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State security as exemplified by the fight against terrorism: a choice between the well-being of the individual and the well-being of the community

Introduction

The objective scope of the research problem is concerned with offences against the state and the state's reaction to the related threats. The specified research object constitutes an interest protected under the Polish criminal law. It is noteworthy that the Polish legislature adopted a narrow understanding of offences against the state. With regard to the protected interest, as it is understood *sensu stricto*, offences against the state include coup d'état, espionage, diplomatic treason, intelligence disinformation, etc. While under Polish law offences against the state are delimited by the protected interest, which the legislature found to be the determinant in the classification of offences, as well as to be the goal it set itself in the criminal policy. Whereas in the legislation adopted in other countries, or legal policy broadly conceived, including political sciences, the meaning of offences against the state is usually more broadly defined. For instance, the group of offences against the state *sensu largo* includes such acts as sabotage, subversion and various types of acts of terrorism. Hence, the objective scope of the analysis concerns offences against the state *sensu largo*, as exemplified by terrorist offences and the state's reaction to the related threats.

Noteworthily, the Polish legislature employs a category of terrorist offences that is narrower than the colloquial category of terrorist acts, or terrorism itself. To define the category of terrorist offence, the Polish legislature used the legal definition in Art. 115 §20 of the Criminal Code (as implementation of the solutions adopted within the European Union). However, it must be noted that in spite of the fact that formal and material prerequisites are indicated, the very legal definition of terrorist offences makes it possible to treat many acts penalised under the Polish criminal law as

terrorist offences.[1] In consequence, this solution may potentially breach the principle of proportionality referred to within the constitutional norms.

In a democratic state ruled by law and a liberal democracy the problematic thing is to make decisions contrary to the interpreted hierarchy of constitutional principles, which can be illustrated with the clash between such principles as dignity and the common good. The clash gains in strength as the state has recourse to – in its opinion – more effective measures, and by extension measures that result in intensive and extensive excesses in the fight against acts of terrorism. A situation like this is possible when the common good becomes more important than man's dignity, which - in highly simplified terms – can be viewed as such basic rights as life or freedom.[2]

The main purpose of this paper is to consider the acceptable scope of radical measures adopted in the fight against terrorism, while taking into account reinterpretation of the priorities in the hierarchy of constitutional principles in a democratic state ruled by law and a liberal democracy, as exemplified by the Polish law (and hence a particular type of the state's reaction to threats related to terrorist offences). A selected practical example can be furnished by one of defunct Polish rules of law, concerned with a possibility of making a discretionary decision with regard to consenting to destruction of a civil aircraft if it has been used as a means of

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[1] Judgment of the Supreme Court of 26 June 2003, V C KN 432/01; R. Zgorzały, *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, "Prokuratura i Prawo" 2007, no. 7–8, pp. 58–79; T. Przesławski, *Cel w konstrukcji przestępstwa terrorystycznego*, "Prokuratura i Prawo" 2009, no. 5, pp. 17–28; R. Rosicki, *Information and Anti-terrorist Security of Poland. A Critical Analysis Exemplified with the Tasks and Activity of the Internal Security Agency*, "Studia Politologiczne" 2015, vol. 38, pp. 88–105; M. Gabriel-Węglowski, *Działania antyterrorystyczne. Komentarz*, Warszawa 2018, pp. 52–64; R. Rosicki, *Counter-Terrorist Security: the Example of the Special Powers of the Polish Special Services in the Field of Surveillance of Foreign Nationals*, "Przegląd Strategiczny" 2018, no. 11, pp. 263–277; A. Gasztold, P. Gasztold, *The Polish Counterterrorism System and Hybrid Warfare Threats*, "Journal Terrorism and Political Violence" 2020.

[2] Cf. P. Chalk, *West European Terrorism and Counter-Terrorism. The Evolving Dynamic*, London 1996; P. Chalk, *The Response to Terrorism as a Threat to Liberal Democracy*, "Australian Journal of Politics and History" 1998, vol. 44, no. 3, pp. 373–88; D.W. Davis, B.D. Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, "The American Journal of Political Science" 2004, vol. 48, no. 1, pp. 28–46; P. Wilkinson, *Terrorism versus Democracy: The Liberal State Response*, London, New York 2006; B. Çinar, *The Relationship Between Terrorism and Liberal Democratic States*, "European Journal of Economic and Political Studies" 2010, vol. 3, no. 2, pp. 207–221; R. Rosicki, *Information and Anti-terrorist Security of Poland. A Critical Analysis Exemplified with the Tasks and Activity of the Internal Security Agency*, "Studia Politologiczne" 2015, vol. 38, pp. 88–105; B.E. Garcia, N. Geva, *Security Versus Liberty in the Context of Counterterrorism: An Experimental Approach*, "Terrorism and Political Violence" 2016, vol. 28, issue 1, pp. 30–48; L.Y. Hunter, *Terrorism, Civil Liberties, and Political Rights: A Cross-National Analysis*, "Studies in Conflict & Terrorism" 2016, vol. 39, issue 2, pp. 165–193; E. Shor, *Counterterrorist Legislation and Subsequent Terrorism: Does it Work?*, "Social Forces" 2016, vol. 95, no. 2, pp. 525–557; E. Shor et al., *Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?*, "Studies in Conflict & Terrorism" 2018, vol. 41, no. 5, pp. 339–364.

terrorist attack (Art. 122a of Aviation Law).[3] Dignity and the common good have been recognised as the main constitutional principles that may determine discretion as to or a ban on special measures in the fight against terrorism, as exercised by the state. That is why on the one hand there is the priority of the well-being of the individual, and on the other hand – the priority of the well-being of the community. At the same time, on the one hand there is the position whereby priority is given to the rights and freedoms of the individual, while on the other hand there is the position whereby priority is given to the security of the community. Polarising these two priority values, and thus emphasising their opposing aspects is purposeful.

In order to elaborate the objective scope of the research problem it is legitimate to present the research question which – following appropriate reasoning – will be answered in the form of conclusions. The question that serves to elaborate the research problem is as follows: *To what extent is it possible to sacrifice the well-being of the individual (dignity, rights and freedoms) for the sake of the common good (security)?*

The analysis methodology is primarily based on the thought experiment consisting in the interpretation of the value hierarchy of the constitutional norms in a democratic state ruled by law and a liberal democracy. The two competing constitutional principles in a democratic state ruled by law and a liberal democracy are the principles of dignity and of the common good – it must be stressed, though, that this is a deliberate reduction of the problematic concerned with constitutional principles and their potential clash with other principles. Defining the ontological and epistemological position within naturalism and anti-naturalism, with regard to the subjectivity of the individual and the community, as well as the principles of dignity and the common good, will serve as the starting point for the thought experiment. Then, use will be made of the general presuppositions behind axiological essentialism with regard to the principles of dignity and the common good. With a view to argumentation based on the reinterpretation of the priority hierarchy of the constitutional principles in a democratic state ruled by law and a liberal democracy, where precedence is given to the principle of the common good, a loose reference is made to the intellectual achievements of such thinkers as Aristotle, J. J. Rousseau and C. Schmitt.

Theoretical dimension

A clash of values

In the first place there is a need to solve some fundamental ontological and epistemological problems which are connected with the subject matter addressed in the present text, i.e. the problems concerned with subjectivity of the individual and the community, as

[3] See *Aviation Law* Act of 3 July 2002 (Journal of Laws 2002 no. 130, item 1112); *Announcement by the Speaker of the Sejm of the Republic of Poland of 3 November 2005 on publication of the consolidated text of the national border protection act* (Journal of Laws 2005, no. 226, item 1944).

well as the principles of dignity and the common good. In the presented analysis both these issues are closely related; what is more, despite their dissimilarities, each one is permeated with the problematics of axiology.

The use of specific social or ethical categories involves a problem of their realness or conventionality, that is a problem of objectivism and subjectivism concerned with, for instance, knowledge and perception of reality. The idealised perspective of naturalism posits that there is a definite social reality presented by particular social and ethical categories; what is more, with the aid of suitable methods, it is possible to establish phenomena and recurring relationships between them. On the other hand, from the idealised perspective of anti-naturalism particular social and ethical categories are merely patterns subject to interpretation, and so the phenomena presented by particular categories do not exist independently, but emerge as a result of social creation, practices and above all discourse. Within the framework of idealised anti-naturalism, real cognition of social and ethical phenomena is not feasible, because they are objects of mere interpretation and play on senses.[4]

The objects of analysis in the present text are dignity and the common good, as constitutional principles whose interpreted superiority or inferiority will determine the nature of the individual or the community. Approaching the individual or collective subject in the context of naturalism or anti-naturalism gives rise to certain effects on the deliberations engaged in. One problem is concerned with the objectivity or subjectivity of existence of particular values, e.g. dignity and the common good. The assumption whereby dignity as a value is objective in character, and – what is more – exists independently will imply the existence of man's innate dignity. The assumption whereby the common good as a value is objective in character will imply the existence of an innate value – auspicious survival and development of the community. Deciding which one of the values is the priority, and by extension how the hierarchy of such values is structured, should, in the naturalist scheme of things, be objective. However, every choice and its justification will in the end have an axiological character, and so it will be merely an interpretation, a social construct. One might, then, say that when it comes to choosing values, their priority status and their hierarchy, social constructivism is indispensable.[5]

The anti-naturalist approach, based on social creation of knowledge, interpretation and play on senses, affords a possibility of reversing, in the hierarchy of values, the accepted order of protected interests, which are attributed to a democratic state ruled by law and a liberal democracy. Therefore, if we assume that the dignity of the individual is a priority in both kinds of democracy, then revising the hierarchy

[4] P. Furlong, D. Marsh (2010), *A Skin Not a Sweater: Ontology and Epistemology in Political Science*, in: *Theory and Methods in Political Science*, D. Marsh, G. Stoker (eds.), Basingstoke 2010, pp. 184–209; C. Parsons (2010), *Constructivism and Interpretive Theory*, in: *Theory and Methods in Political Science*, D. Marsh, G. Stoker (eds.), Basingstoke 2010, pp. 80–97; A. Grabler, *Epistemologia. Sandwiczowa teoria wiedzy*, Kraków 2019, pp. 145–149.

[5] Cf. P.L. Berger, T. Luckmann, *Społeczne tworzenie rzeczywistości*, Warszawa 2010.

results in the value of the common good coming to the fore. Of course, one might espouse the Aristotelian concept whereby the good of the individual can be realised only within the community. This would mean accepting that the common good in a democratic state ruled by law and a liberal democracy is one in which the individual's dignity must be realised. M. Piechowiak[6] is among those who are in favour of this solution, which might also be a possible resolution of the potential clash of values under the Polish constitutional order. However, such a resolution does not always resolve the problem of the clash of values in borderline situations, because one value cannot always be reconciled with another one, particularly if the existence of the community is endangered.

By way of illustration, one might point out that under the Polish constitutional order priority was given to the common good by virtue of the April Constitution, which was in force in the years 1935–1944. Already the first article of this Constitution mentions the common good. The general good is mentioned in, inter alia, Article 5, which indicates that personal values and selected freedoms are delimited by precisely this general good. Besides, Article 7 contains the provision that an individual be evaluated through the prism of the general good. This is expressed in a principle whereby an individual's entitlement to influence public matters should be conditional upon their efforts made and services rendered towards the general good. However, it must be noted that the April Constitution contains elements of the Aristotelian concept of the realisation of an individual's good within the common good, as evidenced by the contents of Article 9: "*The state aims to unite all the citizens in harmonious cooperation for the sake of the general good*." Still, this sentence can be interpreted not only in the Aristotelian, but also in the reverse, or even totalitarian spirit. Given this context, the purport of Article 10 of the Constitution is not too optimistic; it reads as follows: "*no action can stand in contradiction to the goals of the State which are articulated in its rights*" and "*in the event of opposition, the State will have recourse to measures of restraint*."[7]

The common good

M. Piechowiak distinguishes two classical traditions with regard to the conception of the common good, one that refers to Aristotle's thought, and the other that refers to N. Machiavelli's thought.[8] The distinction made by Piechowiak, in the context of

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[6] M. Piechowiak, *Prawne a pozaprawne pojęcia dobra wspólnego*, in: *Dobro wspólne. Teoria i praktyka*, W. Arndt, F. Longchamps de Bérier, K. Szczucki (eds.), Warszawa 2003, pp. 23–65; M. Piechowiak, *Konstytucyjna zasada dobra wspólnego – w poszukiwaniu kontekstu interpretacji*, in: *Dobro wspólne. Problemy konstytucyjnoprawne i aksjologiczne*, W.J. Wołpiuk (ed.), Warszawa 2008, pp. 123–158.

[7] *The Constitutional Act* of 23 April 1935 (Journal of Laws 1935, no. 30, item 227). See also M. Piechowiak, *Filozoficzne podstawy rozumienia dobra wspólnego*, "Kwartalnik Filozoficzny" 2003, no. 31, vol. 2, pp. 5–35.

[8] M. Piechowiak, *Prawne a pozaprawne*…, pp. 23–65; M. Piechowiak, *Konstytucyjna zasada dobra*…, pp. 123–158.

the above thinkers, does not seem to be relevant on account of the fact that both Aristotle and Machiavelli wrote about the community in the context of broadly conceived *bios politikos*. What is more, successful management of the community with a view to attaining the common (supreme) good is in Aristotle's case a kind of art (Greek *techne*), while in Machiavelli it consists in skilful elimination of conflicts, and the guarantee of the people's safety is one of the ruler's virtues (Greek *areté*), i.e. proficiency or astuteness evinced in public matters. The culture has acknowledged Aristotle's adequate concept of politics as having a positive overtone, while Machiavelli's concept of politics as having an extremely negative one. This distinction appears to be erroneous, because both thinkers meant the common good. In the case of Machiavelli for that matter any necessary and pragmatic conduct on the part of the authority (Latin *necessitas*), negatively read by many interpreters, would be meaningless, if it did not serve the prosperity and existence of the community. If the community ceased to exist, the ruler would have nothing to rule. Still, there is no doubt that for Aristotle the interest of the community lies in happiness, while for Machiavelli – in propitiousness and existence. Hence, according to Aristotle the well-being of the individual is happiness that consists in acting in accordance with the soul (psychic goods), while in Machiavelli the well-being of the individual is about happiness understood in a more material sense. Still, a variety of intellectual traditions that invoke these thinkers tend to interpret the relations between the community and the individual differently on account of the very fact that they evaluate these subjects.[9]

Following Piechowiak, one should point out that the common good has at least two meanings. As regards the first one, we can speak about the common good in the subjective sense, while as regards the second one – in the objective sense.[10] Hence, in the first case we speak about propitiousness and survival, as well as the development of the community as a subject – its members, to be more precise – while in the second case, we mean the conditions for its propitiousness, survival and development. Such a division is helpful in effective deconstruction of the concept of the common good. A more interesting problem concerned with the common good is the question whether it is objective or subjective in character, as well as whether it is developed by the collective subject (a political community), or perhaps it is an effect of the development of the general

[9] N. Machiavelli, *The Prince*, Cambridge 2008; Arystoteles, *Etyka nikomachejska*, Warszawa 2012; Arystoteles, *Polityka*, Warszawa 2012. See also W. Jaeger, *Paideia: The Ideals of Greek Culture. Vol. I: Archaic Greece. The Mind of Athens*, Oxford 1946, pp. 3–14; G. Reale, *Historia filozofii starożytnej. Tom II*, Lublin 1997, pp. 473–525; W. Buchner, *Wojna i konkwista. Hiszpańska myśl polityczna Złotego Wieku*, Kraków 2007, pp. 135–160; A. Rzegocki, *Racja stanu a polska tradycja myślenia o polityce*, Kraków 2008, pp. 103–217; S. Opara, *Tyrania złudzeń. Studia z filozofii polityki*, Warszawa 2009, pp. 23–26; I. Pańków, J. Pańków, *Polityka jako sztuka skutecznego rządzenia: Niccolò Machiavelli*, in: *Koncepcje polityki*, W. Wesołowski (ed.), Warszawa 2009, pp. 127–156; F. Raimondi, »Necessità« nel Principe e nei Discorsi di Machiavelli, "Scienza & Politica" 2009, vol. 21, no. 40, pp. 27–50; H. Arendt, *Kondycja ludzka*, Warszawa 2010, pp. 41–100; E. Voeglin, *Arystoteles*, Warszawa 2011, pp. 19–153; D. Quaglioni, *Machiavelli, the Prince and the Idea of Justice*, "Italian Culture" 2014, vol. 32, no. 2, pp. 110–121.

[10] M. Piechowiak, *Prawne a pozaprawne*…, pp. 23–65.

will, which J. J. Rousseau writes about in *The Social Contract*, etc. If we were to abide by the ideas propounded by J. J. Rousseau, then the only subject in a position to lay down the content of a law – what can or cannot be done - would be the people as the only sovereign, in accordance with the rule whereby the people subject to the laws should be their author. This does not, however, mean that J. J. Rousseau does not provide for a lawgiver figure in the capacity of *spiritus movens* at the dawn of the emergent political community.[11]

The question of the community and power orients us towards the problematics addressed by C. Schmitt in his works. From the theoretical perspective, the author's concept of the political is most seminal. The situation of the community is political in character if the entire community defines its enemy. Defining a political enemy has an existential meaning, and by no means is this situation reducible to the symbolical or metaphorical. This means that the public enemy (Latin *hostis humani generis*) is the one who really threatens the existence of the entire community. Noteworthily, ascribing the public enemy status to someone is not synonymous with declaring war, as the war only unveils the ultimate consequence of the people being politically unified in line with the division. In the context of this concept, the political community can consider subjects committing acts of terrorism public enemies, but "war on terrorism" itself does not constitute the political for C. Schmitt. Therefore, it can be concluded that an exceptional or critical situation gives rise to a political unity, which can be identified with pointing to some good, and measures that the community wants to take to obviate potential danger. Hence, real power is exercised by anyone who in a critical situation has the right to determine who the enemy (*hostis*) is, and who disposes of their life and death. Extraordinary measures in the fight against terrorism can then be considered in the context of the suspension of the legal order found to be lawful. The problem that remains unresolved till this day is the question as to what should be regarded as a critical situation that entitles particular subjects or the entire political community to specific actions and to make them legally valid.[12]

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[11] J.J. Rousseau, *Umowa społeczna,* Kęty 2002. See also Cz. Porębski, *Umowa społeczna według Jana Jakuba Rousseau*, "Etyka" 1986, no. 22, pp. 215–229; M. Blaszke, *Umowa społeczna J. J. Rousseau: polityka i racjonalność*, "Archiwum Historii Filozofii i Myśli Społecznej" 1987, vol. 32, pp. 41–74; M. Ludwisiak, *Postać Jana Jakuba Rousseau i jego wpływ na współczesnych*, "Acta Universitatis Lodziensis. Folia historica" 2007, no. 81, pp. 87–107; D. Pietrzyk-Reeves, *Podstawy zgody i dyskursu publicznego w koncepcji umowy społecznej Jana Jakuba Rousseau*, "Krakowskie Studia z Historii Państwa i Prawa" 2010, vol. 3, pp. 333–349; P. Pasterczyk, *Koncepcja umowy społecznej i natury człowieka u J.J. Rousseau w świetle teorii pożądliwości mimetycznej R. Girarda*, "Przegląd Filozoficzny – Nowa Seria" 2012, no. 4, pp. 373–387; R. Lis, *Jean Bodin, John Locke i Jean Jacques Rousseau. O paradoksie suwerenności i ludowładztwa oraz próbach jego rozwiązania*, "Studia Polityczne" 2014, no. 34, pp. 69–83.

[12] C. Schmitt, *Teologia polityczna i inne pisma*, Kraków 2000, pp. 191–250; C. Schmitt, *Teologia polityczna 2*, Warszawa 2014, pp. 21–34; C. Schmitt, *Dyktatura*, Warszawa 2016, pp. 21–46; See also R. Cristi, *Carl Schmitt and Authoritarian Liberalism*, Llandybie 1998, pp. 169–178; P. Kaczorowski, *Polityczność jako sposób egzystencji podmiotu zbiorowego. Koncepcja Carla Schmitta*, in: *Koncepcje polityki*, W. Wesołowski (ed.), Warszawa 2009, pp. 192–209; M. Freeden, *The Political Theory of*

Practical dimension

in the context of the conflict between the two different values, i.e. dignity and the common good, it is worth considering a provision in Article 122a, now defunct, of the Polish Aviation Law. The article made it possible to shoot down an aircraft if it became a means of terrorist attack. Undoubtedly, this solution is structured around a peculiar form of a state of higher necessity or necessary self-defence, which the Polish legislature contained in the general part of the Criminal Code (to some extent also the justification of ultimate need).[13] From the ethical viewpoint, the content of this legal solution exemplifies utilitarianism, if we acknowledge that the only goal is the well-being of the community or a larger group of individuals at the cost of a smaller group, or at the cost of particular individuals. Of course, such a simple conception of utilitarianism would not account for the complexity of presuppositions resulting from the assessment of social utility in accordance with the so-called utility calculus (hedonic calculus). At this point one might also reference one well-known philosophical and cognitive experiment concerned with the trolley (switch) problem. This dilemma appears to appropriately illustrate the legal construction of the solution adopted by the Polish legislature in the Aviation Law.[14]

Prior to the Constitutional Tribunal ruling of 2008, the provision in Article 122a of the Aviation Law reads as follows: "If it is required on the grounds of state security, and if the air defence command, while taking into account particularly the information communicated by the institutions providing air traffic service, finds that a civil aircraft is being used for actions against the law, and especially as a means of terrorist attack from the air, the aircraft may be destroyed in accordance with the rules specified in the national border protection act of 12 October 1990 (Journal of *Laws 2005, no. 226, item 1944)*."[15] However, the Constitutional Tribunal found the above-quoted provision to be unconstitutional on account of the following breaches of the principles, and clashes

Political Thinking, Oxford 2013, pp. 59–60.

[13] *Prawo karne materialne. Część ogólna i szczególna*, M. Bojarski (ed.), Warszawa 2017, pp. 166–186, 211–212; J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2017, pp. 323–336, 339–340, 422–424; *Prawo karne. Część ogólna, szczególna i wojskowa*, T. Dukiet-Nagórska (ed.),Warszawa 2018, pp. 175–186, 199–200, 559–560; Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2019, pp. 291–307, 360–363.

[14] Cf. J.J. Thomson, *The Trolley Problem*, "The Yale Law Journal" 1985, vol. 94, no. 6, pp. 1395–1415; F.M. Kamm, *Harming Some to Save Others*, "Philosophical Studies" 1989, vol. 57, no. 3, pp. 227–256; P. Vardy, P. Grosch, *Etyka*, Poznań 2010, pp. 68–76; E. Awad, S. Dsouza, R. Kim et al., *The Moral Machine Experiment*, "Nature" 2018, vol. 563, pp. 59–64.

[15] The article, with such a wording of this provision, was in effect between 01 IV 2007 and 02 X 2008. *See Announcement by the Speaker of the Sejm of the Republic of Poland of 3 November 2005 on publication of the consolidated text of the national border protection act* (Journal of Laws 2005, no. 226, item 1944).

of values: (1) the principle of the right to life, (2) the principle of proportionality, (3) the principle of adequacy, (4) the principle of subsidiarity.[16]

In fact, in the Polish system of constitutional principles, the right to life is not provided with an absolute guarantee, which means that it can be protected with varying degrees of intensity. However, because of the clash of values and constitutional goods, it is posited that their restriction is possible, but in the case of a clash with values and goods of lower standing in the interpreted constitutional hierarchy no consent should be granted. In a case like this, consent to the use of special measures and means of fight against terrorism (a decision to shoot down an aircraft) would be tantamount to voluntary manslaughter. What is more, the provision would allow use of special means and methods relative to killing with a view to saving goods of lower standing in the constitutional hierarchy (e.g. goods of material character only).

Also, of great significance is the reference, made by the Polish legislature in the defunct Article 122a of the Aviation Law, to quite an abstract category of "state security," which cannot but be seen as an indeterminate phrase. This category is quite important in criminal law on account of the protected interest, with the aid of which the Polish legislature defined penalised acts, but it does not by any means materially coincide with the act mentioned in the defunct Article 122a of the Aviation Law. Therefore, the Polish law has not *de facto* developed a category of state security as a general clause that the judiciary and law-enforcement authorities might refer to in an unambiguous manner.

Likewise, the category of state security is debatable on account of the fact that a government agency would thus consent to the killing of passengers whose safety the state itself failed to guarantee, thereby allowing them to become hostages to individuals using an aircraft as a means of terrorist act. Besides, the Polish legislature indicated the conditions for deeming the aircraft as used for actions against the law in a non-transparent manner. The problem of the lack of transparency also concerns the mechanism for verifying the existing state of threat of a terrorist attack. It infringes upon the individual's freedoms and rights resulting from their dignity, and inappropriately realises the principle of proportionality with regard to the competence to their limitation. In such a reading, the content of the defunct Article 122a of the Aviation Law is in breach of the constitutional ban on the infringement of the human dignity. The constitutional norms provide that dignity is due to everyone, and so it is an essence of humanness, which means that the passengers on board of an aircraft are deprived of legal protection in order that a rescue operation can be mounted for the sake of other individuals, whereas they should also be covered by the rescue operation in the first place. Thus, it can be clearly seen that this line of reasoning cuts across the essential division into two opposing values, i.e. the well-being of the individual and the well-being of the community, by including the endangered passengers in the community.

[16] The Constitutional Tribunal Ruling of 30 September 2008, File no. K 44/07.

As mentioned before, the content of the defunct Article 122a of the Aviation Law resembles solutions concerned with the institutions of the state of higher necessity and necessary self-defence, in force under the Polish law. In the case the state of higher necessity, one should consider what kind of situation we are dealing with in regard to the clash of values. As we make liberal use of the provision concerned with higher necessity, we can consider two cases. In the first one, we can assume that in the event of a direct threat to the lives of community members, if the danger of a terrorist attack cannot be averted otherwise, and the interest sacrificed is less valuable than the interest saved, then the aircraft will be shot down, and the perpetrator will not be deemed to have committed an offence. In the second one, we can assume that in the event of a direct threat to the lives of community members, if the danger of a terrorist attack cannot be averted otherwise, and the interest sacrificed is not obviously more valuable than the interest saved, then the aircraft will be shot down, and the perpetrator will not be deemed to have committed an offence. This division is meaningful with regard to the very institution of the state of higher necessity under the Polish law, because in the case of saving one interest at the cost of another interest of lesser value, we are dealing with circumstances excluding the unlawfulness of the act. As regards saving one good at the cost of another good which is not obviously more valuable, we are only dealing with circumstances excluding guilt. With regard to the institution of the state of higher necessity, one good, which is a life, is a good of neither lesser nor greater value. Life is then a good that is not obviously more valuable, if it is necessary to save one life at the cost of another. The division of the situation into the two above-mentioned cases of shooting down aircraft, with regard to the value of life, would be meaningless, were the interpretation based on the primacy of the individual's dignity to be adopted. But if the primacy of the community's interest is adopted, life as a value becomes highly gradable, and dignity is no longer an inalienable value. There only remains the problem of the measurability of quantitative life relative to the first and the second case – both as a good saved and a good sacrificed. In a case like this it would be necessary to apply the utility calculus (hedonic calculus) in order to save one life at the cost of another.

The problem of the defunct Article 122a of the Aviation Law can also be considered through the prism of the content of the institution of necessary self-defence under the Polish criminal law. Given a loose interpretation of the provision concerned with necessary self-defence, we can consider a situation in which a person responsible for shooting down an aircraft does not commit an offence, if they ward off a direct and unlawful attack on the lives of community members – in this case, a terrorist attack involving the use of an aircraft. It is clear that under the existing interpretation of the institution of necessary self-defence, warding off the attack by shooting down an aircraft is an intensive and extensive excess, and so constitutes a violation of the conditions for necessary self-defence. As regards the intensive excess, the measures and manners applied would be too intense. As regards the extensive excess, the measures and manners applied would be non-contemporaneous with the immediacy of the terrorist attack. In the very institution of necessary self-defence,

the Polish legislature attempts to weigh the application scope for this institution in society on account of, inter alia, the dignity due to every individual. If we were to adopt the interpretation based on the primacy of the community's interest, which in this case is the primacy of security, then every subject in breach of the auspiciousness of the survival and development of the community may be treated as a public enemy. This line of reasoning, however, displays a peculiar flaw, because the use of an aircraft as a means of terrorism presupposes a possibility of killing the passengers, who are by no means consciously involved in any terrorist attack. In the scheme of the primacy of the community's interest, if the passengers constitute a part of the endangered community (e.g. because of the citizenship they hold or a different kind of affiliation with the community), this will also be problematic. In a situation like this it will be more appropriate to consider the problem of shooting down the aircraft pursuant to Article 122a of the Aviation Law as a peculiar form of the state of higher necessity rather than necessary self-defence.

Conclusion

The starting point for the analysis performed in the text is theoretical consideration concerned with such opposing categories as objectivism (naturalism) and subjectivism (anti-naturalism), dignity and the common good, the individual and the community. The text analyses offences against the state *sensu largo*, and the state's reaction to the related threats. The problematics of offences against the state is reduced to terrorist offences, and the problematics of the state's reaction is reduced to the application of special measures in the fight against terrorism. An unconstitutional provision contained in Art. 122a of the Aviation Law has been chosen as a practical example of special measures employed by the state. A special character of this provision lies in its authorisation to make a discretionary decision with regard to consenting to the destruction of a civil aircraft, if it is used as a means of terrorist attack. In order to elaborate the objective scope of the analysis, the following research question has been formulated in the text: *To what extent is it possible to sacrifice the well-being of the individual (dignity, rights and freedoms) for the sake of the common good (security)?*

There is no doubt that from the ethical viewpoint sacrificing the well-being of the individual, i.e. their dignity, rights and freedoms for the sake of the common good as expressed in the category of safety is subject to evaluation. Right from the start there is the problem of evaluating values and their hierarchy. If we adopt the anti-naturalist position, we must acknowledge that there is no objectively innate human dignity, and that it is only a social construct subject to interpretation. Such a presupposition also results in the necessity to adopt a constructivist approach to the value hierarchy, where the priorities of the constitutional principles in a democratic state ruled by law and a liberal democracy are subject to evaluation and liberal classification, frequently for instrumental reasons or on account of a choice of a new overriding characteristic, which

may be the effect of both instrumental and axiological actions. A practical example can be furnished by the relationship between the well-being of the individual and the well-being of the community, as well as the question as to the degree to which the well-being of one subject can be sacrificed for the sake of the well-being of another. The scope and degree in which the individual's well-being, e.g. their life, is taken into account and protected, constitutes an immanent part of ethical deliberation. It is frequently accepted that life is the superior value in legal systems of particular countries, but at the same time it is assumed that despite such a status, life is protected with varying degrees of intensity. This discussion allows for an evaluation of the special measures that the state – especially a democratic state ruled by law and a liberal democracy – tends to employ in the fight against terrorism. It must be clearly indicated that the content of the defunct Article 122a of the Aviation Law granted primacy to the common good (the community as the subject) at the cost of the individual good (the individual as the subject).

In 2008 the Constitutional Tribunal, while investigating the problem of the constitutionality of Article 122a of the Aviation Law, ruled that the protection of an individual life is related to the clause of the democratic state ruled by law. This means that this type of state is realised only as a community of people, even though only people are proper subjects of rights and obligations. Therefore, depriving an individual of their life is tantamount to depriving them of their rights and obligations. Even though the concept of the relation between the individual and the community goes beyond the essentialism of the two subjects, and by extension the essentialism of the two values, it points to a lack of the privileged position of the community in regard to the possibilities for limiting an individual's life in the state of higher necessity, e.g. hijacking an aircraft with a view to committing a terrorist act. Furthermore, the Constitutional Tribunal opts for the interpreted hierarchy of values that is underpinned by the supremacy of the value of human life. In the event of a clash with lower-order values, there should be no room for limiting this value. This, however, does not resolve the dilemma specified in the institution of the state of necessity, featuring two competing interests which, in relation to each other, are not values of obviously higher standing (e.g. life). Also, this does not preclude a possible construction of a legal norm based on a state of necessity construct contained in the Polish criminal law as *lex specialis*.

Therefore, one can clearly see that in the scheme of legal systems based on the principles of a democratic state ruled by law and a liberal democracy there are various kinds of restrictions with regard to the use of special measures in the fight against terrorism. Undoubtedly, every event that disturbs the community's sense of security affords a potential opportunity to use it to reinterpret the hierarchy of both ethical and constitutional values, which results in the state's unwarranted interference in the individual's goods such as dignity, rights and freedoms, and of course life itself. Conversely, such processes can be interpreted as a deliberate suspension of the legal order regarded as lawful in a political community's critical situation.

Bibliography

Arendt H., *Kondycja ludzka*, Warszawa 2010, Fundacja Aletheia.

Arystoteles, *Etyka nikomachejska*, Warszawa 2012, Wydawnictwo Naukowe PWN.

Arystoteles, *Polityka*, Warszawa 2012, Wydawnictwo Naukowe PWN.

Awad E. et al., *The Moral Machine experiment*, "Nature" 2018, vol. 563.

Berger P.L., Luckmann T., *Społeczne tworzenie rzeczywistości*, Warszawa 2010, Wydawnictwo Naukowe PWN.

Blaszke M., *Umowa społeczna J.J. Rousseau: polityka i racjonalność*, "Archiwum Historii Filozofii i Myśli Społecznej" 1987, t. 32.

Buchner W., *Wojna i konkwista. Hiszpańska myśl polityczna Złotego Wieku*, Kraków 2007, Ośrodek Myśli Politycznej.

Chalk P., *The Response to Terrorism as a Threat to Liberal Democracy*, "Australian Journal of Politics and History" 1998, no. 3.

Chalk P., *West European Terrorism and Counter-Terrorism. The Evolving Dynamic*, London 1996, Palgrave Macmillan.

Cristi R., *Carl Schmitt and authoritarian liberalism, Llandybie 1998*, University of Wales Press.

Davis D.W., Silver B.D., *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, "The American Journal of Political Science" 2004, no. 1.

Dobro wspólne. Problemy konstytucyjnoprawne i aksjologiczne, Wołpiuk W.J. (ed.), Warszawa 2008, Wyższa Szkoła Zarządzania i Prawa im. Heleny Chodkowskiej w Warszawie.

Dobro wspólne. Teoria i praktyka, W. Arndt, F. Longchamps de Bérier, K. Szczucki (eds.), Warszawa 2013, Wydawnictwo Sejmowe, Fundacja "Utiriusque iuris".

Freeden M., *The political Theory of Political Thinking*, Oxford 2013, Oxford University Press.

Furlong P., Marsh D., Ercan S.A., *A Skin Not a Sweater: Ontology and Epistemology in Political Science*, in: *Theory and methods in political science*, V. Lowndes, D. Marsh, G. Stoker (eds.), Basingstoke 2010, Red Globe Press.

Gabriel-Węglowski M., *Działania antyterrorystyczne*. Komentarz, Warszawa 2018, Wolters Kluwer.

Garcia B.E., Geva N., *Security Versus Liberty in the Context of Counterterrorism: An Experimental Approach*, "Terrorism and Political Violence" 2016, issue 1.

Gasztold A., Gasztold P., *The Polish Counterterrorism System and Hybrid Warfare Threats*, "Journal Terrorism and Political Violence" 2020.

Grabler A., *Epistemologia. Sandwiczowa teoria wiedzy*, Kraków 2019, Wydawnictwo Universitas.

Hunter L.Y., *Terrorism, Civil Liberties, and Political Rights: A Cross-National Analysis*, "Studies in Conflict & Terrorism" 2016, issue 2.

Jaeger W., *Paideia: The Ideals of Greek Culture. Vol. I: Archaic Greece*. The Mind of Athens, Oxford 1946, Oxford University Press.

Kaczorowski P., *Polityczność jako sposób egzystencji podmiotu zbiorowego. Koncepcja Carla Schmitta*, in: *Koncepcje polityki*, W. Wesołowski (ed.), Warszawa 2009, Wydawnictwo Naukowe Scholar.

Kamm F.M., *Harming Some to Save Others*, "Philosophical Studies" 1989, no. 3.

Koncepcje polityki, W. Wesołowski (ed.), Warszawa 2009, Wydawnictwo Naukowe Scholar.

Lis R., *Jean Bodin, John Locke i Jean Jacques Rousseau. O paradoksie suwerenności i ludowładztwa oraz próbach jego rozwiązania*, "Studia Polityczne" 2014, no. 34.

Ludwisiak M., *Postać Jana Jakuba Rousseau i jego wpływ na współczesnych*, "Acta Universitatis Lodziensis. Folia historica" 2007, no. 81.

Machiavelli N., *The Prince*, Cambridge 2008, Cambridge University Press.

Opara S., *Tyrania złudzeń. Studia z filozofii polityki*, Warszawa 2009, MUZA.

Pańków I., Pańków J., *Polityka jako sztuka skutecznego rządzenia: Niccolò Machiavelli*, in: *Koncepcje polityki*, W. Wesołowski (ed.), Warszawa 2009, Wydawnictwo Naukowe Scholar.

Parsons C., *Constructivism and Interpretive Theory*, in: *Theory and methods in political science*, D. Marsh, G. Stoker (eds.), Basingstoke 2010, Red Globe Press.

Pasterczyk P., *Koncepcja umowy społecznej i natury człowieka u J.J. Rousseau w świetle teorii pożądliwości mimetycznej R. Girarda*, "Przegląd Filozoficzny – Nowa Seria" 2012, no. 4 (84).

Piechowiak M., *Filozoficzne podstawy rozumienia dobra wspólnego*, "Kwartalnik Filozoficzny" 2003, no. 2.

Piechowiak M, *Prawne a pozaprawne pojęcia dobra wspólnego*, in: *Dobro wspólne. Teoria i praktyka*, W. Arndt, F. Longchamps de Bérier, K. Szczucki (eds.), Warszawa 2013, Wydawnictwo Sejmowe, Fubdacja "Utiriusque iuris", s. 23–45.

Piechowiak M., *Konstytucyjna zasada dobra wspólnego – w poszukiwaniu kontekstu interpretacji*, in: *Dobro wspólne. Problemy konstytucyjnoprawne i aksjologiczne*, W.J. Wołpiuk (ed.), Warszawa 2008, Wyższa Szkoła Zarządzania i Prawa.

Pietrzyk-Reeves D., *Podstawy zgody i dyskursu publicznego w koncepcji umowy społecznej Jana Jakuba Rousseau*, "Krakowskie Studia z Historii Państwa i Prawa" 2010, vol. 3.

Pohl Ł., *Prawo karne. Wykład części ogólnej*, Warszawa 2019, Wolters Kluwer.

Porębski Cz., *Umowa społeczna według Jana Jakuba Rousseau*, "Etyka" 1986, no. 22.

Prawo karne. *Część ogólna, szczególna i wojskowa*, T. Dukiet-Nagórska (ed.), Warszawa 2018, Wolters Kluwer.

Prawo karne materialne. Część ogólna i szczególna, M. Bojarski (ed.), Warszawa 2017, Wolters Kluwer.

Przesławski T., *Cel w konstrukcji przestępstwa terrorystycznego*, "Prokuratura i Prawo" 2009, no. 5.

Quaglioni D., *Machiavelli, the Prince and the Idea of Justice*, "Italian Culture" 2014, no. 2.

Raimondi F., »*Necessità« nel Principe e nei Discorsi di Machiavelli*, "Scienza & Politica" 2009, no. 40.

Reale G., *Historia filozofii starożytnej. Tom II*, Lublin 1997, Redakcja Wydawnictw Katolickiego Uniwersytetu Lubelskiego.

Rosicki R., *Information and anti-terrorist security of Poland. A critical analysis exemplified with the tasks and activity of the Internal Security Agency*, "Studia Politologiczne" 2015, vol. 38.

Rosicki R., *Counter-Terrorist Security: The Example of the Special Powers of the Polish Special Services in the Field of Surveillance of Foreign Nationals*, "Przegląd Strategiczny" 2018, no. 11.

Rousseau J.J., *Umowa społeczna*, Kęty 2002, Wydawnictwo Antyk.

Rzegocki A., *Racja stanu a polska tradycja myślenia o polityce*, Kraków 2008, Ośrodek Myśli Politycznej.

Schmitt C., *Teologia polityczna i inne pisma*, Kraków 2000, Wydawnictwo Aletheia.

Schmitt C., *Teologia polityczna 2*, Warszawa 2014, Wydawnictwo Aletheia.

Schmitt C., *Dyktatura*, Warszawa 2016, Fundacja Augusta hr. Cieszkowskiego.

Shor E., *Counterterrorist Legislation and Subsequent Terrorism: Does it Work?*, "Social Forces" 2016, no. 2.

Shor E. et al., *Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?*, "Studies in Conflict & Terrorism" 2018, no. 5.

Theory and methods in political science, D. Marsh, G. Stoker (eds.), Basingstoke 2010, Red Globe Press.

Thomson J.J., *The Trolley Problem*, "The Yale Law Journal" 1985, no. 6.

Vardy P., Grosch P., *Etyka*, Poznań 2010, Zysk i S-ka.

Voeglin E., *Arystoteles*, Warszawa 2011, Fundacja św. Mikołaja.

Warylewski J., *Prawo karne. Część ogólna*, Warszawa 2017, Wolters Kluwer.

Zgorzały R., *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, "Prokuratura i Prawo" 2007, no. 7–8.

Legal acts

Announcement by the Speaker of the Sejm of the Republic of Poland of 3 November 2005 on publication of the consolidated text of the national border protection act (Journal of Laws 2005, no. 226, item 1944).

Act of 3 July 2002 on Aviation Law (Journal of Laws 2002 no. 130, item 1112).

Constitutional Act of 23 April 1935 (Journal of Laws 1935, no. 30, item 227).

Judical decision

Constitutional Tribunal Ruling of 30 September 2008, File no. K 44/07.

Judgment of the Supreme Court of 26 June 2003, V C KN 432/01.

Abstract

The objective scope of the analysis encompasses special measures used in the fight against terrorism in the context of ethical and constitutional principles attributed to a democratic state ruled by law and a liberal democracy. A practical example of a special measure used in the fight against terrorism, and presented in the text, is furnished by the content of one of the articles in the Polish Aviation Law, which was found unconstitutional in 2008. The content of this article made it possible for an administrative authority to make a decision with regard to consenting to the destruction of a civil aircraft, if it was used as a means of terrorist attack.

The main purpose of the paper is to consider the acceptable scope of radical measures in the fight against terrorism, while taking into account the reinterpretation of priorities in the hierarchy of legal principles. In order to elaborate the objective scope of the analysis, the following research question is phrased: *To what extent is it possible to sacrifice the well-being of the individual (dignity, rights and freedoms) for the sake of the common good (security)?*

The adopted analysis methodology is based on a thought experiment consisting in the reinterpretation of ethical principles and the values of the constitutional norms in a democratic state ruled by law and a liberal democracy. With the benefit of essentialist reduction, it is posited that the two competing constitutional principles are the principle of dignity and the principle of the common good; they can be reduced to, for instance, protection of the life of an individual or of members of the community as a whole.

Keywords: terrorism, aviation terrorism, security, state of higher necessity, human rights and freedoms, common good.

Abstrakt

Zakres przedmiotowy analizy obejmuje zagadnienie szczególnych środków walki z terroryzmem w kontekście zasad etycznych i konstytucyjnych przypisanych demokratycznemu państwu prawa i demokracji liberalnej. Przykładem praktycznym szczególnego środka walki z terroryzmem zaprezentowanym w tekście jest treść jednego z artykułów polskiego Prawa lotniczego, który został uznany za niekonstytucyjny w 2008 roku. Treść artykułu dawała możliwość podjęcia decyzji przez organ administracji publicznej w zakresie wyrażenia zgody zniszczenia cywilnego statku powietrznego w sytuacji, gdy ten użyty jest jako środek ataku terrorystycznego.

Głównym celem pracy jest rozważanie zakresu dopuszczalności stosowania radykalnych środków walki z terroryzmem przy uwzględnieniu reinterpretacji priorytetów w hierarchii zasad prawnych. W celu uszczegółowienia zakresu przedmiotowego analizy zaprezentowano następujące pytanie badawcze: *W jakim zakresie możliwe jest poświęcenie dobra jednostki (godności, praw i wolności) na rzecz dobra wspólnego (bezpieczeństwa)?*

Metoda analizy opiera się na eksperymencie myślowym polegającym na reinterpretacji zasad etycznych i wartości norm konstytucyjnych w demokratycznym państwie prawa i demokracji liberalnej. Przyjęto za pomocą redukcji esencjonalnej, że dwie rywalizujące ze sobą zasady konstytucyjne, to zasada godności i zasada dobra wspólnego, które mogą być sprowadzone np. do ochrony życia jednostki lub członków wspólnoty jako całości.

Słowa kluczowe: terroryzm, terroryzm lotniczy, bezpieczeństwo, stan wyższej konieczności, prawa i wolności człowieka, wspólne dobro.