Judgment of 12th December 2005, K 32/04
POLICE SURVEILLANCE

Type of proceedings: Abstract review **Initiator:** Commissioner for Citizens' Rights	**Composition of Tribunal:** 5-judge panel	**Dissenting opinions:** 0

Legal provisions under review	**Basis of review**
Possibility to abandon the destruction of materials collected in the process of an operating control conducted without the consent of a court [Police Act 1990: Article 19(4)]	Principle of legality Principle of proportionality Right to demand correction or deletion of incorrect or incomplete information, or information acquired by means contrary to statute [Constitution: Articles 7, 31(3) and 51(4)]
Allowing the person, subject to the operating control, access to the materials collected during that process [*Ibidem*: Article 19(16)]	Principle of proportionality Right to court and prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms Protection of the privacy of communication [Constitution: Articles 31(3), 45(1), 49 and 77(2)]
Lack of a requirement to obtain the consent of a court to conduct an operating control when the sender or recipient has expressed consent for the information transfer [*Ibidem*: Article 19(18)]	Principle of proportionality Protection of the privacy of communication [Constitution: Articles 31(3) and 49]
Open nature of the catalogue of information that may be collected by the Police about persons suspected of committing criminal offences prosecuted *ex officio* [*Ibidem*: Article 20(2)]	Principle of proportionality Prohibition on collecting unnecessary information about citizens [Constitution: Articles 31(3) and 51(2)]
Permissibility to keep the information collected for the purpose of investigating a criminal offence after the acquittal of a suspected person or the discontinuation of proceedings against such a person [*Ibidem*: Article 20(17)]	
Order No. 6 of the Chief of Police (of 2002) on the acquisition, processing and use of the collections of information about persons suspected of criminal offences prosecuted *ex officio*, underage persons committing acts prohibited by statute as offences prosecuted *ex officio*, unidentified persons or persons attempting to conceal their identity and wanted persons	Legal reservation (exclusivity of statutes) in relation to collecting and making accessible information about citizens Principles governing the issuing of orders [Constitution: Articles 51(5) and 93(2)]

According to the provisions of the Police Act 1990 (amended numerous times), Police operating control (Police surveillance) is conducted secretly and is based on the use of such means as wiretapping or control of correspondence and mail (Article 19(6) of the aforementioned Act).

Police surveillance may be carried out as part of Police operating-discovery activities for the purpose of the detection or prevention of the commitment of certain criminal offences (e.g. offences against life, some economic crimes, or criminal offences connected with the sale of arms and narcotics), the identification of perpetrators, as well as the obtainment and preservation of evidence. The basis for surveillance is the issuance of a decision by an appropriate regional court (so-called order of surveillance). Such an order may be issued upon an application filed by the Chief of Police, after obtaining the consent of the Prosecutor General, or upon an application filed by a Regional Police Commander, after obtaining the consent of the appropriate Regional Prosecutor (Article 19(1) of the Police Act 1990).

The first provision of the Police Act 1990 challenged by the Commissioner for Citizens' Rights, i.e. Article 19(4), concerns conducting an operating control without the prior consent of a court, permitted in "cases of utmost urgency" by Article 19(3) of the aforementioned Act. The rule is that if a court fails to grant consent within 5 days, the control should be stayed, and the evidence obtained in the process should be collectively destroyed. The challenged provision allows for an exception – contingent on the consent of a court, granted upon an application filed by the appropriate Police Commander after obtaining the consent of the appropriate prosecutor – from the requirement to destroy the materials collected in the manner described above, should they constitute evidence or indicate the intention to commit a criminal offence whose detection, on the basis of appropriate statutory provisions, may be facilitated by the use of an operating control or operating-discovery activities.

The second challenged provision, Article 19(16) of the Police Act 1990, states that the person subject to an operating control is not allowed access to the materials collected during such control; this provision does not infringe the rights of a suspect stemming from Article 321 of the Criminal Procedure Code. The latter provision states the right of a suspect to access the evidence collected in their case, which also includes materials collected during the surveillance. If such materials do not provide a basis to institute criminal proceedings, they should be destroyed after a two month period of safekeeping (Article 19(17) of the Police Act 1990).

A suspect, according to the Code, is a person against whom criminal proceedings have been instituted. Therefore, this term does not encompass persons under surveillance whose cases have not been referred to criminal proceedings.

The third challenged provision of the Police Act 1990 is Article 19(18) which envisages an exception from the requirement to obtain the consent of a court in order to conduct an operating control. Namely, the expressed written consent of either the sender or the recipient of the information transfer (e.g. by a telephone user) constitutes a sufficient basis to begin surveillance, which also concerns third parties that communicate with this sender or recipient. In such case, a court order for surveillance is not required.

Another provision challenged by the Commissioner for Citizens' Rights, Article 20(2) of the Police Act 1990, defines the catalogue of information that may be collected by the Police, pertaining to: per-

sons suspected of criminal offences prosecuted *ex officio* (i.e. capable of public prosecution), underage persons committing such acts, unidentified persons or persons attempting to conceal their identity and wanted persons. This catalogue is prefaced by the expression “in particular”, followed by an itemised list of the types of information (i.e. data regarding the genetic code, fingerprints, photos, identifying marks), which is indicative of its open nature.

According to the last challenged provision of the Police Act 1990, Article 20(17), personal data obtained for the purpose of detecting a crime should be kept during the period of time when they are “indispensable to the fulfilment of the statutory tasks carried out by the Police”. This indicates that the acquittal of a person who was subject to surveillance, or the discontinuation of proceedings against such a person, does not result in the requirement to destroy the personal data collected during the operating control.

The applicant alleged that the regulations described above infringe numerous constitutional provisions, listed in the table above, concerning, in particular, the informational autonomy of an individual.

Furthermore, the Commissioner challenged Order No. 6 of the Chief of Police (of 2002; see the table above). According to the applicant, this Order infringes the constitutional requirements concerning the issuance of such acts (Article 93(2) of the Constitution), as well as the principle of legal reservation (exclusivity of statutes) in relation to collecting and making accessible information about citizens.

Rendering some of the challenged provisions unconstitutional implies the necessity to amend the Police Act 1990 within the scope of the discussed judgment. As a result, the Tribunal delayed the loss of binding force of the unconstitutional provisions (see part II of the ruling and point 14 below). Furthermore, in the signalising procedural decision of 25th January 2006, S 2/06, remaining in connection with the hereby judgment, the Tribunal indicated to the Sejm (i.e. the first chamber of Polish Parliament) the need to undertake legislative activity as regards “guaranteeing, within the Police Act, constitutional rights of persons subject to operating control”, as well as pointed to the necessity of an analogous correction of acts other than the Police Act, which contain (or, in the case of drafted acts, might contain) provisions similar to those subject to constitutional review in this case.

RULING

I

1. Article 19(4) of the Police Act 1990:

a) does not conform to Article 51(4), read in conjunction with Article 31(3), of the Constitution,

b) is not inconsistent with Article 7 of the Constitution.

2. Article 19(16) of the aforementioned Act, insofar as it envisages the notification of the suspect and their defender about the operating control after its conclusion, conforms to Article 45(1), Article 49, read in conjunction with Article 31(3), as well as to Article 77(2), of the Constitution.

3. Article 19(18) of the aforementioned Act does not conform to Article 49, read in conjunction with Article 31(3), of the Constitution.

4. Article 20(2) of the aforementioned Act does not conform to Article 51(2), read in conjunction with Article 31(3), of the Constitution since it fails to precisely specify the

circumstances that would allow for gathering information about persons suspected of committing a criminal offence prosecuted *ex officio,* and it fails to specify an exhaustive list of these types of information.

5. Article 20(17) of the aforementioned Act conforms to Article 51(2), read in conjunction with Article 31(3), of the Constitution.

6. The challenged Order No. 6 of the Chief of Police (of 2002) does not conform to Articles 51(5) and 93(2) of the Constitution.

II

The Tribunal ruled that the loss of binding force of unconstitutional provisions shall be delayed for 12 months following the day on which this judgment was published in the Journal of Laws.

PRINCIPAL REASONS FOR THE RULING

1. The Police operating activities described in the challenged provisions are, by nature, secretive, also with regard to the concerned persons, and are carried out under such conditions that provide the Police with a wide margin of discretion, with limited guarantees of the rights of the person subject to these activities and with limited external control. The transparency of these activities would render them ineffective. This manner of Police activity is indispensable in a modern State, which is responsible for ensuring the safety of its citizens against terrorism and crime. Nevertheless, such activities should be accompanied by appropriate substantial guarantees, including a definition of limits on interference within the sphere of privacy, as well as procedural guarantees such as: the obligation to report the control and to legalise it by an external organ; the obligation to make available, even if only in a limited scope and from a certain moment, the information regarding the control and its results to the concerned person; control mechanisms in case of abuse on the part of the controlling organ.

2. The assessment of proportionality of limitations on constitutional rights and freedoms (cf. Article 31(3) of the Constitution) requires answering three questions concerning the introduced regulation: whether it is capable of leading to the intended results; whether it is indispensable for the protection of the public interest with which it is connected; and whether its results are proportional to the burdens it places on the citizen.

3. All constitutional rights and freedoms of the individual stem from their human dignity, protected by virtue of Article 30 of the Constitution. In the case of privacy, this relationship is of a specific nature. The protection of dignity requires the respect of the purely personal human sphere, where the person is not forced to “be with others” or “share with others” their experiences or intimate details.

4. The necessity to interfere within the sphere of privacy in a democratic State is not the same in the case of each area of privacy. For example, the respect for the privacy of the home places greater limits on the interference of the authority using wiretapping than the protection of the privacy of correspondence.

5. The provisions limiting individual rights and freedoms should be formulated clearly and precisely, in order to avoid excessive discretion when determining, in practice, the

ratione personae and *ratione materiae* of such limits. The infringement of this principle may in itself constitute the basis for determining their nonconformity with a provision that requires statutory regulation of a specific domain, as well as with the rule of law principle (Article 2 of the Constitution).

6. Operational materials collected without the consent of a court represent – as of the moment when the court expresses subsequent consent (pursuant to Article 19(4) of the Police Act 1990) – a legal resource, which may be utilised procedurally without being accused of taking advantage of "fruits of a poisonous tree". Therefore, Article 7 of the Constitution does not constitute an adequate basis of review within this scope.

7. However, the subsequent consent of a court, as envisaged in Article 19(4) of the Police Act 1990, may not be deemed to justify the infringement of the constitutional right of an individual to request the removal of information acquired using a method contrary to statute (Article 51(4) of the Constitution). An ordinary statute may not influence the scope of a constitutional notion, especially with a negative result for the scope of a constitutional right of an individual.

8. The challenged Article 19(16) of the Police Act 1990 excludes the possibility of informing the concerned person about the operating control "in the course of its duration". This does not, however, exclude the possibility of divulging such information when operating activities are no longer being conducted and an indictment has not been lodged. Therefore, the applicant is challenging one of the interpretational conjectures emerging on the basis of the challenged norm and, furthermore, an unconstitutional conjecture. However, it has not been proven that such an interpretation constitutes general practice. The subject of constitutional review is a norm whose meaning is based on general and stable practice.

9. The essence of the guaranteeing nature of the external control of operating activities is the independence and impartiality of the controlling organ. Nonetheless, in the situation described in Article 19(18) of the Police Act 1990, the consent to conduct these activities is granted by the subject personally interested in the operating activities (the recipient or sender of the information transfer). Since the discussed agreement represents a justification of encroachment upon the sphere of the person expressing it (*volenti non fit iniuria*), referring to it to justify encroaching upon the private sphere of a third person constitutes a misunderstanding.

10. The use of the term "in particular" in Article 20(2) of the Police Act 1990 signifies that the Police may collect other types of information than those mentioned in the Act. This provision breaches the specificity requirement. Furthermore, the absence of specified preconditions for failure to collect information violates the constitutional requirement of a statutory definition of the principles of collecting information (cf. point I.4 of the ruling).

11. The final acquittal of a particular person, or the discontinuation of criminal proceedings against such a person, does not signify that the collected data concerning this person may not contain information instrumental to the fulfilment of Police tasks against other persons. Article 20(17) of the Police Act 1990 refers to the information collected legally, with the consent of the court. The possibility to retain the information does not refer to so-called sensitive information – disclosing race, ethnicity, political views, religious or philosophical beliefs, religious allegiance, political or union membership, in-

formation related to health, addictions, or sexual practices (cf. Article 20(18)). Therefore, the examined regulation falls within the scope of the legislator's regulatory discretion.

12. It is necessary to differentiate between the absence of an obstacle for making materials available upon request of the concerned party – as ensured by the currently operative legal provisions (cf. point 11 above) – and the obligation to *ex officio* inform the person subject to operating activities about such a control. The existence of the latter duty is recommended and would correspond with the need for efficient instrumentalisation of the right guaranteed in Article 51(4) of the Constitution. However, this issue constitutes a legislative lacuna, which may not be subject to a challenge before the Constitutional Tribunal.

13. The challenged Order of the Chief of Police contains provisions addressed not only to Police organisational units but also shaping the legal status of citizens, in particular specifying situations where the Police collects e.g. fingerprints from certain categories of citizens and where it may abandon certain activities that interfere with the constitutional rights of citizens. Accordingly, the Order does not conform to Article 51(5) of the Constitution, pursuant to which the principles and procedure of collecting information about citizens and making it accessible may be specified exclusively by statute (i.e. the principle of legal reservation), as well as with the second sentence of Article 93(2) of the Constitution, according to which orders may not constitute the basis for decisions with regard to citizens.

14. Delaying the loss of binding force of the provisions deemed unconstitutional (cf. Article 190(3) of the Constitution) was motivated by the weight of legal issues that regulate the operational-discovery Police activities, as well as the necessity to ensure the continuation of ongoing activities. The delay period should be utilised to enact the law compatible with the content of the hereby judgment.

15. The result of the constitutional review in the present case does not determine the outcome of a potential future review from the point of view of bases whereto the applicant did not refer in this case, seeing as the Constitution protects various aspects of privacy. This refers, in particular, to the protection of the home (Article 50) or the right of an individual to present (shape) their public image (Articles 47 and 51(4)).

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 7. The organs of public authority shall function on the basis of, and within the limits of, the law.

Art. 30. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Art. 31. […] 3. Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

Art. 50. The inviolability of the home shall be ensured. Any search of a home, premises or vehicles may be made only in cases and in a manner specified by statute.

Art. 51. 1. No one may be obliged, except on the basis of statute, to disclose information concerning his person.
2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state governed by the rule of law.
3. Everyone shall have a right of access to official documents and data collections concerning himself. Limitations upon such rights may be established by statute.
4. Everyone shall have the right to demand the correction or deletion of untrue or incomplete information, or information acquired by means contrary to statute.
5. Principles and procedures for collection of and access to information shall be specified by statute.

Art. 77. […] 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.

Art. 93. […] 2. Orders shall only be issued on the basis of statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects.

Art. 190. […] 3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.