intelligence Sector**

The reform of military services took a different path. The military counterintelligence structures were disbanded by the order of the Minister of National Defence on April 22, 1990. Based on the structures of the Second Directorate of General Staff and three directorates of the former Internal Military Service, the new military intelligence was formed, first in the form of a new Directorate of Intelligence and Counterintelligence embedded in the General Staff by the Order on July 27, 1990. Then, on July 22, 1991, the new Inspectorate of Military Intelligence Services was created. In terms of legal regulations, until August 2003, the Inspectorate was legally based on Article 15 of the amended Law on universal military service.<sup>25</sup> The Inspectorate was subordinated to the Minister of National Defense (except for the period 1994-1995, when it was under the Chief of the General Staff).

However, it was not until July 9, 2003, that the separate Bill on Military Intelligence Services<sup>26</sup> was adopted. According to the Bill, the Military Intelligence was responsible for tactical and reconnaissance operations that would provide intelligence on defense planning, the organization, armaments, and technology of foreign armies, as well as for the tasks in the field of military counterintelligence and the protection of classified information in international activities of the Polish Armed Forces.

The Military Intelligence Services (*Wojskowe Służby Informacyjne, WSI*) were strongly criticized because they never underwent any vetting procedures, even to the limited extent found in the civilian sector.<sup>27</sup> Instead, the Service was formed as a result of internal reorganization. But while it is true that military intelligence WSI did not experience any institutional verification of the personnel, certain informal, internal vetting procedures had been implemented during the first transformation of 1990. According to various sources,<sup>28</sup> around 1,000 officers were discharged from service or left voluntarily. This amounted to approximately 40% of the original personnel strength. Further, about 70% of the

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<sup>25</sup> Ustawy o powszechnym obowiązku obrony Rzeczypospolitej Polskiej z 21 listopada 1967 (Dz.U. z 1992 nr 4 poz. 16 i Dz. U. z 1994 nr 43 poz. 165).

<sup>26</sup> Ustawa z dnia 9 lipca 2003 r. o Wojskowych Służbach Informacyjnych, Dz.U. 2003 nr 139 poz. 1326

<sup>27</sup> Grzegorz Mafecki, "UOP na tle innych służb europejskich," in *Urząd Ochrony Państwa*, 104.

<sup>28</sup> Personal interviews of the author with former officers of the Military Intelligence.

former officers in commanding positions either left or were discharged even before the new military intelligence WSI was formed. Still, from the formal point of view, the post-communist service was essentially a simple continuation of the former communist service, burdened with either undesirable people or practices from the past.

The military intelligence was never fully trusted by the post-Solidarity governments, despite the apparent need for their professional involvement with the deployment of Polish troops in Iraq and Afghanistan. When the right-wing Government took office in 2005, the dissolution of WSI was imminent. The overwhelming majority of 367 MPs (out of 460) adopted the presidential legislative project to dissolve the existing Military Intelligence Services WSI and form two new services. Only 44 MPs from the post-communist party opposed the bill. The new law was adopted on June 9, 2006,<sup>29</sup> providing for:

- dissolution of the Military Intelligence Services WSI by September 30, 2006;
- creation of the Liquidation Committee led by the right-wing politician Antoni Macierewicz;
- formation of two new military services replacing WSI: Military Intelligence Service SWW and Military Counterintelligence Service SKW.

The professionalism of the new military services was often questioned as the recruitment was largely closed to any seasoned professionals. At the same time, in February 2007, the Liquidation Commission, headed by Macierewicz, published a report in which the former Military Intelligence Service WSI was declared a criminal organization, alienated from the intelligence sector, engaged in illegal operations, and evading civilian control. The report claimed that Russian agents saturated WSI throughout the 1990s, and the Polish military intelligence service was fully aware of the fact and tolerated the agents. The so-called *Macierewicz's second list* was subsequently made public and proved to be highly disruptive to Polish military intelligence. It revealed its structures and working methods and, worse still, published the non-verified and error-strewn list of secret agents of the communist military intelligence, many of them still active many years later. This action resulted in the weakening of Polish military intelligence for many years to come, libel suits from the unjustly accused (most won in courts), and, worst perhaps, dismantling the counterintelligence protection of Polish soldiers on missions in Iraq and Afghanistan.<sup>30</sup> The Minister of National Defense Radosław Sikorski initially demanded the instant dismissal of Antoni Macierewicz from his subsequent position of the Chief of Military Counterintelligence. When Prime Minister Jarosław Kaczyński refused, Sikorski himself resigned.

<sup>29</sup> Ustawa z dnia 9 czerwca 2006 r. o Służbie Kontrwywiadu Wojskowego oraz Służbie Wywiadu Wojskowego, Dz.U. 2006 nr 104 poz. 709.

<sup>30</sup> Łukasz Rogojsz, "Łukasz Rogojsz," *Newsweek*, Polish edition, November 9, 2015, <http://www.newsweek.pl/polska/antoni-macierewicz-raport-wsi-lista-macierewicza-specsluzby,artykuly,371988,1.html>.

## Democratic Oversight of Intelligence Services

As any nascent democracy, Poland experienced difficulties in establishing democratic oversight of the security sector. The oversight institutions have been established in Poland, but the control mechanisms have never been properly consolidated. On the contrary, since the transformation of 2002, the civilian intelligence sector has managed to increase its independence and decrease the degree of democratic oversight, among other things, taking full advantage of European antiterrorist directives but also fostering informal ties with political parties.

### Legislative Oversight

The legislative oversight is carried out mainly by the Parliamentary Commission for Intelligence Services. Its composition and prerogatives are regulated by the Rules of Procedure of the Sejm<sup>31</sup> (lower chamber of the Polish parliament). The Commission's role is mainly to scrutinize the most important documents pertaining to intelligence sector institutions and their operations and give opinions. Among the documents, routinely scrutinized by the Commission, are projects of relevant legislative acts, guidelines for annual activities of the services prepared by the Prime Minister and Minister of Defense for civilian and military services respectively, annual plans of service activities and subsequent annual reports, and last but not least, projected state budgets in the part related to the intelligence and reports on the execution of those budgets. The Commission is also to be informed and consulted on candidatures for chiefs of the intelligence services and the deputies. It gives an opinion in the case of any planned dismissal. It merits a mention that while the issuance of the formal opinion from the Commission is a necessary condition for taking further steps in the legislative or executive processes pertaining to the intelligence organizations (approving laws, budgets, appointments, or dismissals), it is not, however, necessary to acquire a *positive* opinion from the parliamentary Commission for the legislature or the executive to go ahead with the scheme.

The Commission is entitled to demand complete information or relevant documents from the services, particularly if the MPs acquire information about possible irregularities in the service operations. There is a caveat here, however, which may hinder effective control. According to the Law on the protection of classified information, all the MPs (with the sole exception of chairpersons of both chambers of the parliament) have to obtain personal security clearances to gain access to classified information. The screening procedure is carried out and the clearances are issued (and possibly revoked) by the Internal Security Service ABW. The whole process of issuance is obscure, and the appeal procedure complicated (Prime Minister, then the courts), which leaves ABW an option to deny the clearance or revoke it if any MP is particularly 'difficult' from the point of view of the intelligence officers. There were such cases in the past concerning

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<sup>31</sup> Załącznik do uchwały Sejmu RP z dnia 30 lipca 1992 r. – Regulamin Sejmu RP (tekst jednolity M.P. 2012 poz. 32 z późn. zm.)

opposition politicians. One such case involves Zbigniew Wasserman, who subsequently became Minister-Coordinator of Intelligence Services in 2005 but had been earlier denied security clearance while being a member of the parliamentary opposition.

Another potential impediment to effective legislative oversight is that the Commission always has a majority of governing party representatives. As a result, the MPs are usually reluctant to hold the executive branch to account and seldom issue controversial opinions. For example, the only registered activity of the Commission in 2018 was the positive opinion on dismissals of previous and appointments of new chiefs of intelligence services following the Prime Minister's decision to change the heads of services. The register of 2017 activities looks similar. Furthermore, the upcoming reform of civilian intelligence services planned by the present government was not discussed in the documents processed by the Commission. The Commission's activities are limited to statutory duties and respond to the demands of the executive, without playing any role in substantial monitoring of the operations of the services and striving to correct the system of oversight.

The weakness of the legislative oversight was vividly demonstrated in the dramatic events related to the 2007 botched *ABW* operation of arresting Barbara Blida, former minister of construction in the preceding government, suspected of corruption. The operation ended with Mrs. Blida committing suicide in the course of arrest by shooting herself in her own bathroom. Subsequent investigations by many institutions showed that the arrest was politically motivated and that the operation was ill-prepared, and the *ABW* officers did not follow the procedures. At the end of 2007, a special parliamentary investigative commission was created to investigate the case. Yet, despite the change of government in 2008 and three more years of existence, it never came to any substantial conclusions.<sup>32</sup>

### *Executive Oversight*

The executive leg of intelligence oversight is represented by the institution originally established in 2002. Its composition and rules of functioning were defined by the Resolution of the Prime Minister of July 2002.<sup>33</sup> Uncharacteristically for the Polish political scene, the College's institutional design was left largely intact until 2018, when the Government revealed plans for its abolition. The College is an institution chaired by the Prime Minister and includes the following members of the Government:

- Minister of Internal Affairs
- Minister of Foreign Affairs
- Minister of National Defense

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<sup>32</sup> <http://orka.sejm.gov.pl/SQL.nsf/pracekom6?OpenAgent&SKBB>.

<sup>33</sup> Rozporządzenie Rady Ministrów z dnia 2 lipca 2002 r., Dz.U.02.103.929.



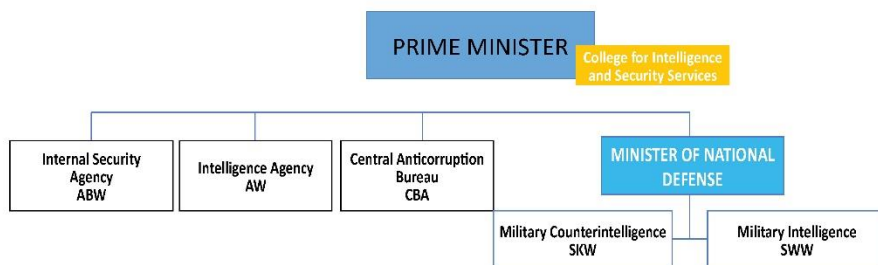
- Minister of Finance
- Head of National Security Office (presidential institution)
- Minister Coordinator of Intelligence Services (if appointed).

Chiefs of the intelligence services (ABW, AW, CBA, SWW, SKW) participate in the meetings, but the Bill makes it clear that they are *not* members of the College. The Chairperson of the parliamentary Commission for Intelligence Services is also entitled to participate in College sessions and is notified for each upcoming meeting. The College's role is to give opinions on all documents pertaining to intelligence, starting with appointment and dismissal of the chiefs of services, through projects of legislative acts, budgets, guidelines for annual planning, annual plans and reports, to the issues of coordination of intelligence activities with any other security service. The College also commonly puts current matters on the agenda, taking advantage of the obligatory presence of all relevant decision-makers in the field of state security.

If used properly, the College could become a powerful instrument of intelligence control and might facilitate the sharing of intelligence with government members. However, it did not become a robust oversight institution, primarily due to the lack of focus on effective oversight and sharing intelligence among the politicians. The composition of the College makes it an appropriate body for substantive discussion on important matters, and the presence of the Prime Minister and all the chiefs of services facilitates control and coordination. The College meetings are classified and take place in the special safe room in the Prime Minister's Office, protected from interception of any kind. Over the years, a minor information leak to the media occurred only once, making it an impressive record compared to the parliament or other government institutions. Therefore, the idea that a new round of intelligence reform is coming, the College will be disbanded, and some new body created is rather disturbing.

Finally, there is the position of the Minister-Coordinator of Special Services. However, his appointment is optional for any Prime Minister. Such a minister without portfolio (or recently just undersecretary of state) does not have independent powers or an institutional place of his own in the government structures. His actual importance strongly depends on the support of the Prime Minister. For that reason, he is hardly a controlling authority; rather, he serves as a liaison between the services and the government and is used as an expert in internal government workings.

The present structure of the intelligence sector and subordination lines are presented in Figure 2.



**Figure 2: Structure and Subordination of Intelligence Sector in Poland, 2018.**

### ***Judicial Control/ Civil Watchdogs***

In discussions on intelligence oversight in Poland, one cannot but notice the weakness of the judicial control of the intelligence sector and the scarcity of citizens' watchdogs. The judicial branch does not have any specially designated role in the systemic oversight of the intelligence sector. Similarly, there is no specified procedure for complaints against the services. Often, the court proceedings are stalled by problems with access to classified information or lack of experience with security issues on the part of the judges.

There is a degree of irony in the fact that it was the judicial sector, after all, that managed to curtail the growing powers of the intelligence services to carry out covert, intrusive operations. That was achieved against the background of the utterly inert executive and legislative oversight bodies. The Constitutional Tribunal abolished some controversial prerogatives of the security and intelligence services and forced legislative changes in this respect.<sup>34</sup> More information on that subject can be found in the subsequent section discussing the operational powers of intelligence services.

Regarding the civil watchdogs, it seems that, after the initial extensive development of civil society in the 1990s, the process has stalled, and civil activities in the security area are now few and limited. That does not mean, however, that they are non-existent. At least two professional watchdogs carry out systematic oversight of legislative regulations and covert activities of the intelligence and security services and deliver public reports. These are the Panoptikon Foundation<sup>35</sup> and the Helsinki Foundation for Human Rights,<sup>36</sup> both actively monitoring the sector and providing invaluable insights.

<sup>34</sup> See Marta Kolendowska-Matejczuk, "Ile ograniczeń, a ile wolności w społeczeństwie obywatelskim w kontekście zapewnienia bezpieczeństwa państwa i obywateli," in *Ochrona informacji niejawnych, biznesowych i danych osobowych*, ed. Małgorzata Gajos (Katowice, 2012), 53-69.

<sup>35</sup> Panoptikon Foundation, <https://en.panoptikon.org/>.

<sup>36</sup> Helsinki Foundation for Human Rights, <http://www.hfhr.pl/en/foundation/>.

## The Problem of Covert Surveillance Powers

At the heart of the problems with democratic control of the intelligence sector in Poland lies the unsolved and unregulated issue of how to control the use of covert surveillance and intrusive investigative methods without jeopardizing the assets and putting intelligence operations at risk. From the start of the democratic transformation in Poland, the mix of police, law enforcement, and intelligence-gathering powers vested in the intelligence services opened the way to their heavy reliance on using covert, intrusive methods of investigation and surveillance. With time, this reliance only grew stronger. Since the early 1990s, several legislative attempts were made to regulate the covert powers of investigation and surveillance by a separate bill, the disclosure of such information, and its ultimate disposal. The first semi-complete legislative project was created in 2008 by the parliament. It included the definition of covert surveillance and the investigations linked to the goal of such activities.<sup>37</sup> The works on that project were abandoned though, and the same happened to several other attempts. Consequently, the term “covert surveillance and investigation activities”<sup>38</sup> has been widely used in several legislative acts pertaining to security and intelligence services and their activities. Yet, none of them gives a legal definition or sets limitations to such activities. As a result, the scope of powers and the constraints have been defined by the services’ practice and their internal regulations.<sup>39</sup>

The enhancement of covert powers began in 2003 when Polish intelligence services (and the Police) obtained the right to request telecommunications data (granted by the law on the telecommunications sector, not the intelligence bills). Paradoxically, the arrival of the European directive on data retention<sup>40</sup> and its incorporation into the Polish law gave the services almost unlimited and uncontrolled access to telecommunication data and provided a strong incentive to augment their powers of direct surveillance. In parallel, it limited the opportunities for control over the secret intelligence operations. But while the European directive aimed at countering terrorism, the Polish law did not provide for such limitation with regard to requesting telecom data. Effectively, the right to obtain individual telecommunication data was granted to the intelligence services unreservedly, without imposing any restriction or additional requirement for justi-

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<sup>37</sup> Draft Bill on covert surveillance activities of February 7, 2008, parliamentary printout no. 353.

<sup>38</sup> In Polish “działania operacyjno – rozpoznawcze” or to translate exactly “operational and surveillance activities,” which collectively signify the operations with the use of covert human intelligence, intrusive investigations, direct surveillance, eavesdropping, interception of communication data, gathering of bulk data and the likes.

<sup>39</sup> Dariusz Laskowski, “Prawne aspekty funkcjonowania służb specjalnych z perspektywy potrzeb obronnych państwa,” *Obronność. Zeszyty Naukowe* 2, no. 10 (2014), 71.

<sup>40</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, abolished 2014.

fication. Before long, it became the favorite method of any investigation carried out by the intelligence services (or the Police, for that matter), without considering its proportionality to the potential threat or a requirement that it be a genuine threat to national security. In the record year 2014, the services asked for disclosure of telecommunication data 2.35 million times.<sup>41</sup>

The indiscriminate right to demand telecommunication data helped deepen the intelligence services' secretive culture and weaken external controls. The services were reluctant to disclose even the exact number of requests for information they lodged with telecom providers within a given period. In 2009, the Helsinki Foundation for Human Rights in Warsaw asked *ABW* for such statistics for 2002-2009, and it was denied information. The Internal Security Service *ABW* claimed that the information was secret and could not be disclosed as public information. The Foundation appealed to the administrative court against the decision. After several years of going back and forth, the court ruled in favor of the Foundation. However, the law had changed in the meantime, and the whole case could not be used for further reference or as a case of good practices.<sup>42</sup>

Looking back at the development of the intelligence sector's covert powers between 2003 and 2018, one can notice that, despite being better positioned to exert scrutiny and oversight, neither legislative nor executive institutions played any part in curtailing the growing independence and secrecy of the services. Instead, the judicial sector and some civic foundations played that role, proving to be more effective than designated control bodies. In 2005, acting on the motion of the Ombudsperson, the Constitutional Tribunal declared several regulations in the Law on Police unconstitutional. More specifically, the Tribunal abolished the articles that permitted the situation when data acquired by the services without prior judicial authorization (in the course of covert operations) could be stored indefinitely and could be used as legally sanctioned evidence in the criminal court proceedings. The corollary of the sentence was the amendment of legal regulations in all relevant bills, including the laws on the intelligence sector.<sup>43</sup> The second round of legal changes limited the covert powers of the services concerning the indiscriminate and disproportionate use of telecommunication data by the security and intelligence sector. Finally, on July 30, 2014, the Constitutional Tribunal, again acting on the motion of the Ombudsperson and several civil watchdogs, declared those regulations unconstitutional and allowed 18 months to make the relevant laws compliant with the Constitution. Unfortunately, the sentence did not indicate how precisely the legal regulations should be changed, leaving the problem entirely to the discretion of the politicians.

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<sup>41</sup> "Rok z ustawą inwigilacyjną. Co się zmieniło," *Fundacja Panoptykon*, January 18, 2017, <https://panoptykon.org/biblio/rok-z-ustawa-inwigilacyjna>.

<sup>42</sup> Arkadiusz Król, „Działalność Operacyjna Służb Specjalnych w Systemie Bezpieczeństwa Państwa,” *Przegląd Bezpieczeństwa Wewnętrznego* 9, no. 5 (2013), 287-289.

<sup>43</sup> Król, „Działalność Operacyjna Służb Specjalnych w Systemie Bezpieczeństwa Państwa,” 283-285.

Ultimately, the parliament passed a separate bill, dealing collectively with the required amendments in relevant bills on all the security and intelligence services authorized to carry out covert activities. The Bill, adopted on January 15, 2015,<sup>44</sup> was immediately nicknamed “The Surveillance Bill” as it did more harm than good to curb the services’ appetite for personal data acquisition. In the common opinion of watchdogs and independent experts, in fact, the new law facilitated the access of the services to certain categories of data while further diminishing the transparency of their covert activities. Specifically, in striving to regulate the data acquisition processes, the new Bill introduced a new category of data that can be disclosed to the services, namely the data on the use of the internet by individuals. Even more, if any intelligence service concluded an agreement to that effect with the internet service provider, the data will be disclosed through a dedicated link without even the provider knowing the content of the data disclosed. Previously such arrangements were only possible with telecommunication companies; now, the security and intelligence sector won additional powers and further diminished oversight. The purpose of obtaining such data has been defined very widely in the new law as being in connection with “prevention and investigation of criminal acts as well as in order to save the life or health of natural persons.” The Bill did establish some judicial control over acquiring such data, but the control is retrospective, information aggregated, and the present law does not provide any measures to stop such process before it happens. It is also practically impossible to judge whether the data was acquired in connection with legally authorized causes for such request, or it was legally dubious, as the new law allows for the gathering of data on the “just in case” basis, previously not allowed with the telecommunication data.<sup>45</sup>

In brief, one may say that intelligence services in Poland, supported by politicians, were very proficient in using the European directives aimed at improving the efficiency of counterterrorist activities in order to increase their covert surveillance and investigatory powers beyond justifiable levels—Poland not being precisely the terrorist hub of Europe—and to limit the effective oversight from any external institutions. Sadly, such an approach to European directives seems like a Polish ‘trademark.’ When the EU was debating the data retention directive, Poland postulated 15 years period of data retention, the longest proposed by any EU country. When the PNR Directive<sup>46</sup> came into force, it was incorporated into Polish national law in an all-inclusive manner so that the PNR regulations also cover domestic flights. Part of the fault may lie with the European legislators who never included any provisions for obligatory national checks on the data acquisition, allowing for national incorporation of the regulations in the manner

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<sup>44</sup> Ustawa z 15 stycznia 2016 r. o zmianie ustawy o Policji oraz niektórych innych ustaw (Dz. U. 2016, poz. 147), dalej: tzw. ustawa inwigilacyjna, ustawa.

<sup>45</sup> “Rok z ustawą inwigilacyjną. Co się zmieniło,” 2-12.

<sup>46</sup> Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime.

exceeding the original cause of action. But more importantly, the situation is blatant proof of the weakness of all the state oversight and control institutions and their apparent inability to counter the increasing secrecy of intelligence services. To dot the 'i', the case of the so-called Police directive<sup>47</sup> should be mentioned here. This directive is supposed to provide a degree of protection of natural persons from excessive personal data processing practices. Yet, it is clear that the Polish government is dragging its feet in preparing the legislative regulations to adopt it to national law.<sup>48</sup>

## Tentative Conclusions in Lieu of Good Practices

Looking back at the history of democratic transformations of the intelligence sector in Poland, it is difficult to point to practices that had proved unequivocally successful in the course of reforms. Rather, it is the case for lessons learned, which may help with recommendations for avoiding certain mistakes and achieving higher success with less cost in the future.

Dealing with the communist past of the services and vetting former communist officers appears to be the most important and most disruptive issue throughout the history of the post-communist transformation of intelligence. In post-1989 Poland, there were three options for dealing with the past: 1) the policy of "thick line," proposed by the first post-communist Prime Minister Tadeusz Mazowiecki and offering to close the past accounts on day one and never look back; 2) the so-called "zero option," consisting in getting rid of all the former functionaries of the communist regime and starting new services from scratch; and 3) the option of central vetting of former officers thus limiting the access of officers of the old regime to the new services. Each option had (and still has, for that matter) its supporters and opponents among the politicians. However, the problem was that each option was applied partially and to a limited extent in different places. There was never a binding decision taken by any government to apply one of those options in its entirety and end the discussion. Consequently, the debate on historical injustices is still ongoing. Politicians from the first post-communist government are accused of betraying the nation. The subsequent rounds of reforms of the intelligence sector always have had a backdrop of historical resentments. Those unsealed historical accounts have been partly the reason for the recurrent waves of institutional transformations of the services,

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<sup>47</sup> Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

<sup>48</sup> Letter from deputy Minister of Internal Affairs in response to watchdog enquiry, see <https://www.rpo.gov.pl/sites/default/files/odpowied%C5%BA%20MSWiA%20z%2015%20listopada%202017%20w%20sprawie%20wdra%C5%BCania%20dyrektywy%20ODO.pdf>.

which in the long run contributed to the politicization of the sector, had an adverse effect on the officers' professionalism, and hampered the relations between the politicians and the functionaries.

Secondly, the democratic intelligence sector in Poland has not been formed along any conceptual lines. Rather, it was affected by the existing security situation and current political priorities, combined with the traditional scope of responsibilities inherited from the communist period. Hence the inherent overlap of intelligence, policing, and law enforcement powers and responsibilities, particularly in civilian and military counterintelligence services. Given the combination of investigative and policing prerogatives, the services shifted the focus to enhance their powers of covert and intrusive operations. This, in turn, has led to increased secrecy of the intelligence sector and weakened the effectiveness of the oversight.

Thirdly, the legislative and executive oversight institutions have been successfully established following commonly recognized democratic principles but were never properly consolidated in their functions. As a result, the oversight bodies have all the tools at their disposal necessary to exert their powers but remain reluctant to do so. Also, until recently, no special judicial authorities have been established to monitor the sector, although, in practice, the judicial branch proved to be most efficient in curtailing the undesirable processes of deepening secrecy in the services. Last but not least, the prolonged and complicated process of transforming the sector has resulted in highly dispersed legislative regulations pertaining to the security sector and the lack of definition or regulations of some key aspects of the functioning of the intelligence.

Still, the transition of the security sector in Poland should not be looked at too critically. The services, in general, accepted the civilian leadership and oversight of often inexperienced politicians and, with the dubious exception of the OLIN case over a decade ago, they have never appeared a serious threat to the sovereignty or integrity of the democratic state (notwithstanding some unsubstantiated accusations of certain politicians). The services were also reconciled with the successive rounds of institutional reforms and, in contrast to the military, never openly challenged the politicians. Finally, the post-1989 intelligence services did register some notable successes. All in all, it seems that the main problem of the Polish transformation is the impeded development of the democratic system, which was successfully established but failed to fully consolidate into a mature democracy with a robust civil society. This has led to certain alienation of the intelligence sector and permanent distrust between the politicians and the services.

Based on those observations, the following recommendations for the democratic transitions of the intelligence sectors may be formulated:

1. Historical past should be dealt with knowingly, purposefully, and without undue delay. Politicians should hold some sort of national discussion in this respect and legitimize their decisions about the inheritance of the past regime and the functionaries of the predecessor institutions, what-

ever the decision might be. Leaving the historical resentments unresolved will inevitably lead to undermining the democratic legitimacy of the new intelligence institutions in the future;

2. The powers and responsibilities of the intelligence sector should be delineated as clearly as possible at the start of the transformation, with some conceptual underpinning of the institutional design to justify the division of prerogatives. It would be advisable to avoid excessive fragmentation of the sector and overlaps of powers as that will complicate control and coordination procedures, lead to intra-services rivalries and increase the budget for intelligence;
3. Covert surveillance prerogatives should be legally regulated early on, preferably through a separate bill or as part of laws on individual services; above all, the field of covert operations should not be left for the services to define and decide what can be done and what not;
4. While drafting new directives, European legislators need to take into account the possibility of undermining democratic oversight in transitional states and unduly enhancing the powers of intelligence services. Therefore, it is recommended to impose in the directives some obligatory constraints on the use of new powers, if only for educational reasons.

## Disclaimer

The views expressed are solely those of the author and do not represent official views of the PFP Consortium of Defense Academies and Security Studies Institutes, participating organizations, or the Consortium's editors.

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