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67

CURRENT CHALLENGES FOR CRIMINAL LAW:

FOREIGN CULTURES AND TERRORISM

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TABLE OF CONTENTS

SPIS TREŚCI

FOREWORD

This passing year brought plenty of scholarly events to the Faculty of Law and Administration at the University of Warsaw – conferences, conventions, seminars and workshops. This issue of *Studia Iuridica* is to be devoted exclusively to the *21st Polish-Austrian Seminar on Criminal Law*, organized together by the University of Salzburg (*Universität Salzburg*) and the University of Warsaw.

Professors, junior academics and students, hailing not only from the Universities of Warsaw and Salzburg, but also other institutions, partook in this important scholarly event of long tradition. The problems discussed in the course of the Seminar are particularly significant and topical, which is evidenced by its theme: *Current challenges for criminal law: foreign cultures and terrorism*. The Seminar took place from 6th to 10th June 2016.

The seminars we organize are underpinned by the idea of initiating relevant – not only academically but also socially – discussions, on the challenges of today which criminal law must face up to. In this way, academic considerations and a social perspective are married together. Seminar participants may familiarize themselves with the latest criminal concepts, diagnose the causes of pertinent phenomena and put forward proposals *de lege ferenda*. Following the conclusion of the *21st Polish-Austrian Seminar on Criminal Law*, we all agreed that the subject and our debates thereon are of such value that it was worthwhile to publish academic papers with a view to joining the international discourse on the contemporary challenges encountered by criminal law, many of which stem from the increasing wave of immigration as well as the rise of terrorism.

Courtesy of the Dean of the Faculty of Law and Administration at the University of Warsaw, the result of our work is published in the form of a special issue of the *Studia Iuridica* magazine.

The success of this endeavour would not materialize if not for the tremendous effort of the participants of the *21st Polish-Austrian Seminar on Criminal Law*. We are appreciative not only of the speakers whose papers were subsequently cleared for publication, but also of those whose talks and comments enriched our academic debate. We wish to thank Prof Tomasz Giaro, the Dean of the Faculty of Law and Administration at the University of Warsaw, who supported the organization of the Seminar as well as the publication of this special issue. Thanks are also extended to our Austrian partners and friends.

Words of gratitude are hereby conveyed to the reviewers of the papers submitted for publication in this issue of our magazine: Prof. Maria Eder-Rieder,

Prof. Kurt Schmoller, Prof. Otto Lagodny, Prof. Adam Górski, Prof. Rong-geng Li, Prof. Ali Emrah Bozbayindir, Prof. Hanna Kuczyńska, Prof. Tatjana Hörnle, Prof. Andrzej Sakowicz.

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THE IMPACT OF HUMAN DIGNITY ON THE PRINCIPLES OF CRIMINAL LIABILITY. THE EXAMPLE OF GUILT[1]

1. HUMAN DIGNITY

Human dignity is a well-known concept among Western countries since after World War II, when states, in an effort to create a new platform of cooperation with a view to guaranteeing peace, were looking for an axiological foundation of the new order. United Nations perceived human dignity as the real source of human rights and freedoms, independent from the will of states and legislatures. This phenomenon became a basis for the entire catalogue of human rights and freedoms. What is really crucial, and sometimes forgotten, is that the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on December 10, 1948, was named "declaration" instead of "covenant", "convention", "agreement"[2]. It cannot be understood as an irrelevant choice of words, arbitrarily determined by the assembly. To declare human rights means proclaiming rights that belong to a human being, regardless of the will of the state. These fundamental rights need not be passed in a legislative process because their validity and claim for obedience are derived from the nature of a human being, particularly from human dignity[3]. Yet at the very beginning of the declaration, in the first sentence of the preamble, we read: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". The General Assembly recognized the inherence of dignity, therefore its axiological basis is free from

[1] The article was written as part of the project: "Impact of the principle of human dignity on the concepts of liability in criminal law", financed by the National Science Centre, Poland, project number: 2015/19/D/HS5/00526.

[2] It presupposes the semantics used to describe the phenomenon of human rights declared by the United Nations Assembly in 1948. These rights should not be referred to as "established", "constructed", "enacted", since they are construed from an anthropological – in a philosophical sense – vision of the person, independent from the dynamic approach of a legislature.

[3] M. Piechowiak, *Human rights: How to Understand Them*?, (in:) P. Morales (ed.), *Towards Global Human Rights*, Tilburg 1996, pp. 25–26.

the legislature's will. Later in the text, in article 1, it is declared that: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". This reasoning validates a conclusion that the human dignity principle is the very foundation of the human rights order[4].

A growing role of human dignity in international law has not remained without influence on national legislation, especially on constitutions passed either after World War II or after the collapse of communism in Central and Eastern Europe. One of the best examples, doubtless constituting a role model for other modern democracies revising their axiological foundations after totalitarian experiences, is the Basic Law for the Federal Republic of Germany, which in its article 1(1) declares: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority"[5]. Article 30 of the Constitution of the Republic of Poland should be mentioned as well: "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"[6].

The human dignity principle can be found in many other basic laws, particularly in Western countries. In the preamble to the Fundamental Law of Hungary it is declared that human dignity is the foundation of human existence. This is elaborated upon in article II of the chapter entitled "Freedom and responsibility", where dignity is stipulated to be inviolable. Every person is granted a right to life and respect for their dignity[7]. Dignity is also recognized in art. 10(1) of the Spanish Constitution, which sees it – together with inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights

[4] It does not imply the claim that all of the provisions currently grouped in the human rights aggregation are – so to say – mechanically destined to have roots in human dignity. Some time after the proclamation of the Universal Declaration of Human Rights the emphasis shifted from mere recognition of human rights to enacting human rights, based more on the current wishes of the states and their citizens than on deep reasoning regarding the status of a person and conclusions derived therefrom. Nevertheless, criticism addressed at the modern method of establishing human rights should not be understood as a view which excludes any role of positivistic laws with regard to human rights. The obligation of a legislature, when human rights are considered, is to protect them by enacting proper laws. *Cf.* M. Piechowiak, *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin 1999, pp. 124–126.

[5] An English version of the Basic Law for the Federal Republic of Germany is available on the following website: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0012 (visited August 9, 2016).

[6] An English version of the Constitution of the Republic of Poland is available on the website of the Polish Sejm: http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (visited August 9, 2016).

[7] An English version of the Fundamental Law of Hungary is available on the following website: http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf (visited August 9, 2016).

of others – as a foundation of political order and social peace[8]. In the Constitution of Portugal, similarly to the German Constitution, a reference to dignity appears in art. 1, pursuant to which dignity underpins the whole structure of the state and its engagement in building a free, just and solidary society[9]. Article 23 of the Constitution of Federal Belgium guarantees to everybody the right to conduct their lives in accordance with the requirements of human dignity[10].

That the principle of dignity is not explicitly embraced in other constitutions need not necessarily mean that they reject it. Instead, it suggests that those legal systems are rooted in dignity in an indirect way[11]. For example, art. 2(1) of the Constitution of Greece declares respect for a person and protection of their values as the most important duty of the state[12]. The French Constitution does not refer directly to the notion of dignity, however the courts in their judgments often cite it as a fundamental value and take it into account in making decisions[13]. To add more, not only do European constitutions refer to the human dignity category. The Constitution of the Republic of South Africa proclaims in art. 1 that the Republic of South Africa is one, sovereign, democratic state founded on – among other values – "Human dignity, the achievement of equality and the advancement of human rights and freedoms"[14]. A similar approach to the relation between a state and the human dignity can be found in art. 1 of the Constitution of the Federative Republic of Brazil, which indicates that it is a legal democratic state founded on several principles, human dignity being one of them. All these examples prove the weight accorded to human dignity by legal systems. Human dignity is included in the most important parts of constitutions, either among provisions proclaiming the foundations of the state or as the starting point of a human rights catalogue.

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[8] An English version of the Spanish Constitution is available on the following website: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf (visited August 9, 2016).

[9] An English version of the Constitution of the Portuguese Republic is available on the following website: http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf (visited August 9, 2016).

[10] An English version of the Constitution of the Federal Belgium is available on the following website: http://www.const-court.be/en/basic_text/basic_text_constitution.html (visited August 9, 2016).

[11] P. Tuleja, *Stosowanie Konstytucji RP w świetle zasady jej nadrzędności*, Warszawa 2003, p. 106.

[12] An English version of the Constitution of Greece is available on the following website: http://www.cecl.gr/RigasNetwork/databank/Constitutions/Greece.html (visited August 9, 2016); *cf.* S. Retter, *Pojęcie godności w obowiązującym i przyszłym prawie wspólnotowym*, (in:) K. Complak (ed.), *Godność człowieka jako kategoria prawa*, Wrocław 2001, p. 91.

[13] N. Rao, *On the Use and Abuse of Dignity in Constitutional Law*, "Columbia Journal of European Law" 2008, issue 14, p. 217.

[14] An English version of the Constitution of the Republic of South Africa is available on the following website: http://www.gov.za/documents/constitution-republic-south-africa-1996 (visited August 9, 2016).

Both approaches should compel us to consider what implications are triggered by such an important position of this basic principle in legal texts. The reasoning underlying this importance should exert effects to be found in criminal law, which, although recognized as the last resort, interferes deeply with basic human rights. Consequently, the assumption that human dignity seems to have an impact on criminal law, particularly on rules of responsibility, is justified[15].

2. CONTENT OF THE PRINCIPLE

Above all, before trying to interpret relations between human dignity and rules of criminal responsibility, it is necessary to make an effort to recognize the content of the principle discussed here. An attempt to discern the content of human dignity and presumptions derived from it is really complicated and demands subtle reasoning, but above all necessitate research on the philosophical context in which this concept entered into the legal system. Such a necessity arises most strikingly when we compare the European, at least German and Polish, approach to human dignity with the Anglo-American approach, mostly seen in the United States. Whilst in Poland and Germany a really important part of reasoning about the sanctity of human life is rooted in human dignity, in the United States it is rather seen as a justification for such values as equality and freedom of speech[16]. Differences are not so fundamental that it would not be possible to find any common denominator. Both systems seem to emphasize the autonomy of a person as a necessary implication of human dignity[17].

Every reflection on the manner of expression of the human dignity principle in a constitution must be finally challenged by the question on the philosophical

[15] Another area where human dignity plays an important role is the making of decisions with regard to criminalization and construction of criminal norms. This angle of the concept will not be discussed at length here, as it has been analysed in: K. Szczucki, *Wykładnia prokonstytucyjna prawa karnego*, Warszawa 2015 (Polish edition) and K. Szczucki, *Proconstitutional Interpretation of Criminal Law*, Lanham, Boulder, New York, London 2016.

[16] V. C. Jackson, *Constitutional Dialogue and Human Dignity: State and Transnational Constitutional Discourse*, "Montana Law Review" 2004, p. 21 *et seqq.*; F. Schauer, *Speaking of Dignity*, (in:) M. J. Meyer, W. A. Parent (eds.), *The Constitution of Rights. Human Dignity and American Values*, Ithaca, London 1992, p. 179; R. G. Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, "San Diego Law Review" 2006, Vol. 43, p. 530 *et seqq.* An example of a difference between approaches to human dignity in Poland and the U.S. is the debate on abortion and arguments used therein. In Poland, most supporters of the pro-life position use the argument from human dignity of an unborn child, whereas in the U.S. it is rather common to defend the pro-choice position by reference to human dignity of the woman.

[17] M. Dan-Cohen, *Harmful Thoughts. Essays on Law, Self, and Morality*, Princeton 2002, p. 135; D. Luban, *Legal Ethics and Human Dignity*, Cambridge 2007, pp. 74–75.

source of the understanding of this concept. Since there are so many available interpretations of human dignity, it is almost impossible to point to a universal one. Within the bounds of legal reasoning it is more useful to find out what the concrete philosophical context accompanying the decision of enshrining dignity in a constitution was. With regard to the Polish Constitution, it is rightly argued that the object of protection in art. 30 has its source in personalist philosophy[18]. However, the legacies of stoicism[19], medieval philosophy (particularly Saint Thomas Aquinas)[20] and Immanuel Kant[21] are also relevant. An advantage of personalism, worth noticing in this context, is that this philosophical current grows out of various philosophical traditions mentioned above. With some caution, personalism might be interpreted as a response to the dialogue between Thomism and Kantianism. Although explanations of the human dignity concept located in the German Basic Law are much more Kantian than Thomist[22], we can try to discuss it from the same perspective as the Polish Constitution, at least when legal methods are used instead of pure philosophical reasoning[23]. The personalist approach to dignity may be – for the purposes of this analysis – boiled down to stating that the nature of a human being expresses through one's inside. Every

[18] L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa 2012, p. 21. *Cf.* also O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Warszawa 2011, p. 415.

[19] L. Bosek, *Gwarancje godności*..., p. 31. *Cf.* also H. Izdebski, *Godność i prawa człowieka w nauczaniu Jana Pawła II*, "Studia Iuridica" 2006, issue 45, p. 299 *et seqq.*

[20] Unfortunately, it happens so that the earliest and the main philosophical source of human dignity is found in I. Kant's scholarship. Sometimes it is attributed to Cicero, however very rarely to St. Thomas Aquinas' writings. See W. Arndt, *Godność człowieka jako istotny element racji stanu*, (in:) A. Krzynówek-Arndt (ed.), *Kryterium etyczne w koncepcji racji stanu*, Kraków 2013, p. 65; M. Piechowiak, *Tomasza z Akwinu koncepcja godności osoby ludzkiej jako podstawy prawa. Komentarz do rozdziałów 111–113 księgi III Tomasza z Akwinu "Summa contra gentiles"*, "Poznańskie Studia Teologiczne" 2003, issue 14, *passim*; M. Piechowiak, *Klasyczna koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół św. Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka*, (in:) P. Dardziński, F. Longchamps de Bérier, K. Szczucki (eds.), *Prawo naturalne – natura prawa*, Warszawa 2011, p. 3 *et seqq.*

[21] M. Dan-Cohen, *A Concept of Dignity*, "Israel Law Review" 2011, issue 44, p. 11; S. Hufnagel, *The impact of the German Human Dignity Principle on the Right to Life and the Right not to be Subject to Torture*, (in:) J. Bröhmer (ed.), *The German Constitution Turns 60. Basic Law and Commonwealth Constitution. German and Australian Perspectives*, Frankfurt am Main 2011, pp. 65–66.

[22] It does not mean that the German doctrine does not recognize other possible contexts of interpretation: R. Herzog, M. Herdegen, H. H. Klein, R. Scholz, *Grundgesetz. Kommentar*, München 2016, pp. 8–10.

[23] Ch. Starck notices both Christian and secular roots of the principle of human dignity, but he underlines that – bearing in mind a reference to God in the preamble to the German Basic Law – the Christian context shall not be put aside: Ch. Starck, *Art. 1 Abs. 1*, (in:) Ch. Starck (ed.), *Kommentar zum Grundgesetz*, München, 2010, pp. 30–31. In the literature, we can find even some attempts to construe the human dignity concept without any philosophical background. See D. Luban, *Legal Ethics*..., p. 66 *et. seqq.*

externalization, like acts, creativity, products, have their origin and cause in the inside of a human being. As noticed by Karol Wojtyła, the essence of this internal cause of human acts is reason and freedom. These elements of human nature constitute the basis of human dignity[24]. From the criminal law perspective, another remark of this author is crucial, namely that an act can be understood only as a conscious action of a human. No other action deserves this name[25]. When the "good" is understood as the end and motive of an action, it conduces to preserving the sovereignty of a person and simultaneously – secondarily to human – the sovereignty of the state[26].

The human dignity principle is a norm prescribes recognition of a person as a subject rather than as an object. Subjectivity of a person deserves absolute and equal protection in the legal system[27]. This argument, in favour of a special and unique status of a person, is rooted in the conviction that the human dignity principle embodies an axiom, according to which each person is possessed of internal value, regardless of any committed act or any other behaviour which may affect our opinion about the person[28]. Sybille Rolf claims that recognition of inner autonomy of a person, through human dignity, being a guarantee of voluntary and internal action, might be the only foundation of a universally valid morality[29]. The author, referring mostly to I. Kant, assumes that autonomy of a person should be treated as an absolute value, because it is what makes morality possible[30]. This inference, as a consequence, has to prove that not only is human dignity the groundwork of a legal system, but for morality also. Nevertheless, setting the relation between human dignity and morality aside, for us it is enough to notice the equal value of human dignity in every human being.

This means that when human dignity is considered, at least in the context present in the German Basic Law and in the Polish Constitution, it should be

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[24] K. Wojtyła, *Osoba i czyn oraz inne studia antropologiczne*, Lublin 1994, p. 418. See also: M. Szymonik, *Filozoficzne podstawy kategorii godności człowieka w ujęciu personalizmu szkoły lubelskiej*, Lublin 2015, pp. 212–213.

[25] K. Wojtyła, *Osoba i czyn*..., p. 73.

[26] M. Szymonik, *Filozoficzne podstawy kategorii godności człowieka*..., pp. 243–244. This push towards "good" and the role of different communities in human life, including family and the state, opens the human dignity principle to a close correlation with the principle of common good. Some characteristics of human dignity, similar to the reasoning from the common good principle, may be found in R. Bronsword's analysis. See R. Bronsword, *Human dignity from a legal perspective*, (in:) M. Düwell, J. Braarvig, R. Brownsword, D. Mieth, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge 2014, p. 10 *et seqq*. See also: M. Dan-Cohen, *Harmful Thoughts*..., p. 163.

[27] L. Bosek, *Komentarz do art. 30*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom 1. Komentarz do art. 1–86*, Warszawa 2016, p. 723.

[28] *Ibidem*.

[29] S. Rolf, *Humanity as an Object of Respect: Immanuel Kant's Anthropological Approach and the Foundation of Morality*, "The Heythrop Journal" 2009, Vol. 53, p. 597.

[30] *Ibidem*, p. 599.

understood as something internal, depending only on the human status of a person. This category shall not be confused with other interpretations of dignity, like honour, position, authority or whether a person is good or bad. As Marcus Düwell notes, there are several ways of conceptualizing human dignity: "rank, virtue and duty, dignity and religious status, the cosmological status of the human being, respect for the dignity of the individual human being"[31]. Evidently, rank, virtue, duty and other features of a person are important in our daily life, but these characteristics are not attributes that can embody the deepest value of a person, equal in case of every person, no matter what rank, position, virtue or vice may be assigned to him or her. A good illustration of the importance of the division proffered here might be the prohibition of tortures and cruel, inhuman, or degrading treatment or punishment. This absolute, exceptionless and universal prohibition is the consequence of human dignity belonging to every person. Proper law enforcement tools should be utilized with the same intensity against every possible risk of breaching the prohibition of torture recognized as a *iuris cogentis* norm in international law, regardless of how considerable the differences between potential victims are. An exceptionless prohibition of tortures excludes even torturing a person who tortured other people in the past. Should human dignity prohibiting tortures depend on some acquired features of a person, this would mean that different people can be protected from tortures with varying intensity and some of them may even be excluded from the protection altogether[32].

As it was mentioned above, the wording of the Polish Constitution assumes that human dignity constitutes the source of freedoms and rights of persons and citizens. However, it should not prompt a conclusion that the content of human dignity can be reduced only to the source of rights and freedoms[33]. This would mean that this principle has no other content than that expressed in the constitutional catalogue of rights and freedoms. One, at least, remark seems to be necessary here. Not all rights and freedoms can be automatically included in the catalogue derived from the content of human dignity. We could not rule out that a legislature or the international community would accept such a right or freedom that could not be reconciled with the human dignity principle. With just this argument it might be proved that dignity must have its own content, which, in turn, facilitates verifying which of the projected provisions can be sourced in dignity and assigned thereto. The requirements of human dignity oblige everyone, not

[31] M. Düwell, *Human dignity: concepts, discussions, philosophical perspectives*, (in:) M. Düwell, J. Braarvig, R. Brownsword, D. Mieth, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge 2014, pp. 25–27.

[32] See an illuminating discussion about torture, especially in cases where many lives depend on the law enforcement's ability to extract information from an interrogated person: Y. Ginbar, *Why Not Torture Terrorists? Moral, practical, and legal aspects of the "ticking bomb" justification for torture*, Oxford 2008, *passim*.

[33] M. Safjan, *Refleksje wokół konstytucyjnych uwarunkowań rozwoju ochrony dóbr osobistych*, "Kwartalnik Prawa Prywatnego" 2002, issue 1, p. 227.

only with regard to relations between people, but also legal entities and authorities in their dealings with people, to treat a person as a subject rather than as an object. Expression of human dignity in a constitution should be understood as a guarantee of one's subjective right to demand from the state protection from acts which may result in infringing human integrity and autonomy. Andrzej Zoll claims that the constitutional subjective right to human dignity shall be understood as a basic right[34]. An assumption that human dignity might be a constitutional subjective right may lead to a mistaken recognition of the source of human dignity. In both philosophical and legal contexts, underlying constitutional expressions of human dignity, particularly in Poland and Germany, dignity belongs to a person regardless of the will of the state. As mentioned above, institutions within constitutions have merely the status of declarations. They declare what can be derived from the ontological condition of the person. However, we cannot exclude that a literal expression of human dignity in a constitution may be needed by the state, which – founded on the positivistic approach – bases all of its activities on the written law, passed in a special legislative procedure.

3. THE SUBJECTIVE CRITERIA OF HUMAN DIGNITY

A lot about the characteristics of human dignity has been said above but still one gap has to be filled, namely the subjective criteria of human dignity. In other words, it is necessary to recognize the very first moment when human dignity and all claims derived therefrom has to be recognized in a human being. A very important legal argument helpful in delimiting the boundaries of the human dignity principle may be found in two verdicts of the Court of Justice of the European Union: the Judgment of the Court (Grand Chamber) of December 18, 2014, *International Stem Cell Corporation* v *Comptroller General of Patents, Designs and Trade Marks* and the Judgment of the Court (Grand Chamber) of October 18, 2011, *Oliver Brüstle* v *Greenpeace eV*. In these two judgments the Court, on the basis of the so called biotechnological directive, construed the "human embryo" term and declared that "any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo'"[35] and that "an unfertilised human

[34] A. Zoll, *Wymiar kary w aspekcie godności człowieka*, (in:) *Godność człowieka a prawa ekonomiczne i socjalne. Księga jubileuszowa wydana w piętnastą rocznicę ustanowienia Rzecznika Praw Obywatelskich*, Warszawa, Łódź 2003, p. 173.

[35] Judgment of the Court of Justice of the European Union (Grand Chamber) of October 18, 2011, *Oliver Brüstle v Greenpeace eV*, C-34/10.

ovum whose division and further development have been stimulated by parthenogenesis does not constitute a 'human embryo'"[36]. That may trigger a conclusion that a human being, in other words: a person with human dignity, exists since conception or in some other cases even without conception. At the core of these judgments lays recital 16 to the Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998 on the legal protection of biotechnological inventions[37]: "Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented; whereas these principles are in line with the criteria of patentability proper to patent law, whereby a mere discovery cannot be patented". The relation between determining the meaning of "human embryo" and recognition of the beginning of a person with human dignity imposes itself when the Court noted: "The context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows that the concept of 'human embryo' within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense"[38]. There is no other possible interpretation than claiming that protection of human embryos necessitates, at the same time, protection of human dignity. It is true that the Court reserves that its task is not to broach questions of a medical or ethical nature, which means that the Court must restrict itself to a legal interpretation of the relevant provisions of the Directive. Although the Court's task is to construe the Directive, many academics have noted that these two judgments have much broader impact than only enforcing the Directive's provisions[39].

The issue of relation between terms like "person", "human being", "human dignity" and the matter of the beginning and the end of protection of dignity

[36] Judgment of the Court of Justice of the European Union (Grand Chamber) of December 18, 2014, *International Stem Cell Corporation* v *Comptroller General of Patents, Designs and Trade Marks*, C-364/13.

[37] Official Journal 1998 L 213, p. 13.

[38] Judgment of the Court of Justice of the European Union (Grand Chamber) of October 18, 2011, *Oliver Brüstle v Greenpeace eV*, C-34/10, 34.

[39] S. H. E. Harmon, G. Laurie, A. Courtney, *Dignity, Plurality and Patentability: the Unfinished Story of Brüstle v Greenpeace*, "European Law Review" 2013, Vol. 1, pp. 92–105; P. Łącki, *Ludzkie embriony i godność człowieka w świetle prawa patentowego. Wyrok Trybunału Sprawiedliwości Unii Europejskiej z dnia 19 października 2011 r. w sprawie Brüstle przeciwko Greenpeace*, "Przegląd Sejmowy" 2012, issue 4, pp. 33–54; A. Wnukiewicz-Kozłowska, *Zdolność patentowa embrionu ludzkiego w kontekście orzeczenia Trybunału Sprawiedliwości Unii Europejskiej z dnia 19 października 2011 r. w sprawie Brüstle przeciwko Greenpeace*, "Przegląd Sejmowy" 2012, No. 4, pp. 55–75.

is worth examining in a separate article. Only to conclude this part of reasoning, one more argument in favor of protecting the person from the moment of conception as a person with inherent dignity is a presumption in support of resolving any doubts in favor of protection appropriate to a human being. It is always less risky to protect a being, even when there are doubts regarding the status of a person, than to take a grievous burden and infringe the integrity of the being, particularly when the extent of this infringement consists of depriving someone of such a fundamental value as life[40].

Before moving to the next part of this analysis, one more possible confusion should be mentioned. While conducting research focused on the human dignity concept, it is common to be confronted with an approach that differentiates – with reference to criminal law – between the concept of a person and human dignity[41]. It is a partly mistaken approach because it detaches the concept of a person from the concept of human dignity, whereas there is no person without dignity, and there is no dignity without a person. The mistake lies in the attempt to construe characteristics of a person without considering his or her dignity, which is the basic source of those characteristics.

4. THE IMPACT ON CRIMINAL LAW

Since we have realized that human dignity is one of the most important principles in the legal system, with non-positivistic roots, expressed in constitutions, we have to ask whether such a construct has any impact on criminal law, especially on the principles of liability. The process of criminalization is not discussed here[42]. With regard to criminalization, it is just worth mentioning here that human dignity might constitute a standalone basis for criminalization of given behaviour, without references to other values, which a government might need to protect, being necessary. Infliction of torture has already been mentioned. Even

[40] See more about the different approaches to human dignity: *Human Dignity and Bioethics Essays Commissioned by the President's Council on Bioethics*, March 2008. The Collection of essays is available on the website: https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/ (visited August 10, 2016).

[41] For example, G. Jakobs refers to the concept of a person and avoids the concept of human dignity. See G. Jakobs, *Zum Begriff der Person im Recht*, (in:) H. Koriath, R. Krack, H. Radtke, J.-M. Jehle (eds.), *Grundfragen des Strafrechts, Rechtsphilosophie und die Reform der Juristenausbildung*, Göttingen 2010, p. 69 *et seqq.*; G. Jakobs, *Zur Theorie des Feindstrafrechts*, (in:) H. Rosenau, S. Kim (eds.), *Straftheorie und Strafgerechtigkeit*, Frankfurt am Main 2010, p. 167 *et seqq.*

[42] K. Szczucki, *Wykładnia prokonstytucyjna...*, *passim* (Polish edition) and K. Szczucki, *Proconstitutional Interpretation...*

threatening someone to torture them and to treat or punish in a cruel, inhuman, or degrading manner shall be allocated to the set of "torture" and prohibited. The only justification needed claims that even mere threatening infringes human dignity, particularly the subjectivity of the person[43]. What is more, the closer the relation of particular value to human dignity is, the better protection it should receive from authorities[44]. The human dignity principle and its careful analysis lead to an important conclusion that a state has a strict obligation to criminalize behaviour that cannot be reconciled with the status of a person, in other words: with human dignity[45].

The very goal of this article is to verify the thesis that the human dignity principle affects principles of responsibility in criminal law. Horst Dreier writes that this branch of law has always been strongly influenced by the principle of human dignity. The author draws attention to the role of human dignity in perception of the nature of criminal punishment and the relationship between guilt and atonement[46]. Doubtless, the position of the principle both in the Polish and German basic laws cannot be without significance in criminal law, let alone with regard to the rules of responsibility. Having conducted the above analysis, we can point to basic elements describing human nature, derived from the human dignity principle: reason, freedom, consciousness and sovereignty. Presence of this elements in the content of principles of responsibility in criminal law would mean that without a doubt the human dignity principle affects rules of criminal responsibility.

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[43] L. Bosek, *Komentarz do art. 30…*, p. 743.

[44] The special role of dignity in the process of balancing principles when making a criminalizing decision was given effect to by the Polish Constitutional Court in its judgment dated October 30, 2006, where the Court, examining the constitutionality of art. 212 of the Criminal Code, remarked: "In those circumstances [prohibition on eliminating or limiting freedoms and rights which would lead to a violation of human dignity – author's note] it shall be held that the stronger the relation between a right or a freedom with the essence of human dignity, the better (the more effectively) it should be protected by public authorities. (...) Freedoms and rights which express the quintessence and constitutive an emanation of human dignity, including honour, reputation and privacy (protected under art. 47 of the Constitution), may deserve priority in case of a conflict with freedom of speech or freedom of the press and other media, and therefore trigger restrictions thereof, regardless of the fact that they have not only an individual, but also a public dimension, in being a guarantee of public debate necessary in a democratic state ruled by law".

[45] See examples from the judgments of the European Court for Human Rights: of April 29, 2002, *Pretty v The United Kingdom*, application No. 2346/02; of July 25, 2005, *Siliadin v France*, application No. 73316/01; of January 7, 2010, *Rantsev v Cyprus and Russia*, application No. 25965/04.

[46] H. Dreier, *Human dignity in German law*, (in:) M. Düwell, J. Braarvig, R. Brownsword, D. Mieth, *The Cambridge Handbook of Human Dignity. Interdisciplinary Perspectives*, Cambridge 2014, pp. 381–382.

5. THE PRINCIPLE OF GUILT

According to art. 1(3) of the Polish Criminal Code: "The offender of a prohibited act does not commit an offence if no guilt can be attributed to him at that time". It is not the only condition which excludes the possibility of attributing liability to a perpetrator of a crime. Polish criminal law jurisprudence describes criminal law from the perspectives of a few accounts of the structure of a criminal offence[47]. According to the wording of the general part of the Polish criminal code it seems that the structure that fits best current Polish law is the five-elements theory which distinguishes such elements as: act, illegality, punishability, reprehensibility and guilt. This structure is logically ordered, which means that exclusion of the preceding element excludes the possibility to assign responsibility to the defendant. There is no need to consider culpability (guilt) when there was no act (e.g. due to *vis absoluta*) or when an act was not illegal nor punishable[48]. Attribution of guilt has two consequences. First of all, it means that the defendant committed an illegal and punishable act. However, culpability cannot be limited only to an assertion that an illegal and punishable act has been committed. Otherwise, it would have no content on its own and as such could not serve as an element of the structure of a crime.

There are different definitions of guilt in the criminal law doctrine, but what seems to be the most significant here, from the human dignity perspective, is one's personal ability to bear responsibility for an illegal and punishable act. Culpability in this approach means that it is possible to charge someone with a crime. Since our task is to examine the influence of human dignity over the concept of culpability, it is justified to verify in the conditions of culpability the presence of elements derived from the dignity principle, namely reason, freedom, consciousness and sovereignty. When the ability of a person to be subjected to criminal liability is considered, the doctrine and the legislature cannot detach the principles of culpability from a person's reason, freedom, consciousness and sovereignty. Otherwise, guilt cannot be assigned, because the action in question was

[47] There are: three-element theories, which analyse the structure of a crime on three grounds, i.e. illegality, punishability and guilt; five-element theories, which analyse crimes on five grounds, i.e. act, illegality, punishability, reprehensibility and guilt; six-element theories, which differentiate six dimensions within the structure of a crime, i.e. act, social harmfulness, illegality, statutory elements, guilt and punishability; four-element, under which, in order for criminal liability to arise, a committed act must be: criminally illegal, socially dangerous (i.e. objectively antisocial and culpable), not insignificant (i.e. socially dangerous to a higher extent than insignificant). See Z. Jędrzejewski, *Bezprawność jako element przestępności czynu*, Warszawa 2009, pp. 23, 49–51; A. Zoll, *O normie prawnej z punktu widzenia prawa karnego*, "Krakowskie Studia Prawnicze" 1991, issue 23, pp. 93–94.

[48] See, in the German jurisprudence: M. Kremnitzer, T. Hörnle, *Human Dignity and the Principle of Culpability*, "Israel Law Review" 2011, Vol. 44, p. 115.

not self-determined by the perpetrator[49]. The principle of human dignity demands the imposition of liability on the defendant for their acts, but only if they were conscious. To be punished, a perpetrator should have wanted to infringe the law in the broad sense of that expression. The word "to want" shall not be limited only to the situation when an agent knows a criminal provision literally and then infringes it. Especially when crimes classified as *mala in se* are considered, the requirement resulting from the culpability principle is fulfilled when a perpetrator knows that they infringe protected values and engage in socially inadequate behaviour. The relation between the perpetrator and their act within the meaning of his intent (*mens rea*) is not an issue that should be solved in the frames of guilt. It is rather a problem discussed within the frames of illegality. The role of culpability as an element of the structure of a criminal offence is to find out whether a perpetrator has the ability to develop the will to infringe values protected by criminal law, even if that merely means acting recklessly or negligently. For instance, a child cannot – because of immaturity – act consciously and freely against the public order understood as values protected by the law. Even if a child acts knowingly, with an intent to kill, they are unable to bear criminal responsibility, because their process of education, particularly their secondary socialization, is not yet finished. A child cannot fully understand the consequences of their acts. Quite similar reasoning must be applied to insanity. Here, one's act is not caused by lacks in secondary socialization, but one's inability to recognize the significance of an act or to control one's actions due to a mental disease, mental deficiency or other mental disturbance. In these two cases, immaturity and insanity respectively, criminal acts are not committed by a person with an ability to exercise their reason, freedom, consciousness and sovereignty[50]. One may question whether there is any inconsistency between the features of a person derived from the principle of human dignity and the lack of ability to bear responsibility by children or insane people. If a child is gifted with human dignity and if human dignity means that a person is self-determined, reasonable, and acts consciously, should it not be said that a child can be criminally liable? Two comments are necessary here. The human dignity principle describes the nature of a person, which means that in some cases it may not be fully actualized. A child needs to grow biologically and develop psychologically in order to be able to use the full potential of their reason and sovereignty. An akin conclusion should be accepted in the case of an insane person. Because of his or her psychological disease they are not able to fully use the potential of consciousness, reasonability and

[49] M. Królikowski, *Komentarz do art. 1*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Vol. 1. Komentarz do artykułów 1–31*, Warszawa 2010, pp. 202–203.

[50] Insanity gives rise to more challenges. It is difficult to say whether an insane person has the ability to commit an act in itself, since the human act is understood as a conscious expression of the will. It is worth considering whether to relocate insanity to a logically earlier stage of criminal assessment, namely determination whether a criminal act actually occurred.

sovereignty. Secondly, by reference to human dignity, it may be said that liability shall be imposed proportionally to the ability of a person to use the potential of their consciousness, reason and sovereignty, no more and no less, exactly what they deserve and can be blamed for. In such cases one could deduce from the dignity principle that it is necessary to impose not an outright sanction (punishment), but an obligation to undergo psychiatric treatment or other social pressure. In a sense, it may be concluded that on the culpability level it is the general attitude to undertaking actions against the system of legally protected values that is verified, whereas on the *mens rea* level – in Poland classified as the illegality level – one's particular attitude to undertake an action aimed at a particular value is described[51].

The division between culpability and *mens rea* might be better understood and discerned by reference to the examples of mistake over the exclusion of illegality or guilt and mistake of law[52]. Someone who acts under a justified conviction that they are being attacked, who reacts in a typical self-defence manner, doubtless has an intent to infringe the integrity of the offender in order to protect their life and health. When there was only a mistaken conviction as to the propriety of self-defence, not only is it the case that illegality is not excluded, but also the goods of the purported attacker are violated. Nevertheless, if this mistake is justified, we cannot assign guilt to the man acting with a mistaken conviction, because his general approach towards the system of legally protected values cannot be judged as wrong. Should he have been really attacked, his reaction would have been proper. The perpetrator may be said to have acted with the

[51] It does not mean that these two levels are completely independent from each other, since together – with other elements – they make up one element of a crime. Mutual permeation of these two elements might be observed especially vividly when the issue of excluding illegality and culpability is analysed. For example, a 19-year-old man is going to have sexual intercourse with an almost 15-year-old girl. He does not know that she is under 15 and he does not want to sleep with a girl under 15. She lies to him and tells him that she is 17. His mistake seems to be justified which means that art. 28 of the Polish Criminal Code may be applied: "No offence is committed by anyone who is justly mistaken about the circumstances constituting a feature of a prohibited act". The age of the victim is one of the features of the crime of engaging in sexual intercourse with a minor: "Anyone who has sexual intercourse with a minor under the age of 15, or commits any other sexual act, or leads him or her to undergo such an act or to execute such an act, is liable to imprisonment from two to 12 years" (art. 200). In this example the man neither has an attitude to infringe the legal order in general by seducing a girl under 15, neither does he have an intention to sleep with the girl under 15 in this particular set of facts. Taking all this into consideration, he should not be found to have committed a criminal offence.

[52] A mistake over the exclusion of illegality or guilt: "No offence is committed by anyone who performs a prohibited act in the justified but mistaken conviction that there are circumstances excluding illegality or guilt; if the offender's mistake is unjustified, the court may apply an extraordinary mitigation of the penalty" (art. 29 of the Polish Criminal Code). A mistake of law: "No offence is committed by anyone who performs a prohibited act while being justifiably unaware of its illegality; if the offender's mistake is not justified, the court may apply an extraordinary mitigation of the penalty" (art. 30).

requisite intent because he wanted to attack the alleged assaulter, however guilt shall not be assigned to him, because he acted under a mistaken conviction. If he had not acted in a mistake, he would not have attacked the alleged assaulter. The same conclusion remains valid when a man acts with a mistaken but justified conviction that his act is legal, whereas it is illegal. If he is not mistaken, he does not commit an illegal act.

The analysis conducted above proves how important in establishing the structure of crime the principle of human dignity and basic features of the person derived from it are. Criminal law aims at punishing only those who consciously and self-determinedly infringe a system of legally protected values, either by direct trespassing or by violating precautionary rules of conduct. Human dignity provides for perceiving an individual as a moral agent who is able to distinguish between good and evil and between what is permitted and what is forbidden[53]. The bigger the guilt of a perpetrator is, the severer punishment he deserves. This concept finds its reflection in the set of general directives governing sentencing, where a relevant statute proclaims that – among other directives – the court passes a sentence at its own discretion, within limits prescribed by law, ensuring that the severity does not exceed the degree of guilt. A person endowed with human dignity, who has to be treated as an end and not a means of every act, should be punished exactly to the degree their guilt indicates[54].

A very good recapitulation of this part of the article may be offered by a quote from Germany's highest court in criminal matters: "Culpability means to be blameable. The blaming act which ascribes culpability reproaches the offender for the illegal act, for making a decision in favour of wrongdoing although he could have made a decision in favour of the law. The inner reason for the judgment of culpability is that human beings are capable to act in a free, responsible and moral way and thus capable to decide in favour of the law and against wrongdoing"[55].

6. THE ROLE OF HUMAN DIGNITY IN ASCRIBING GUILT

The above reasoning presents the crucial role of the principle of human dignity in criminal law, particularly in ascribing guilt to a perpetrator. To treat dignity as the foundation of a state system, or – at least – of a system of rights and freedoms of persons and citizens, and recognize a strong connection between human dignity and culpability, means to impose on the legislature an obligation

[53] M. Kremnitzer, T. Hörnle, *Human Dignity...*, p. 122.

[54] As M. Kremnitzer and T. Hörnle noticed, measurement of the degree of culpability is a complicated task. See M. Kremnitzer, T. Hörnle, *Human Dignity...*, p. 123.

[55] 2 BGHST 200, cited by: M. Kremnitzer, T. Hörnle, *Human Dignity...*, p. 128.

to tie every type of penal responsibility with the requirement of guilt[56]. The Polish traditional criminal law does not prescribe absolute liability offences. The *mens rea* and culpability requirements always have to be met. These observations are not final because there is still a growing body of administrative penal law[57]. Provisions of this branch of law are based on the principle of strict liability, where no guilt has to be proven. To illustrate some problems that this may give rise to, a relatively new law allows the police to seize one's driving license and to keep it for three months when a driver exceeds the speed limit by more than 50 km/h in a built-up area[58]. In practice, it means that by speeding 100 km/h in such an area one risks being deprived of one's driving license for three months. Although this sanction consists of a merely physical seizure of a license, with no court prohibition on driving, the effect is almost the same because driving without a license is illegal. On top of this administrative sanction, imposed by a policeman, a driver may still be punished by a criminal law sanction and a penal measure – a driving ban. A number of issues arises here, including, but not limited to, that of *ne bis in idem*[59]. Administrative penal law does not envisage any culpability requirement or exemptions from the liability. It is irrelevant whether an agent drives faster on a whim or because he has to get to the hospital as soon as possible. Examples can be multiplied. Usually, administrative penal law imposes financial penalties, which sometimes are really severe.

The motives behind espousing such a trend were – with no restraint – explained in the reasons attached to amendments to the Act on Protection of the Health of Animals: "it is assumed that administrative responsibility, which is characterized by automatically imposed sanctions for an objective infringement of the law, will be a more efficient, proportional and deterring reaction to an infringement of provisions regarding by-products of animal origin and derivatives thereof, in comparison to the current criminal responsibility regulations; most importantly, a significant increase in financial liability for such infringements will be observed,

[56] It is complicated to precisely define the boundaries of a "penal case" in order to designate cases which should be covered by guarantees typical in classical criminal law (e.g. *nullum crimen sine lege*, culpability and – from the procedural point of view – prohibition on demanding self-accusation).

[57] In Poland, a person can be punished within the frameworks of: criminal law, petty offences law and administrative penal law. See R. A. Stefański, *Odpowiedzialność administracyjna czy karna sensu largo?*, (in:) M. Kolendowska-Matejczuk, V. Vachev (eds.), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, Warszawa 2016, p. 10 *et seqq.*; P. Kardas, M. Sławiński, *Przenikanie się odpowiedzialności wykroczeniowej i administracyjnej – problem podwójnego karania*, (in:) M. Kolendowska-Matejczuk, V. Vachev (eds.), *Węzłowe problemy prawa wykroczeń – czy potrzebna jest reforma?*, Warszawa 2016, p. 22 *et seqq.*

[58] Article 135 of the Road Traffic Act of June 20, 1997.

[59] Pursuant to relevant Polish law currently in force, a driver can be administratively punished by stripping them of a driving licence, only to be punished again as a result of ensuing criminal or misdemeanour proceedings. Some writers believe that this is an example of double punishing, however this view is not universally shared.

in comparison to the current legislative regime; it is assumed that a change will limit economical motivation to purposeful deeds; it should be also considered that under the current legislation criminal proceedings for crimes or petty offences where laws on by-products of animal origin and derivative products are infringed often end with an imposition of a mild sanction or even an acquittal because of insignificant social harmfulness; current criminal provisions do not perform a preventive function"[60]. This example shows how important the value of "trial's expeditiousness" is, so much so that it can even justify a shift from criminal law, full of guarantees addressed to the defendant as well as the victim, to administrative law. Doubtless, "trial's expeditiousness" is a value that should be seriously considered when a law is written, especially when a parliament passes procedural law, e.g. criminal procedure. However, its importance is limited, and respect for it should not lead to abridging other considerations. The attribute of absoluteness belongs to the human dignity principle. Consequently, expeditious handing down of punishments might be put into law only within the boundaries delimited by human dignity. In other words, the human dignity principle cannot be infringed, even if it was to be justified by the will to act quickly.

7. CONCLUSION

The analysis conducted above allows us to propose a few concluding remarks. The human dignity principle is one of the most important elements that should be taken into consideration in the legislative process. This proves particularly clear once the principle of dignity is recognized in the constitution of a given state. Even if this is not the case – also from a positivist perspective – the weight and significance of dignity find its grounding in UDHR, a foundation of the international order. This leads to a conclusion that the human dignity principle cannot be neglected by the legislature, particularly when passing criminal laws which have the ability to interfere with basic and intimate freedoms and rights of a person. Dignity of a person in the frames of criminal law shall be understood not only as a set of guidelines for designing a catalogue of punishments or methods of executing punishments provided for in the law. Since the human dignity principle is interpreted as a category that describes the nature of a person as conscious, reasonable, self-determining, it is difficult not to see some possible dependencies between the principle and rules of criminal liability. As noted above, the presence of the human dignity principle gives rise to a conclusion that there is no

[60] Reasons appended to a government bill amending the Act on the Protection of Animal Health and Combating Infectious Diseases of Animals and Several Other Acts (Sejm paper 1698, Archives of the Sejm of Poland (7th term)).

possibility to create any responsibility in the law without a requirement to verify whether any given act is culpable. It means that a legislative intention to bypass the standards typically connected with classical criminal law, i.e. by omitting the standard of culpability, and to transfer the administration of punishment to the executive branch cannot be approved. Although this was illustrated on the grounds of administrative penal law, similar conclusions are valid regarding the – constantly expanding – antiterrorist law.

The findings described in the article may serve to underpin the following notions, which have to be the object of further research on relations between the human dignity principle and rules of criminal liability, guilt in particular. First, the "guilt standard" is obligatory, whenever the state intends to punish a person. Second, punishment can be meted out only to an offender with an ability to bear responsibility. In other words, only a person whose characteristic derived from the principle of dignity is fully actualized can be punished. Third, punishing should be preceded by an analysis of the degree of guilt. The more eager the perpetrator was to act against the legal system and against values protected by it, the severer punishment should be meted out. Finally, law should provide for exclusion of culpability when the human dignity principle demands one to act in a manner that is outwardly criminal, but was committed due to a motivation that ought to be excused in the light of the dignity principle. Obviously, the culpability standard is not the only one to be expected from the human dignity perspective, nevertheless further aspects of the impact of the human dignity principle require separate writings.

Summary

Human dignity is a well-known concept among Western countries since after World War II, when states, in an effort to create a new platform of cooperation with a view to guaranteeing peace, were looking for an axiological foundation of the new order. The findings described in the article may serve to underpin the following notions, which have to be the object of further research on relations between the human dignity principle and rules of criminal liability, guilt in particular. First, the "guilt standard" is obligatory, whenever a state intends to punish a person. Second, punishment can be meted out only to an offender with an ability to bear responsibility. In other words, only a person whose characteristic derived from the principle of dignity is fully actualized can be punished. Third, punishing should be preceded by an analysis of the degree of guilt. The more eager the perpetrator was to act against the legal system and against the values protected by it, the severer punishment should be meted out. Finally, law should provide for exclusion of culpability when the human dignity principle demands one to act in a manner that is outwardly criminal, but was committed due to a motivation that ought to be excused in the light of the dignity principle.

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SŁOWA KLUCZOWE

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COMBATING TERRORISM AT THE EXPENSE OF INNOCENT PEOPLE. A CRIMINAL LAW PERSPECTIVE

1. INTRODUCTION

For a long time, Al-Qaeda and their predecessor organizations have been carrying out terrorist attacks, wherein they initially focused on Yemen, East Africa, Afghanistan and Pakistan. In fact, already in 1993 many people were killed and injured as a result of a terrorist attack on the World Trade Centre in New York. However, on September 11th the so called "attack on America" showed the whole world and the American people in particular in a devastating way the apparently new danger of Islamist terrorism. All of a sudden, one was confronted with an enemy acting against the Western world and its values by all available means. A new global threat scenario was created, which caused fears of further attacks. Despite various measures enacted to prevent and combat terrorism, there have recently been numerous disastrous terrorist acts all over the world – such as the attack on the satirical magazine "Charlie Hebdo" in Paris or the suicide bombings in Brussels – conducted by the Islamic State, which has been keeping the whole Middle East busy for months[1]. National and international measures to prevent terrorism, however, are often implemented at the expense of innocent people, who thereby lose their lives or have to suffer impairments of their legal interests.

While in international or internal armed conflicts human and fundamental rights are to some extent precluded by what international humanitarian law refers to as *jus in bello*, which accepts so called "collateral damage" inflicted

[1] Even if terrorism is not new and people have been engaged with this topic for some time, there is still no commonly recognized definition of this phenomenon. Various government agencies and legal systems have their own differing definitions of terrorism. However, most of these definitions agree at least upon the fact that terrorism is the use or threat of violence in order to achieve a special goal, such as for example political, ideological or religious changes. This article mainly focuses on one part of terrorism – religiously motivated Islamist terrorism.

on civilians[2], in case of terrorist attacks and defensive measures national criminal law usually remains applicable[3]. Assessment of killings of innocent persons or of infringements of their legal interests raises a lot of questions on the grounds of criminal law: How far can counterterrorism go in affecting the rights of citizens? Is the sacrifice of innocent victims acceptable, if the struggle against terrorism so requires[4]?

2. SHOOTING DOWN OF TERROR-SUSPECT AIRCRAFT

2.1. GENERAL ASPECTS AND STATEMENT OF THE PROBLEM

Hardly has any other topic caused such heated discussions as the legal assessment of the ethically highly controversial shooting down of hijacked passenger planes posing a terrorist threat. Here, various possible scenarios must be distinguished: If there are only terrorists on board of the aircraft the situation is easier to assess: if the plane threatens to crash into a building or any other piece of infrastructure and to kill people on the ground, this is a clear case of emergency relief according to § 3 StGB[5] (self-defence), which says that who defends oneself or another person in a way necessary to avert a current or imminent unlawful attack on life, health, physical integrity, freedom or property, does not act unlawfully. The behaviour is not justified if it is obvious that the defender has to face only a minor disadvantage and if the defence is inappropriate, especially because inflicting severe damage on the attacker would be necessary in order to avert the attack. Therefore, if there are only terrorists on board, the shooting down is lawful and allowed. This, however, does not hold true if also innocent passengers, who would be killed by shooting down the aircraft, are on the plane. Since the terrorist attacks on September 11, 2001, attempts have been made to find a solution to this moral dilemma of weighing human lives. It is controversial whether and under which conditions the sacrifice of innocent in order to save others shall be

[2] H. Schmitz-Elvenich, *Targetet Killing. Die völkerrechtliche Zulässigkeit der gezielten Tötung von Terroristen im Ausland*, Frankfurt am Main 2008, p. 224; B. Müller, *Den Rechtsstaat gegen Terror rüsten*, "diePresse", November 15, 2015, at http://diepresse.com/home/recht/rechtallgemein/4867038/Den-Rechtsstaat-gegen-Terror-rusten (visited September 30, 2016).

[3] D. Thürer, *Humanitäres Völkerrecht und amerikanisches Verfassungsrecht als Schranken im Kampf gegen den Terrorismus*, "Zeitschrift für schweizerisches Recht" 2006, p. 157 *et seqq.*

[4] As the legal situations in Austria, Germany and Switzerland are very similar in this field, the following considerations will include opinions and literature from the whole German-speaking area.

[5] StGB = Austrian Criminal Code.

exempt from punishment or even allowed. In this regard the literature represents different approaches.

2.2. JUSTIFICATION

2.2.1. SELF-DEFENCE

Especially if the number of people who would be saved by shooting down an aircraft is much higher than the number of passengers who would have to let their lives, we may automatically and intuitively think of justifying the offender. However, according to the prevailing opinion there is no doubt that self-defence is no possible legal ground of justification in this situation, because this legal institution is directed only against the attacker and does not apply in case of a third innocent person being killed. The legal construct of self-defence is characterized by a special conflict between the unlawfully acting attacker and the defender[6], that is why self-defence or emergency aid are the only possible means of justification if there are exclusively terrorists on board who use the aircraft as an instrument for suicide attacks. Furthermore, for comparison only – in other similarly dangerous situations, for example if an airplane is no longer controllable (because of technical defects or in case of the pilot's unconsciousness, caused by a loss of cabin pressure) and threatens to crash down into an urban agglomeration, no one would assume self-defence arises on those facts. A different opinion, however, is held by Spendel[7], who thinks the injuring or killing of people shall be justified by means of self-defence in so called "protection shield cases", in which innocent people are misused as a shield or for other purposes supporting the attack. In his opinion, in such constellations these people would be deeply mired in the crime scene and therefore standing on the side of injustice, so that the attacked people on the ground would seem more worthy of protection. Nonetheless, this argumentation is not really convincing, because these "human shields" – even if the passengers serve as a protector preventing the aircraft from being shot down – got into this threatening situation merely by accident. There is no reason to deviate from the ordinary self-defence rules in this case[8].

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[6] H. J. Hirsch, *Defensiver Notstand gegenüber ohnehin Verlorenen*, (in:) M. Hettinger, J. Zopfs, T. Hillenkamp, M. Kühler, J. Rath, F. Streng, J. Wolter (eds.), *Festschrift für Wilfried Küper zum 70. Geburtstag*, Heidelberg, München, Landsberg, Berlin 2007, p. 153.

[7] For further literature references, see A. Archangelskij, *Das Problem des Lebensnotstands am Beispiel des Abschusses eines von Terroristen entführten Flugzeuges*, Berlin 2005, p. 86 *et seqq*.

[8] To the same effect A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 89; H. J. Hirsch, *Defensiver Notstand...*

2.2.2. (PRESUMED) CONSENT

Moreover, it is partly taken into consideration that the passengers might in this situation agree with their own killing, because they are lost in any way, which is why they – as reasonable subjects – would want to sacrifice themselves for the benefit of others acknowledging the meaninglessness of their own remaining lifetime[9]. It is argued that even on September 11th some passengers – aware of their upcoming death – selflessly decided to down the aircraft at the expense of their own lives, in order to save the population on the ground[10]. It is, however, not convincing to assume a justification through "presumed consent"[11] in this situation since human life is not a disposable object of legal protection. On the one hand, this already results from § 77 StGB and § 216 of the German Criminal Code, which both regulate the punishability of "killing on request", because in these cases the unlawful content of the behaviour may be reduced, nevertheless killing of other people is still not legitimate and therefore remains punishable[12]. This illustrates that the legal order considers protection of human life itself more important than the affected persons' right to self-determination. This also applies if the threatened people are hopelessly doomed to death, because human life is not worth less just because of its limited duration[13]. By analogy, euthanasia is unlawful too even if the person willing to die is lethally ill. On the other hand, the assumption of presumed consent of the passengers in case of the shooting down of hijacked planes is based on a "quixotic fiction"[14], as the German Federal Constitutional Court rightly decided. In this situation probably only very few people would agree with the shooting down, even if they knew they were anyway going to die soon. Although some may be that heroic and understanding, such a general assumption

[9] For more details cf. T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen Beurteilung von Tötungshandlungen im Lebensnotstand*, Baden-Baden 2009, p. 364 *et seqq.*; I. Bott, *In dubio pro Straffreiheit? Untersuchungen zum Lebensnotstand*, Heidelberg, München, Landsberg, Frechen, Hamburg 2011, p. 119 *et seqq.* It might also be argued that shooting down of a hijacked aircraft could be justified by a *given effective consent*, assuming that the passengers express their implied consent as early as they book the flight and enter the plane. Under this assumption, however, the same problems arise.

[10] I. Bott, *In dubio pro Straffreiheit?...*, p. 119.

[11] "Presumed consent" is a legal justification which arises when an authorized person cannot be asked for permission, but it may be presumed that they would agree to a violation of their legally protected rights under the given circumstances.

[12] *Cf.* H. J. Hirsch, *Defensiver Notstand...*, p. 159 *et seqq.*; F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter? Anmerkungen zum Defensivnotstand bei terroristischen Angriffen*, (in:) M. Jahn, H. Kudlich, F. Streng (eds.), *Strafrechtspraxis und Reform. Festschrift für Heinz Stöckel zum 70. Geburtstag*, Berlin 2010, p. 137.

[13] *Cf.* note 22.

[14] BVerfGE 115, 118 (157); F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*

should not be made[15]. That is why killings of people can never be justified under the principle of (presumptive) consent.

2.2.3. JUSTIFYING NECESSITY

Apart from (presumptive) consent, a legal justification might arise by virtue of "justifying necessity". This legal justification, which is not explicitly featured in the Austrian Criminal Code, has been developed by the judiciary and the doctrine and applies whenever the offender averts an imminently threatening disadvantage from himself or others and thereby violates a lower-value interest deserving of legal protection in order to save one of a higher value. At first, we can say that legal assessment is less problematic if the hijacked aircraft threatens to crash into an empty building or an object of infrastructure on the ground, because in this case the life of the passengers and crew on board weighs clearly more than the legally protected interest of "property", and therefore justifying necessity is anyway excluded in this situation. The question of life-emergency, however, is more complicated in constellations where one life comes into conflict with another in a way that it can only be rescued at the expense of the other. Regarding the shooting down of terrorist-hijacked aircraft, justifying necessity can in particular be considered if the number of saved people is higher than the number of those being killed. For some might say it seems intuitively plausible not to condemn the choice of "the lesser of two evils"[16] in such extreme situations, but on a closer inspection this pragmatic approach is difficult to substantiate and therefore largely rejected in literature. The prevailing opinion is right to emphasize in this context the principle of equivalence of human lives. According to this widely recognized principle every human life has the same value and is an absolute maximum[17]. It is neither quantifiable nor qualifiable and a weighing

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[15] T. Hörnle, *Töten, um viele zu retten. Schwierige Notstandsfälle in moralphilosophischer und strafrechtlicher Sicht*, (in:) H. Putzke, B. Hardtung, T. Hörnle, R. Merkel, J. Scheinfeld, H. Schlehofer, J. Seier (eds.), *Strafrecht zwischen System und Telos. Festschrift für Rolf Dietrich Herzberg zum siebzigsten Geburtstag*, Tübingen 2008, p. 556 *et seqq.*; H. J. Hirsch, *Defensiver Notstand...*, p. 159; I. Bott, *In dubio pro Straffreiheit?...*, p. 119 *et seqq.*

[16] For more details, see I. Bott, *In dubio pro Straffreiheit?...*, p. 33 *et seqq.*

[17] For example R. Moos, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch*, Vol. 1, 35th ed., delivery 12, Wien 2005, § 10, marginal No. 91; F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 137; F. Höpfel, (in:) F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd ed., delivery 22, Wien 2012, § 10, marginal No. 14; for Germany see, for example: W. Perron, (in:) A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar*, 29th ed., München 2014, § 34, marginal No. 23 *et seqq.*; F. Zieschang, (in:) H. W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (eds.), *Leipziger Kommentar zum Strafgesetzbuch*, Vol. 2, 12th ed., Berlin 2006, § 34, marginal No. 65; V. Erb, (in:) W. Joecks, K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd ed., München 2011, § 34, marginal No. 116; for further literature references, see T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 39; for Switzerland G. Stratenwerth, *Schweizerisches Strafrecht. Allgemeiner Teil I: Die Straftat*, 4th ed., Bern 2011, § 10, marginal No. 45.

exercise is not possible. The situation here is much the same as a mathematical principle: every single life has the value "infinite" and is therefore worth the same as 100 lives, because "infinity" is not an increasable factor[18]. Compared to other emergency situations, in the case of life-emergency the principle of accumulation, which says that the values of saved or violated objects of legal protection must be added (e.g. 20 cars are worth more than 3), does not apply[19]. This inadmissibility of the quantification of human lives, which is mainly supported within the German-speaking legal area[20], is nothing self-evident on an international comparison though. Especially in the English and American literature we can find various opinions which support quantitative weighing and consider the prohibition of killing single persons particularly to rescue many people as unacceptable[21].

According to the prevailing view within the German-speaking literature, human life may not be examined from a qualifying perspective as all life represents the same value. Human value always remains unaffected by and independent of factors such as age, illness, life expectancy or others[22]. However, especially within the German literature, calls for a more generous solution are noticeable. It is – with diverging approaches and nuances – argued that, although human life is always a maximum value, the balancing of legal interests in the context of justifying necessity would require a careful consideration of all legal and factual circumstances of each case. Not only the abstract ranking ratio of the colliding objects of legal protection (life against life), but also further factors and criteria would have to be taken into consideration[23]. In this context, especially the short remaining lifetime of the passengers is often given as a reason for assuming a situation of justifying necessity. In comparison to those factual constellations in which everybody is exposed to a threat to the same extent within so called "risk-bearing communities", it comes to an asymmetrical distribution of the chances of rescue where terrorist-hijacked aircraft is concerned[24]. While the

[18] A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 29 *et seqq.*; T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 39.

[19] T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 36 *et seqq.*

[20] Also, the German Supreme Court follows this opinion as it for example (the so-called "Cat King-Case") rejected the justification of necessity even in case of one person being killed to avert a danger for one million other people or the whole human race, stating that this legal instrument would never allow a weighing of lives.

[21] A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 31 et seqq.; T. Hörnle, *Töten, um viele zu retten...*, p. 558.

[22] For example R. Moos, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch...*, § 10, marginal No. 91; T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 34; U. Neumann, (in:) U. Kindhäuser, U. Neumann, H.-U. Paeffgen (eds.), *Strafgesetzbuch Kommentar*, Vol. 1, 4th ed., Baden-Baden 2013, § 34, marginal No. 74.

[23] W. Perron, (in:) A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar...*, § 34, marginal No. 22; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 27 *et seqq.*

[24] T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 304.

passengers on board would in any scenario be doomed to die and have no chance of escaping the danger, the people on the ground might survive if the plane was shot down. In these cases of unequally distributed chances the killing of the passengers should – in their opinion – be justified and legal since it is rationally hard to explain why those who could still be saved should be forced to die together with those lost in any case[25]. Such "overdone solidarity" could and should not be demanded by the legal order, as the protection of life would have to take the second place in this situation[26]. In this context, thought has also been given to the fact that no arbitrary selection of victims is made and the offender does not intervene in the passenger's fate[27]. The inevitable entry of death would only be accelerated by shooting down the airplane[28]. Assessing the conduct as unlawful would lead to the protection of life being, as it were, reversed because in these cases, paradoxically, it would precisely be the killing that serves the protection of the people on the ground[29]. As we can see, some follow quite a utilitarian point of view, proposing a justification for the perpetrator in the case of the shooting down of a hijacked aircraft as this solution would lead to the greatest overall benefit. There are, however, convincing arguments against these approaches, taking for example unequal chances of rescue and short remaining lifetime as criteria of consideration. On the one hand, clear forecasts about the course of events are almost impossible, as even an unexpected rescue at the last minute could be imaginable[30]. Besides, thereby the fundamental principle of not-assessing human lives would be given up, which may lead to undesired results. At this point, often the example of a terminally ill or moribund person is given, one who is killed intentionally in order to remove the still working body organs. If this were to be lawful through a justification, everyone would have to be afraid of being legally killed by someone who takes care of them when death is upon them, which is of course unacceptable[31]. Upcoming questions concerning life expectancy and quality of life necessary for a killing to be lawful through justifying necessity would convolute the problem *ad absurdum*. Even those doomed to death should enjoy the

[25] T. Hörnle, *Töten, um viele zu retten...*, p. 570; for further literature references C. Roxin, *Der Abschluss gekaperter Flugzeuge zur Rettung von Menschenleben*, "Zeitschrift für internationale Strafrechtsdogmatik" 2011, p. 555.

[26] H. J. Hirsch, *Defensiver Notstand...*, p. 161.

[27] H. Otto, *Pflichtenkollision und Rechtswidrigkeitsurteil*, 2nd ed., Marburg 1974, p. 82 *et seqq.*; for further literature references, see F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 141.

[28] V. Erb, (in:) W. Joecks, K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch...*, § 34, marginal No. 127.

[29] W. Küper, *Tötungsverbot und Lebensnotstand*, "Juristische Schulung" 1981, p. 787; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 46 *et seqq.*

[30] F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 140; H. J. Hirsch, *Defensiver Notstand...*, pp. 160, 162.

[31] C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 556.

same protection of fundamental rights as healthy and young people, because it is not the positive future forecast but the present existence that is of importance. Similarly, the argument that in the future terrorists could take innocent passengers on board in order to prevent a – therefore unlawful – shooting down, is not carrying weight[32]. Also, the occasionally alleged lack not of worthiness of protection but of protectability[33] is not entirely convincing, because also the remaining lifetime of the passengers is under the state's protection and has to be preserved. It is, even if it is limited in time, neither worthless nor senseless. On the contrary, the last minutes of life are often the most important to pray, say goodbye to relatives or solve other matters[34].

In contrast to Austria, the German legislator explicitly regulated the question of the lawfulness of shooting down a passenger plane hijacked by terrorists in 2005 by enacting the ASA (Aviation Security Act). Paragraph 14 III para. 3 of this law stated that military forces were allowed to shoot down an aircraft in case of an explicit command of the defence minister when, according to specific circumstances, the conclusion could be reached that the plane was going to be used as a weapon against lives of individuals and if this was the only possibility to avert the imminent danger. The adoption of the Aviation Security Act has been mainly due to an incident occurring in the airspace of Frankfurt am Main in 2003: an armed and mentally disturbed man had hijacked a sports aircraft and was circling above the bank district of Frankfurt threatening to crash the plane into the European Central Bank building if his requirements of enabling a telephone call to the USA would not be met immediately. After a red alert had been triggered and large parts of the city had been evacuated, a police helicopter and two air force fighters took off to track the aircraft. Finally, after 30 minutes it turned out that the offender was only a confused single person and by no means a terrorist. He was allowed to make the phone call and surrendered without any use of violence[35]. This incident was an occasion for the German administration to improve aviation security through specific measures and to provide appropriate legal regulations to intervene if a serious aircraft incident is likely to cause a disaster. The ASA tried to respond to the new threats and risks of air traffic with this unprecedented measure of explicitly allowing the shooting down of hijacked aircraft. In 2006, however, the German Federal Constitutional Court declared the authorization of the military forces according to § 14 III para. 3 ASA unconsti-

[32] J. Isensee, *Leben gegen Leben. Das grundrechtliche Dilemma des Terrorangriffs mit gekapertem Passagierflugzeug*, (in:) M. Pawlik, R. Zaczyk (eds.), *Festschrift für Günther Jakobs zum 70. Geburtstag* am 26. Juli 2007, Köln, Berlin, München 2007, p. 225 *et seqq.*

[33] A. Sinn, *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?*, "Neue Zeitschrift für Strafrecht" 2004, p. 585.

[34] C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 556.

[35] FAZ, *Flugzeug-Entführung Irrflug versetzt Frankfurt in Angst und Schrecken*, February 5, 2003, at http://www.faz.net/aktuell/gesellschaft/flugzeug-entfuehrung-irrflug-versetzt-frankfurt-in-angst-und-schrecken-189977.html (visited September 30, 2016).

tutional because it was not compatible with the right to life according to art. 2 para. 2 clause 1 GG[36] as long as people not involved in the action are aboard the aircraft that could be struck. Moreover, the killing of aircraft personnel and passengers was in conflict with the guarantee of human dignity of art. 1 para. 1 GG, because thereby the state disregarded their subject status degrading them into mere objects for the protection of others[37]. After this decision the problem could have been seen as solved, however part of the German-speaking literature strongly insisted on the lawfulness of the shooting down of hijacked planes[38].

2.2.4. DEFENSIVE NECESSITY

Since this decision of the Federal Constitutional Court, the current legal situation in Germany is broadly comparable to the situation in Austria, where the problem of shooting down hijacked aircraft is now increasingly more discussed under the heading "defensive necessity"[39]. In the case of defensive necessity, for specific reasons some people pose an increased threat to others and seem therefore less worth protecting[40]. The threat, however, must not reach the extent of an unlawful attack because otherwise it would have to be considered a case of self-defence according to § 3 StGB.

Defensive necessity is therefore restricted to cases in which people are not to blame for the threat that comes from them because they are either not "acting" within the meaning accepted in the criminal law at all or at least not acting illegally[41]. Therefore, it is often spoken of a "special responsibility by virtue of the suffered loss of control over their own body"[42], whereby the exact reason for justification is still controversial[43]: partly it is presumed that this is a discrete legal justification inspired by § 228 BGB[44]. According to this civil law regulation, anyone who destroys or damages another person's property in order to avert

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[36] GG = Grundgesetz = German Constitution.

[37] *Bundesverfassungsgericht*, "Neue Juristische Wochenschrift" 2006, p. 751 *et seqq.*

[38] For more details, see C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 552.

[39] In the case of "defensive necessity", an item poses a threat to someone else's legally protected rights and is subsequently damaged or destroyed in order to avert disadvantages. In contrast to that, in cases of "aggressive necessity" it is not the threat-posing item but another one that is damaged.

[40] K. Schmoller, *Strafrechtliche Verantwortung in ethischen Grenzbereichen. Plädoyer für eine Zurückhaltung des Strafrechts jenseits fundamentaler Verhaltensregeln*, (in:) *Bundesministerium für Justiz*, Wien, Graz 2010, p. 23 with further literature references cited therein.

[41] C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 558; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 68.

[42] M. Pawlik, *Der rechtfertigende Notstand. Zugleich ein Beitrag zum Problem strafrechtlicher Solidaritätspflichten*, Berlin 2002, p. 321; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 68.

[43] A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 69; F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 144 *et seqq.*

[44] BGB = German Civil Code.

the threat that it poses to the defender or others does not act unlawfully, so long as the damage or destruction is necessary to avert the threat and if it is not disproportionate against it. In this case, the interest in protecting the good threatened by a foreign object weighs higher than the preservation of the threat-causing object itself. Although according to its wording ("objects"), the regulation seemingly does not cover human lives, some voices in the literature call for an analogous and expanded application in criminal law[45]. The opposite opinion considers the legal thought behind § 228 BGB and the fact of the danger coming from the victims' sphere within the weighing decision that has to be made in the frame of justifying necessity[46]. This justification is regulated in § 34 German Criminal Code and in large part corresponds with the Austrian regulation. Ultimately, both opinions lead to the same result: intentional killings in situations of defensive necessity shall be considered lawful. Differing ideas and concepts have been proposed regarding defensive necessity. Some scholars argue that even if the threat for the people on the ground does not directly come from the passengers on board of the plane, they are "inseparably connected with the source of danger"[47] and therefore as such part of "attack and injustice"[48]. One reason for the justifying effect of defensive necessity is also that the flight would have taken place just because of the passengers who booked it[49]. This argumentation can be discarded as it is doubtful under causation rules, for the flight would have taken place even if single passengers would not have booked it. Besides, some passengers might be on board not out of their own volition, such as children for example[50]. Overall, the presumption of defensive necessity in case of the shooting down of terrorist-hijacked aircraft does not seem convincing. It is doubtful that this random incident can be ascribed to the victims who are not to blame for the dangerous situation. The mere fact that the threat derives from the sphere of the victims cannot be a reason for the prevalence of the interests of the people on the ground who might still be saved. Furthermore, the passengers on board are in fact not part of the attack, because they do not contribute to or increase the danger at all[51]. Even if we may not deny some relevance to defensive necessity, this aspect is not strong enough to legitimize an intended killing which normally is one of the most severe crimes.

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[45] *Cf.* H. Frister, *Strafrecht Allgemeiner Teil*, 7th ed., München 2016, chapter 17 marginal No. 21; U. Neumann, (in:) U. Kindhäuser, U. Neumann, H.-U. Paeffgen (eds.), *Strafgesetzbuch Kommentar*..., § 34, marginal No. 86 with further literature references.

[46] W. Perron, (in:) A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar*..., § 34, marginal No. 30 with further literature references cited therein.

[47] H. J. Hirsch, *Defensiver Notstand*..., p. 164.

[48] F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?*..., p. 146.

[49] W. Gropp, *Der Radartechniker-Fall – ein durch Menschen ausgelöster Defensivnotstand? Ein Nachruf auf § 14 III Luftsicherheitsgesetz*, "Goltdammer's Archiv" 2006, p. 288.

[50] F. Streng *Gerechtfertigte Aufopferung Unbeteiligter?*..., p. 147.

[51] M. Pawlik, *§ 14 Abs. 3 des Luftsicherheitsgesetzes – ein Tabubruch?*, "Juristen Zeitung" 2004, p. 1049.

Accidental external circumstances of being involved in the dangerous situation alone cannot lead to a loss of the existential right to live[52]. A justification of the killing must therefore be denied.

3. EXCULPATION

As follows from the above, the shooting down of an airplane hijacked by terrorists cannot be justified by means of justifying necessity, therefore impunity of the offender might only be reached through "exculpatory necessity". The relevant legal provision is § 10 StGB, which regulates that the perpetrator is excused and therefore not punishable if he commits a crime in order to avert an imminently threatening disadvantage from his or another's legally protected interest, if the damage caused is not disproportionate to the threatened violation of legally protected interests if the same behaviour was expected from a person tied to the legally protected values. This regulation takes account of the fact that there exist psychologically extremely burdening situations in which the offender reaches the limits of reasonable compliance with the rules. The behaviour of the offender remains unlawful in this situation, however he is not to blame for his offence. In contrast to justifying necessity, § 10 StGB also applies if the saved legally protected interest is worth the same or even less than the one violated by the criminal action[53]. The present dilemma of life-emergency due to hijacked planes is generally a case of § 10 StGB as people on board are killed in order to avert the imminently threatening danger of death from those on the ground. However, as the limits of reasonableness are hard to define, it is questionable how far exculpation reaches in cases of life-emergency. The underlying principle of exculpatory necessity particularly finds expression in the construct of a "person tied to the legally protected values". But overall this figure, which is a peculiarity of the Austrian regulation and does not appear in either the Swiss or German exculpatory necessity rule[54], does not seem convincing. This is, on the one hand, due to the fact that the construct of a "person tied to the legally protected values" is dispensable, because it has no other function than activating legal practitioners to think case-comparingly[55]. As regards

[52] K. Schmoller, *Strafrechtliche Verantwortung in ethischen Grenzbereichen. Plädoyer...*, p. 23.

[53] R. Moos, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch...*, § 10, marginal No. 22.

[54] Instead of this figure, both foreign regulations directly ask if lawful behaviour could have been reasonably expected.

[55] K. Schmoller, *Zur Argumentation mit Maßstabfiguren – Am Beispiel des durchschnittlich rechtstreuen Schwachsinnigen*, "Juristische Blätter" 1990, p. 706 *et seqq.*

content, it does not bring any specification; it merely indicates that every determination of guilt is rooted in a case comparison[56]. On the other hand, if the hypothetical figure is not eliminated, the legislator should choose a more "plastic" expression, taken from real life. Indeed, it is hard to imagine what behaviour is to be expected from a "person tied to the legally protected values", which, in turn, leads to very different assessments. Furthermore, this hypothetical figure often fails to render a solution to special legal problems, just as in the case of the shooting down of hijacked aircraft, because in such extreme situations we are not able to make an estimation regarding the potential behaviour of others since this is simply beyond our imagination. There is also no general answer to this question, as probably every fighter pilot would act differently in this situation. In brief, the mode of regulation of exculpatory necessity should be reconsidered and improved because it often does not offer a solution to special problems, such as the one in question here. All in all, it is of course difficult to find reliable and consolidated standards for the assessment of the reasonableness of lawful conduct as such assumptions are mainly based on estimates. There are different approaches in the literature – especially in Germany[57] – regarding the shooting down of hijacked planes, wherein a majority[58] – with different reasons and nuances – is in favour of excusing the perpetrator in this case owing to the massive moral dilemma and the psychological predicament under which he is acting. It is argued that, even if the pressure motivating the offender to conduct the unlawful act does not result from an urge of self-preservation or preservation of relatives, it would not be less

[56] F. Haft, *Der Schulddialog: Prolegomena zu einer pragmaischen Schuldlehre im Strafrecht*, Freiburg im Breisgau, München 1978, p. 78 *et seqq.*

[57] In Germany, in this and similar cases the scope of exculpation is disputed as well. It is, in particular, problematic that the legal regulation of exculpatory necessity, prescribed in § 35 German Criminal Code, contrary to the Austrian regulation, only applies if the defendant acts in order to protect himself or a person close to him. The catalogue of people is therefore much narrower compared to the Austrian counterpart as uninvolved third parties do not belong to the protected group. This would lead to the offender being punishable when shooting down a hijacked aircraft, that is why a very prevailing opinion – in contrast to the judiciary – considers § 35 German Criminal Code too narrow. They think this unintended legal loophole should therefore be closed by tools of academic and judicial construction. The existence of so called "exculpatory necessity beyond law" is commonly recognized (U. Neumann, (in:) U. Kindhäuser, U. Neumann, H. U. Paeffgen (eds.), *Strafgesetzbuch Kommentar...*, § 35, marginal No. 54; T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 262 *et seqq.* – both with further literature references cited therein) but its limitations are still unclear and controversial. In this context, the majority agrees to an exculpation in cases of so called "risk-bearing communities with asymmetrical chances of rescue", that is when a group of people is in a serious danger to their lives whereby the factual possibility of salvation is *a priori* limited to one part of this group. As far as the shooting down of a hijacked aircraft is concerned, the passengers on board would in all likelihood be dead within a few minutes so that the offender who just follows the altruistic goal of saving as many lives as possible should not be guilty.

[58] A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 77 with further literature references cited therein.

strong. This can as a result be agreed upon, as a conviction would seem unreasonable in this regard. The fighter pilot has to make a weighted decision about life and fate of other people within a very short period of time, which is an extremely burdening task, the consequences of which he should not be blamed for.

4. LEGAL VACUUM AND SIMILAR MODELS

Another solution of the present problem has been proposed by representatives of the theory of a "legal vacuum", the centrepiece of much scholarly discussion in Germany. Propjnents of the idea point out that there are extreme and borderline situations in which a legal assessment would not be suitable. In these situations that drop out of everyday life in a random, unanticipated manner, the law could not distinguish between right and wrong so that a legal regulation would not be appropriate. Therefore, the legal order should retreat from this area. In such unsolvable conflict situations, where all action alternatives seem inadmissible, the law would have to accept the actor's decision and leave it all to his conscience, whilst abstaining from a legal assessment and declaring the behaviour "unforbidden", which means legally neutral, neither unlawful nor lawful. In such tragic factual constellations rational criteria would be failing, that is why the assumption of a legal vacuum would help[59].

The idea of a legal vacuum, however, is not convincing. On the one hand, the legislator apparently did not want to leave these factual configurations unregulated, since § 10 StGB as well as §§ 34, 35 of the German Criminal Code and art. 17 and 18 of the Swiss Criminal Code aim at the regulation of just such situations[60]. On the other hand, the legal value of "life" is under protection of the legal order and therefore belongs to the legally regulated area. The existence of a killing outside of the legally regulated area is dogmatically not possible if the legal elements of the offence of "murder" are fulfilled. By creating a criminal offence the legislator does already make an assessment. Behaviour can therefore be either unlawful or lawful, and mixed categories are not intended. Overall, the legislator should clearly state its position also in difficult matters and decide whether given conduct is unlawful or not.

A similar concept was developed by Otto[61] who says that the offender would have to save as many people as possible. If he lives up to this decision,

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[59] H. J. Hirsch, *Defensiver Notstand...*, p. 157 *et seqq.*; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 17 *et seqq.* – both with further literature references cited therein.

[60] *Cf.* A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 21.

[61] H. Otto, *Die strafrechtliche Beurteilung der Kollision rechtlicher gleichrangiger Interessen*, „Jura" 2005, p. 479.

it would neither be unlawful in the light of the legal order's values nor lawful as against the victims. Instead, it would just be "not unlawful". This, however, is also not an apt solution because as a result it would lead to killings being allowed in this situation which is, as stated above, not a development worth endorsing[62]. Günther[63] tried to solve the problem by creating a construct of a "situation similar to necessity". This would be an interim stage between the legal defences of exculpatory and justifying necessity, whereby the unlawfulness of an act would be denied, the punishable wrongful content of the crime would, however, still remain intact. This model is also not convincing because Austrian law does not contain such mixed forms. We should aim at finding a solution within the given legal categories[64].

5. FURTHER EXAMPLES OF PREVENTING TERRORISM AT THE EXPENSE OF INNOCENT PEOPLE

One very tragic example that immediately comes to our mind when thinking of the topic of combating terrorism at the expense of innocent is the drone strikes in the Near and Middle East, for example in Pakistan, Afghanistan or Yemen. These drone attacks are – especially for the USA – an effective means in the war against terrorism and are used particularly for so called "targeted killings" of terrorists or terror suspects. However, they often lead to devastating effects, as not only the intended person, but dozens of innocent civilians are killed every year in the aftermath of these attacks. In the process, also other legally protected interests might be violated, especially houses and foreign property. But in fact, a legal assessment of this phenomenon is not a problem in the Austrian criminal law. As a neutral state Austria is not allowed to participate in any warfare activities, besides, the Austrian Criminal and Criminal Procedural Codes do not provide for such sanctions. If a soldier, however, decides to commit such a crime, or if for some reason Austria is the place of jurisdiction and Austrian criminal law is applicable, this would lead to punishability of the offender if there is neither a current nor an imminently threatening attack (which would allow self-defence) nor a situation of necessity (imminently threatening significant disadvantage). That is why such attacks are committed without a legal basis leading to the offender being sued for the relevant crime (murder, injury, damage to property...).

Moreover, counter-terrorism can affect people in other ways. Owing to the recently increasing number of – especially Islamist – terrorist attacks in Europe, there is high pressure on the police to investigate terrorist crimes and criminal

[62] C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 560.
[63] For further literature references C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 560.
[64] C. Roxin, *Der Abschuss gekaperter Flugzeuge...*, p. 560.

activities as well as to arrest the offenders. At the same time, severe security precautions are taken in advance to prevent further attacks and to investigate other potential terrorists. In the frame of an effective fight against terrorism the police are equipped with wide powers of intervention and investigation. Regarding this, the Austrian Code of Criminal Procedure allows – under specific formal and material conditions – for personal and house searches, seizure of assets[65], monitoring of messages and people, arrest of suspects as well as computer searches ("Rasterfahndung")[66]. In the view of the current threat caused by the IS, a number of major raids have been conducted in the course of which lots of house searches took place where many suspect jihadists were arrested. Fulfilling of these official duties is a special justification defence within the Austrian Criminal Code. While – for example – a search of a house (regulated in §§ 119 *et seqq.* StPO[67]) would be unlawful according to § 109 StGB, an arrest of a person (§§ 170 *et seqq.* StPO) would be unlawful as deprivation of liberty according to § 99 StGB and electronic eavesdropping (§ 136 StPO) would fulfil the crime of "abuse of sound recording and listening devices" under § 120 StGB, the behaviour is no longer unlawful when the official is acting within the scope of their legal authorization. In fact, most of the circumstantial conditions existent in a particular set of facts are to be seen from an *ex-ante* point of view. Investigative custody can for example be imposed lawfully only in case of a "strong suspicion". Even if it turns out afterwards that the suspect is *de facto* innocent, detention was nevertheless justified and therefore lawful. Owing to a large amount of investigative measures to recognize and combat terrorist acts in a timely manner, a lot of innocent people have to suffer violations of their interests, and this applies in particular to foreigners and Muslims. If all the applicable legal criteria are fulfilled, however, they have to accept these impairments that result from the justifying effect of these regulations.

6. CONCLUSION

A legal assessment of killings of innocent people in order to save others raises a lot of difficulties. Regarding the shooting down of hijacked aircraft different

[65] According to § 109 *et seqq.* of the Austrian Criminal Procedural Code, on the instructions of the Public Prosecutor the Criminal Investigation Department is allowed to acquire temporary authority to dispose of certain assets or items, especially in order to secure evidence. It can also forbid the owner of a certain item or asset to sell, pledge or release it. This is called "Sicherstellung". Furthermore, the law regulates that the court can decide to continue the temporary "Sicherstellung" and seize these assets.

[66] This is a computer-aided search employed with regard to wanted persons whereby data of a large number of people is checked against existing data in a database.

[67] StPO = Austrian Criminal Procedural Code.

opinions are held, with the focus of the discussion being mainly placed upon the question whether the legal justification of necessity arises. To summarize a plethora of contrasting viewpoints, it can be said that in the end all approaches supporting the existence of a justification of the offender do not seem convincing. The decisive aspect is that human life is not a disposable object of legal protection and not apt for any weighing. Every life is worth the same regardless of one's age, life expectancy or health, therefore killings in the state of life emergency are in any case unlawful. The same principle prevails not only for terrorist attacks but also in other fields, since the legal order does not allow every kind of danger defence. Our verdict on this matter, however, does not necessarily imply a punishment of the perpetrator. Even if the legal order condemns killings in these situations, the perpetrator (under certain circumstances) deserves forbearance. They are not acting out of any criminal motivation but among under enormous pressure of having to make a decision about the life and fate of others. All in all, various measures to prevent such scenarios are taken. The combat of terrorism is often combined with a loss of freedom, this, however, is the price we have to pay for safety.

Summary

Nowadays terrorism is becoming an increasing world-wide problem. To prevent and combat terrorist activities various national and international measures are implemented, however thereby often innocent people are killed or suffer infringements of their legal interests. This article deals with the question of how far counterterrorism can go and if even the sacrifice of innocent civilians is accepted, if the struggle against terrorism requires this. Since 9/11 the topic of shooting down a hijacked passenger aircraft that threatens to crash into a building on the ground, has caused heated discussions. Is it lawful and therefore allowed to kill innocent in order to save others? Or shall the perpetrator be excused and therefore exempt from punishment? This article shows the legal situation as well as the current opinions in Germany and Austria and aims to make a contribution to the solution of this legal problem.

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terroryzm, porwany samolot, stan wyższej konieczności wyłączający winę, stan wyższej konieczności wyłączający bezprawność, obrona konieczna, zgoda

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LEGAL QUALIFICATION OF SUICIDE. POLISH SUBSTANTIVE CRIMINAL LAW AGAINST SUICIDE TERRORISTS

1. INTRODUCTION

Over the last decades, certain incidences of acts particularly dangerous to large numbers of people have prompted legal academics to seek mechanisms which could effectively prevent and eliminate new threats[1]. Even though terrorist attacks are not an entirely recent phenomenon, contemporary legal orders still, it would appear, have not developed a sufficiently adequate and comprehensive system of criminal instruments capable of addressing the scale of dangers stemming from terrorist attacks. Combatting such dangers is further hindered by a necessity to find appropriate devices which would not only facilitate successful neutralization of threats, but also ensure respect for rights and freedoms of every individual to the greatest possible extent[2]. Waging an efficient battle against contemporary crises becomes very difficult, if not impossible, if highly liberal standards of a democratic state ruled by law are to be complied with[3]. Most attempts to eliminate terrorist dangers in a definitive and firm manner have met with considerable criticism[4].

Recently, one may have observed an increasing frequency of terrorist attacks, as a result of which harm (usually death) is inflicted not only upon third parties, but also upon the perpetrator. Therefore, these are actions within which one may distinguish two constituent elements: on the one hand, they are to cause the death of the largest number of people possible, and, on the other – aside from potential

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[1] W. Hassemer, J. Y. Choi, *Criminal Law Facing a New Challenge [Strafrecht Ansichts Neuer Formen von Kriminalität]*, „Corea Univesity Law Review" 2007, Vol. 2, p. 1 *et seqq.*

[2] Ch. Michaelsen, *Balancing Civil Liberties Againts National Security? A Critique of Counterterrorism rhetoric*, "UNSW Law Journal" 2006, Vol. 29, p. 1 *et seqq.*

[3] S. Horn, *Präventive Terrorismusbekämpfung im Rechtsstaat*, "Zeitschrift für Deutsches und Amerikanisches Recht 2014", issue 3, p. 94.

[4] M. C. Meliá, *Terrorism and Criminal Law: The Dream of Prevention, The Nightmare of The Rule of Law*, "New Criminal Law Review" 2011, Vol. 14, No. 1, p. 108 *et seqq.*

third party victims – one consequence of the attack is the death of the attacker themselves.

Although criminal qualification of acts which bring about the death of other people is not usually difficult on the grounds of Polish criminal law, here it seems that an unequivocal legal assessment of the suicidal act of the attacker is not straightforward. This question deserves an exhaustive answer as it would condition whether and, if so, how, it would be possible to prevent such acts by having recourse to criminal mechanisms already in existence. In this connection, numerous writers have asserted the illegality of suicide and floated a possibility of treating the actions of persons who counteract a terrorist attack as self-defence. On a side note, it shall be noted that questions regarding the axiological foundations and reasons for a perpetrator's decision to kill themselves in the midst of a terrorist attack, due to their irrelevance to the issues discussed in this article, will not be considered.

In an effort to examine the aforementioned conundrums in the light of Polish law, first, we should generally legally qualify a suicidal act, that is also a suicidal act which is not a manifestation of terrorism (ordinary suicide) and therefore does not trigger any adverse consequences for third parties (as opposed to a suicide which, at the same time, constitutes a terrorist act – aggravated suicide).

Polish law (as well as most contemporary legal systems) does not recognize liability for an act which entails depriving oneself of one's own life. However, the legal character of a suicidal act, as well as personal freedom of disposing of one's life, is not an uncontroversial topic. Numerous jurists have proposed a view according to which suicide is illegal. What serves as a starting point for this position is considering human life as an objective social value, which its holder cannot freely dispose of[5]. A contrary view, that suicide is a legal act, is also prevalent[6]. Other theories also deserve attention, e.g. in the opinion of some academic writers, one has the freedom to dispose of one's own life even in cases where the destruction of the good in question is caused by a third party. Others, on the other hand, believe that suicide belongs to a so-called law-free zone (German: *rechtsfreier Raum*), where the law should refrain from making judgments about a given act[7].

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[5] See M. Cieślak, (in:) L. K. Paprzycki (ed.), *System Prawa Karnego. Tom 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, Warszawa 2013, p. 373; see also: A. Zoll, (in:) A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz. Tom II. Komentarz do art. 117–277 k.k.*, Kraków 2012, p. 320.

[6] Z. Jędrzejewski, (in:) L. K. Paprzycki (ed.), *System Prawa Karnego. Tom 4. Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, Warszawa 2013, p. 91; *cf.* P. Konieczniak, *W sprawie eutanatycznej pomocy do samobójstwa*, "Państwo i Prawo" 1999, No. 5, p. 72 *et seqq.*; see also: J. Malczewski, *Problemy z prawną kwalifikacją lekarskiej pomocy do samobójstwa (art. 151 KK)*, "Prokuratura i Prawo" 2008, issue 11, p. 20 *et seqq.*

[7] Z. Jędrzejewski, (in:) L. K. Paprzycki (ed.), *System...*, 91.

2. FREEDOM TO DISPOSE OF LIFE

Criminal law scholars generally agree that life is a good of the highest standing in the hierarchy of legally protected values. However, it is also argued that this hierarchy is absolutely binding only in a handful of cases[8] and as a consequence it is impossible to resolve a conflict between legally protected goods solely by reference to their place in the hierarchy. Despite the significance and weight of life as a legal good not being in dispute, deliberations regarding one's freedom to dispose of that good are problematic. One fundamental issue is the nature of consent of the holder of the good to an interference with that good by another. A debate over consent's place within the criminal law has persisted for long. In the contemporary doctrine of criminal law, a view in favour of the heterogeneous nature of consent appears to be dominating. For it is accepted that consent may, in the frames of criminal law, perform two general functions – exclude illegality or the essence of a criminal act (in other words, prevent all elements of the *actus reus* from materializing). Furthermore, consent can, *inter alia*, subsidiarily or unaided, influence the degree of punishment (art. 53 § 2 of the Polish Criminal Code), constitute an element of a justification (art. 27, the so-called justification of experiment) or be part of an *actus reus* (art. 152)[9].

Where a legal good is perceived individualistically – derived from a democratic-liberal take on relations between an individual and the state, in the light of which the latter is expected to merely guarantee freedom of conduct to the former – consent of the holder of a good to an interference therewith makes it so that no violation of the good occurs[10]. On the contrary, in line with a paternalistic account of relations between an individual and the state, one's ability to dispose of one's good is dependent upon the significance of the said good for the public interest; the more important a given good is as a social value, the narrower one's freedom to dispose thereof is. By analogy, in the case of goods placed the highest in the hierarchy of legally protected values – such as life – one's ability to dispose of such a good is excluded altogether, because it is the public interest that preserves certain goods regardless of the wishes of their holders. In turn, in the light of a compromising view of legal goods, individualistic and over-individualistic interests are to be balanced, as it were, against each other. T. Kaczmarek is one

[8] See P. Konieczniak, *W sprawie*..., p. 77.

[9] Since the middle of the 20th century, German scholars have favoured a differentiation between two types of consent – *Einverständnis* (consent which excludes the essence of a criminal act, in other words: makes it so that not all elements of the *actus reus* are present) and *Einwilligung* (consent which excludes illegality). For more on this see Z. Jędrzejewski, *Zgoda dysponenta dobrem a struktura przestępstwa*, "Prokuratura i Prawo" 2008, issue 5, p. 36 *et seqq.*; V. Vachev, *Rozwój instytucji zgody dysponenta dobrem i jej miejsce w strukturze przestępstwa*, "Internetowy Przegląd Prawniczy TBSP UJ" 2015, issue 1, p. 31 *et seqq.*

[10] Z. Jędrzejewski, (in:) L. K. Paprzycki (ed.), *System*..., 85.

Polish scholar who favours the legalization of acts which, in a show of compassion, deprive another person of their life upon their demand (euthanasia)[11]. Doubtless, on the grounds of Polish criminal law one cannot freely dispose of one's own life (see art. 150 of the Criminal Code), however this does not mean that suicidal acts are illegal, to which I shall return.

3. SUICIDE IN THE LIGHT OF POLISH LAW

Views of Polish legal scholars on the nature of suicide may be divided into two general groups. One group argues that an attack on one's own life is illegal, the other denies that, holding that it is legally indifferent. Of fundamental importance in this context is the notion of illegality (German: *Rechtswidrigkeit*), which constitutes – alongside *actus reus* and *mens rea* – an element that conditions the criminal nature of an act[12]. Illegality is one of the most complex and controversial questions in the theory of criminal law, which is why it is necessary to offer at least a cursory account of problems which may have an impact upon the legal qualification of a suicidal act. One of the most contentious issues with regard to illegality is whether it makes up a category of the legal system as a whole (in a formal sense this would trigger incompatibility with the legal system understood as a whole) or whether it should be a notion to be interpreted separately within particular branches of law[13]. Adoption of any of those two views may be consequential when attempting to legally qualify suicide, because supporters of the illegal character of suicide derive its illegality not from it being at variance with criminal norms, but also norms from outside of the system of criminal law.

In the Polish legal doctrine, A. Zoll is the chief proponent of the illegal character of suicide. He has espoused a so-called monistic view of illegality whilst discarding the notion of illegality only of a given branch of law[14]. He argues that criminal law does not determine illegality or legality, but only punishability or non-punishability, which is justified by an ancillary function criminal law per-

[11] T. Kaczmarek, *Wolność dysponowania życiem a prawo do godnej śmierci*, (in:) *Rozważania o przestępstwie i karze. Wybór prac z okresu 40-lecia naukowej twórczości*, Warszawa 2006, p. 404 *et seqq.*

[12] For more on the topic of illegality and its place in the structure of a criminal offence, see Z. Jędrzejewski, *Bezprawność jako element przestępności czynu. Studium na temat struktury przestępstwa*, Warszawa 2009, p. 23 *et seqq.*

[13] More on this Z. Jędrzejewski, (in:) L. K. Paprzycki (ed.), *System...*, p. 330 *et seqq.*

[14] See, for example: A. Zoll, *Okoliczności wyłączające bezprawność czynu. Zagadnienia ogólne*, Warszawa 1982, p. 51 *et seqq.*

forms as against other branches of law[15]. Perceiving illegality as incompatibility with the legal system as a whole, A. Zoll goes on to maintain that an act which deprives one of one's own life is incompliant with constitutional protection of life enshrined in art. 38 of the Polish Constitution[16]. Other advocates of suicide's illegality have also endorsed the paternalistic concept of relations between an individual and the state. M. Cieślak has written that: "It is highly controversial (...) to argue that an individual can freely dispose of their own life. Such an argument does not give requisite weight to the social character of existence and human identity, it also does not recognize (...) the fact that human life constitutes the highest value not only for themselves, but it is a social value, a value for other people and society at large"[17]. J. Warylewski explicitly declared that Polish criminal law takes away from a person the right to die, since life as a legal good cannot be considered exclusively from an individualistic perspective[18].

In the eyes of some defenders of the illegality of suicide, criminalization of aiding and abetting suicide as criminal offences *sui generis* in art. 151 of the Criminal Code is an expression of the legislator's condemnation of suicidal acts (on a side note, the adequacy of terms "aiding" and "abetting" in connection with this provision – as a reference to general institutions of aiding and abetting in art. 18 § 2 and 3 of the Code – is not entirely full[19]). According to some writers, the fact that the legislator decided to introduce in the system a specific criminal offence constitutes a disapproval of suicide as a social phenomenon. The suicidal act has not been condemned in any other way in the criminal law, because it is impossible to *punish* a person who commits suicide in violation of a public interest. It is true that lack of expressions of disapproval shall not be equated with the legislator's indifference as against suicide. That suicide attempts are not criminalized has been justified by "punishment being nonsensical, irreconcilable with

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[15] See A. Zoll, *Karalność i karygodność czynu jako odrębne elementy struktury przestępstwa*, (in:) T. Kaczmarek (ed.), *Teoretyczne problemy odpowiedzialności karnej w polskim oraz niemieckim prawie karnym*, Wrocław 1990, p. 102.

[16] According to A. Zoll "(...) an individual right to life does not exhaust the remit of the justification of protection of life. The value of life as a social good is equally as important (author's emphasis), the holder of which cannot dispose of freely and even though a person who commits suicide does not fulfil the elements of the sanctioning norm prescribed in art. 148 § 1, such a person still infringes the sanctioned norm which mandates protection of each and every human life (...)" (A. Zoll, (in:) A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*..., p. 320).

[17] M. Cieślak, (in:) L. K. Paprzycki (ed.), *System*…, p. 373.

[18] J. Warylewski, *W sprawie prawnokarnego postrzegania eutanazji*, "Państwo i Prawo" 1999, issue 3, p. 78.

[19] Academic writers have pointed to a fundamental distinction between the general constructs of aiding and abetting and "aiding" and "abetting" related to suicide, in keeping with which one is liable for aiding or abetting a crime as regulated in art. 18 § 2 and 3 of the Polish Criminal Code even if that crime is not in fact committed (formal character of the institution), whereas liability under art. 151 is predicated upon at least actually attempting suicide, even if failingly – see P. Konieczniak, *W sprawie*..., p. 73 and J. Malczewski, *Problemy*..., p. 31.

commonly recognized purposes of punishment. For if somebody, due to feelings of misery or as a result of a mental disturbance, attempted to commit suicide and was saved, punishing such a person, so imposing an additional burden, not only would not perform the functions of specific prevention, but could actually prompt an impulse to repeat the failed attempt to kill oneself. (...) Also, imposition of a punishment would be at least doubtful from the perspective of justice"[20]. It is said that the negative approach of the legislator towards suicide is also manifested by the fact that it is a punishable offence under art. 162 of the Criminal Code not to tender "help" (not interrupt) to a person who commits suicide.

Without delving into the correctness of the above arguments it is difficult not to notice that they do not provide an answer to the fundamental question regarding legal qualification of suicide. An assessment of illegality or legality of an act – even if the monistic theory of illegality is to be accepted – could take place only by reference to relations between a given act and applicable laws. Such abstract notions as *disapproval*, *negative attitude* or *the legislator's condemnation* are foreign to Polish law (they do not even constitute extra-legal norms of conduct) and therefore cannot serve as a source of illegality without any statutory basis that commands or prohibits a given act.

However, numerous Polish academic writers have advanced a view that suicide is not an illegal act. One of the main arguments in favour of such a proposition is that Polish criminal law does not prohibit, let alone command anybody to commit suicide. In this way it constitutes a legally indifferent act[21]. Supporters of this stance do not believe that criminalization of behaviour referred to in art. 151 of the Criminal Code proves the legislator's negative view of suicide. P. Konieczniak has argued that the provision's *ratio legis* is not indirect prevention of acts of suicide, but is aimed at merely allowing individuals to freely make and execute decisions concerning their own lives – without any interference from third parties[22]. J. Malczewski concludes that art. 151 should not serve to condemn people who commit suicide or contemplate doing so, but it should shield them from the influence of third parties[23]. Therefore, the regulation in question was designed to prevent abuse by people who act out of deplorable motives, i.e. those who could benefit from the death of another person.

Another argument of those who reject the illegality of suicide is that the legislator could have expressed its disapproval of suicide in a number of ways, but it has not done so[24].

Clear references to the liberal-individualistic concept of a legal good are commonly used by defenders of the legal indifference of suicide. The concept

[20] M. Cieślak, (in:) L. K. Paprzycki (ed.), *System*..., p. 373.
[21] P. Konieczniak, *W sprawie*..., p. 77; see also: J. Malczewski, *Problemy*..., p. 24 *et seqq.*
[22] P. Konieczniak, *W sprawie*..., p. 75.
[23] J. Malczewski, *Problemy*..., p. 29.
[24] P. Konieczniak, *W sprawie*..., p. 77.

has its starting point in refusing to acknowledge the existence of a collective, which, together with an individual holding a given good, is authorized to decide whether that good may be violated due to its value for the collective as a whole. Nobody can make decisions about sustaining life without taking into account the will of the good's holder. The liberal-individualistic view in its radical forms treats as legal not only an attack on one's own life, but also intentional murder so long as the victim consented. Admittedly though, it is rare to encounter such extremely liberal opinions on the subject[25]. Still, even more moderate views remain clearly inconsistent with A. Zoll's exposition. Whilst in his estimation the constitutional principle which commands protection of human life constitutes a sanctioned norm, transgression of which triggers the illegality of the underlying act, opponents claim that the Constitution, by expressing the principle of protection of human life in art. 38, does not exclude a possibility of legal violation of that good by its holder[26].

Stopping short of definitively siding with either proponents or opponents of the illegality of suicide, it shall be stressed that on the grounds of Polish criminal law life cannot be freely disposed of by its holder (see art. 150 of the Polish Criminal Code, which declares killing another at their request a punishable offence). Criminalization of aiding and abetting as a crime *sui generis* is also inconclusive. Although a moral or any other extra-legal assessment of suicide could not impact the qualification of that act, it is wrong to say that the legislator, by criminalizing acts mentioned in art. 151 of the Criminal Code, intended to voice its disapproval of suicide and condemn it. Even if that was the case, it could be asked whether that would have any consequences for the legal qualification of an attack on one's own life without any participation of third parties.

4. ATTACK ON ONE'S OWN LIFE WHILST ENDANGERING OR VIOLATING GOODS BELONGING TO THIRD PARTIES

The theoretical and dogmatic problems signalled so far point to far-reaching discrepancies and doubts already at a very early stage of attempting to legally qualify suicide as an act which brings about harm solely for the person who per-

[25] See Z. Jędrzejewski, (in:) L. K. Paprzycki (ed.), *System*..., p. 93 and the literature referred to therein.

[26] P. Konieczniak argues that: "(...) the mere fact of declaring legal protection of life does not mean that that good may not be violated by the person to whom it belongs. For life is a good that belongs to an individual (...). The formula of 'everybody has a right to life' cannot be interpreted as 'everybody has a duty to live' – such a construction would in any case be inconsistent with the phrase's literal meaning. The inalienable nature of certain rights is irrelevant as inalienability does not imply a duty to make use". See P. Konieczniak, *W sprawie*..., p. 77.

forms such an act. Matters become even more complicated if a suicidal act generates harm also to another good belonging to a person other than the doer. In other words, we refer here to situations where one event leads not only to the death of the principal agent, but also causes adverse changes in the external world by violating goods of third parties. Terrorist attacks are meant to irreversibly and definitively violate important legally protected goods (which does not mean that a terrorist act cannot have a deeper axiological foundation). Therefore, the example of a terrorist suicide attack puts the question of the value of the terrorist's life in an entirely new light. As noted above, an extremely paternalistic view of relations between an individual and the state dictates that human life belongs not to any particular holder of that good, but, first and foremost, to the society at large due to its societal value. Supporters of this theory (A. Zoll, among others) derive a basis for it from art. 38 of the Polish Constitution which mandates absolute protection of human life. In this connection, we shall consider the value and significance of a suicide terrorist's life. If one were to accept art. 38 of the Constitution may be interpreted in the manner just suggested, it becomes apparent that even the life of a suicide attacker does not lose its societal value. If those who assert the illegality of suicide apply the principle voiced in art. 38 to every human life[27], it would be normatively baseless to exclude a terrorist from the objective remit of that regulation. Further, if art. 38 is to be interpreted as widely as to constitute the source of suicide's illegality, proponents of such a view should say that it covers everybody, including a suicide terrorist. Clearly, this standpoint cannot be accepted if one takes into account the weight and significance of goods which may find themselves in conflict with the terrorist's life. Crucially though, we could not have recourse to an analysis of such conflicts if we were to endorse the legitimacy of referring directly to art. 38 of the Constitution as the source of suicide's illegality. If the defenders of this view were to exclude a suicide terrorist from the purview of that provision as they understand it, they could easily be attacked for depriving certain individuals of their ability to be subjects of constitutional rights and freedoms. The provision in question does, without a doubt, refer to the life of every individual – regardless of their characteristics[28], and exclusion of certain subjects or individuals from the scope of protection of constitutional rights and freedoms is not possible[29].

[27] A. Zoll has emphasized that a person who commits suicide violates a sanctioned norm mandating "protection of every human life" by killing themselves (A. Zoll, (in:) A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz*..., p. 320).

[28] The Polish Constitutional Court has repeatedly held that the rights to life and to its protection are inherent, and art. 38 of the Polish Constitution merely declares and confirms those rights. See, in this spirit, the judgment of the Polish Constitutional Court of May 28, 1997, K 26/96. See also: T. Sroka, *Komentarz do art. 38*, (in:) M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Warszawa 2016, pp. 925–926.

[29] On a side note, the German criminal jurisprudence has attempted to introduce a division of legal subjects into certain categories by reference to different criteria. Günther Jakobs was the

The problems which the paternalistic theory concerning the significance of human life (and therefore the illegal nature of suicide) gives rise to, can be addressed, slightly less controversially, by constructing a new set of legally protected goods which stand in opposition to one another. Resolving a conflict so created could render unconditional realization of the duty to protect life (including the life of a terrorist) in art. 38 of the Constitution obsolete. For whilst in the case of "ordinary" suicide (which does not inflict harm on third parties) the public interest of protecting the life of an attacker is confronted with only one's personal freedom to dispose of one's own life, in the case of aggravated suicide (which is also an attack on goods belonging to third parties) other considerations start to come into play. Aside from the said freedom to dispose of one's own life we have to consider that other values may be potentially violated in the course of committing aggravated suicide, some of which are placed the highest in the hierarchy of legally protected goods – the lives of other people. Therefore, on the paternalistic account, a classic conflict between a *societal good* (life of the person who commits suicide) and an *individual good* (freedom to dispose of one's own life) transforms into a conflict between a *societal good* (life and other goods of potential victims of an attack) and *the life and other goods belonging to an attacker.*

The theory which considers suicide illegal by reference to art. 38 of the Constitution is incapable of generating solutions to a problem so stated. The situation is different on the grounds of the view that suicide is legally indifferent. If Polish law is indifferent towards suicide so long as it affects only the rights, duties, interests and all other legally protected values belonging to the person who kills themselves, the law's position with regard to a suicide attack where third parties are hurt is equally clear. Where there is no duty to save or protect the life of the attacker, all conflicts between goods which arise in our hypothetical may be resolved by reference to general principles and institutions of criminal law.

Theoretical doubts have been partially addressed as a result of the passage of the Act on Anti-Terrorist Activities (June 24, 2016)[30]. Article 23 is worthy of par-

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first proponent of this view in the 1980s. Simply put, G. Jakobs divided the legal order into two parts – civic criminal law (German: *Burgerstrafrecht*) and criminal law of the enemy (German: *Feindstrafrecht*). In G. Jakobs's view, according to not entirely clear criteria, some offenders belong to a privileged, as it were, category of ordinary offenders, whilst others – to the category of offenders-enemies. Should an offender be considered an enemy of the society, such a person is stripped of all constitutional rights and freedoms and as a "non-subject" becomes an object of all-around state-sanctioned repression. For more on the concept of *Feindstrafrecht*, see G. Jakobs, *Kriminalisierung im Vorfeld einer Rechtsgutsverletzung*, "Zeitschrift für die gesamte Strafrechtswissenschaft" 1985, Vol. 4, issue 97, p. 751 *et seqq*.; G. Jakobs, *Bürgerstrafrecht und Feindstrafrecht*, "Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht" 2004, issue 3, p. 88 *et seqq*.; G. Morguet, *Feindstrafrecht. Eine kritische Analyse*, Berlin 2009. For more on this in the Polish literature, see D. Gruszecka, *Ochrona dobra prawnego na przedpolu jego naruszenia*, Warszawa 2012, p. 207 *et seqq.*

[30] Journal of Laws of the Republic of Poland from 2016, item 904.

ticular attention as it accords a number of privileged agents[31] certain special rights of an exceptional character as against not only the general principles of criminal law but also the rules governing competences and procedures of secret services. Article 23.1 of the Law creates a right to a so-called special use of firearms (sniper shot): "Within counter-terrorist activities, if necessary to counteract a direct, illegal and violent attack on the life or health of a person or to free a hostage, and where use of a firearm in a manner inflicting the least harm possible is insufficient and counteraction against such an attack or freeing a hostage is not possible, it is permissible to, with regard to all the circumstances of an event of a terroristic character and the potential to undertake counter-terrorist activities, use a firearm against the attacker or hostage-taker, which may result in the death or direct endangerment of life or health of such a person (...)".

In the context of protection of every human life (art. 38 of the Polish Constitution), it can be said, as a side note, that the reasons appended to the draft bill which later became the Act on Anti-Terrorist Activities raised many doubts. Introduction of a normative basis for a so-called special use of firearms is said "not to be intended to violate the principle of value of every human life, however in instances where it can be applied, protection of the life of the victim is a superior value to the life of the attacker"[32]. It is highly debatable to argue that life as a good – regardless of whether we adopt a paternalistic or liberal approach to relations between an individual and the state – may be gradable depending on the characteristics of its holder. Here, the life of the attacker would not be a good of lesser value than the life of the victim. In the light of general constitutional principles and general rules of criminal law they would represent equal value. This should not lead us to believe that criminal law is helpless when faced with such a conflict of equally important or even the same goods (e.g. life against life). On the contrary, the Polish criminal law is equipped with mechanisms to resolve conflicts between values placed equally high in the hierarchy of legal goods. Nevertheless, the sheer normative content of art. 23 of the Act on Anti-Terrorist Activities does not give rise, from a dogmatic standpoint, to larger doubts since the legislator precisely determined both the procedure in which the special use of a firearm may occur as well as the group of agents who are authorized to undertake such actions[33].

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[31] Pursuant to art. 23(4) the following officials are authorized to have recourse to the special use of firearms: police officers, officials of the Border Guard, the Internal Security Agency, servicemen of the Military Gendarmerie or soldiers of the Polish Armed Forces which form part of a group performing counter-terrorist operations, referred to for the purposes of the Act on Anti-Terrorist Activities as a "counter-terrorist group".

[32] *Uzasadnienie*..., p. 25.

[33] On a side note, it shall be emphasized that the Act on Anti-Terrorist Activities contains plenty of regulations which are highly doubtful from a constitutional perspective (the definition of an event of a terroristic character, a possibility of undertaking surveillance operations against non-citizens of the Republic of Poland, seizure, retention and processing of biometric data of non-

Even though, in the realm of the so-called special use of a firearm, the 2016 Act contains regulations of undoubted utility for the purposes of our discussion, these are still mechanisms to be used solely by certain professionals, i.e. officials of certain government services and agencies[34]. As a consequence, the Act does not allow other individuals to act in any other way than those prescribed by the general principles of criminal law.

5. CONCLUSION

In the light of our analysis to this point, it appears that the Polish law does not warrant a conclusion that suicide is an illegal act so long as it does not cause harm to third parties. Particularly, no backing for such a conclusion is offered by art. 38 of the Polish Constitution. The Polish legal system does not feature any prohibition, let alone any command to commit suicide. Therefore, it is submitted that a suicidal act that does not cause harm to third parties is legally irrelevant. One cannot declare all acts which lead or could potentially lead to violations of goods of *significant social importance* to be illegal only by reference to a socially objective account of legal goods – this is in fact an attempt to introduce limits on conceivable violations of goods without any legal basis. If we were to accept the illegality of ordinary suicide, then, both practically and theoretically, we would encounter potentially insurmountable obstacles on the grounds of aggravated suicide, i.e. one which endangers or violates other goods (including suicide terrorist attacks).

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citizens, limits on the right to assemble, blocking of telecommunications data etc.). Due to doubts with regard to the Law's compliance with the standards of protection of rights and freedoms of individuals, the Ombudsman of the Republic of Poland decided to challenge a number of its provisions before the Constitutional Court (complaint of the Polish Ombudsman dated July 11, 2016, VII.520.6.2016.VV/AG). However, the constitutionality of the provision which allows for the special use of a firearm was not disputed in the Ombudsman's complaint on account of the uncontroversial nature of that regulation (the author of this article co-wrote the Ombudsman's complaint to the Constitutional Court).

[34] We shall note that the Act on Anti-Terrorist Activities is not an isolated piece of legislation, but it fits into a general tendency of enacting highly repressive law. I refer here to legislation which abridges rights and freedoms of individuals, said to defend "public safety"/"public interests". One example is the new provisions of the Police Act of April 6, 1990 (Journal of Laws of the Republic of Poland from 2015, item 355 as amended) which introduced new principles governing the operational control of telecommunications data. It should be stressed that numerous contemporary legal orders have embraced the penchant for enacting surveillance laws because of the danger of terrorism. For instance, following the 9/11 terrorist attacks not only in the United States, but also in Germany legislatures took comprehensive legislative action aimed at preventing such incidents in the future. For more on this see C. J. M. Safferling, *Terror and Law. German Responses to 9/11*, "Journal of International Criminal Justice" 2006, issue 4, p. 1152 *et seqq.*

On the contrary, legal irrelevance of suicide as an attack only on one's own goods makes it possible to use general institutions of criminal law (such as self-defence, necessity) every time the Polish law does not envisage a possibility of using specific mechanisms (e.g. special use of firearms mentioned above). Of course, the practical implication of this view is not an end in and of itself, but a result of its legal-theoretical justification. Even though there is no doubt that Polish law does not authorize people to freely dispose of their lives, it is untenable to consider that freedom inconsistent with the law. In this context, the constitutional principle of protection of every human life is not an adequate basis for the illegality of suicide (even if the monistic view of illegality is adopted) when confronted with the essence of suicide as well as the function of art. 38 of the Polish Constitution. Notwithstanding purely dogmatic problems – as the issue at hand is not free from axiology – we should ask whether, in the case of ordinary suicide, the fact that life, in a moment where it has lost all value for its holder, is still *the highest value for the society*, should have the effect of stripping an individual of their ability to make decisions about it, by subjecting it to protection regardless of the holder's will?

Even having discarded both radically paternalistic and liberal theories, the leeway a person has in the case of a terrorist suicide attack is murky and not precisely delineated. It remains an open question whether general institutions of criminal law are capable of ensuring practicably wider and safer space for acting, or whether additional regulations supplementing the current system of criminal instruments shall be enacted. For it may transpire that due to an act's high level of danger posed to a large number of goods placed the highest in the hierarchy of legally protected values, mechanisms recognized hitherto in contemporary criminal law are insufficiently effective and comprehensive. Legislative action should be taken with a view to adjusting the Polish legal system to modern threats, as has been done with regard to privileged agents. Simultaneously, it should be emphasized that any legislative decisions shall be made in full observance and respect for the principles of a democratic state ruled by law and should therefore be consistent with fundamental rights and freedoms of every individual.

Summary

The paper examines the question of suicide in the light of Polish criminal law. The starting point of discussion is an analysis of actions leading to one depriving oneself of one's own life which, at the same time, do not pose any harm to third parties. Here, the paper strives to answer the question whether suicide is legal or illegal in view of criminal law, as well as whether state interference with such actions is possible and justified. These questions serve as the background for the core part of the paper, in which justifications for the criminalization of suicidal acts simultaneously being attacks on third parties,

i.e. so-called suicide attacks, are sought. The paper sheds light on the latest anti-terrorist laws and formulates conclusions pertaining to its directions of development, particularly in the field of combating suicide terrorist attacks.

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THE CONCEPT OF A SPECIAL CRIMINAL LAW AS A WEAPON AGAINST "ENEMIES" OF THE SOCIETY

1. THE CONCEPT OF "FEINDSTRAFRECHT"

Günther Jakobs developed the concept of "Feindstrafrecht" as opposed to "Bürgerstrafrecht" in 1985[1]. The "Feindstrafrecht" (enemy criminal law) aims at curtailing the threat caused by dangerous individuals, which it views as enemies of the society, as sources of danger rather than as citizens. This would refer to anyone whose criminal actions meant the denial of the legal system as a whole, e.g. terrorists. "Bürgerstrafrecht" (citizen criminal law) represents the traditional criminal law which, according to Jakobs, reacts to attacks against the existence of its norms. By punishing the criminal, it defends the existence of the broken law, declaring the norm as still valid. Punishment is a symbolic interaction between the society and the offender, who is still accepted as a person, as a member of the society. If it was not for the symbolic act, punishment would not be necessary[2].

In 1985, G. Jakobs was rather critical towards the concept of "Feindstrafrecht" and was describing it as a problematic development in criminal law. It should only be legitimate in a state of emergency, if at all. The limitations of state power exerted by liberal criminal law would be constitutive of a liberal state; if they were to be abandoned, so would the liberal state[3]. Jakobs' idea of "Bürgerstrafrecht" is particularly influenced by his rejection of the concept that the objective of liberal criminal law is to protect legal goods ("Rechtsgüter"), which is widespread in the German-speaking area. According to Jakobs, criminal law aims

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[1] Günther Jakobs (26th of July 1937 Mönchengladbach) is a German criminal law professor emeritus at the University of Bonn, specialized in dogmatic and philosophical aspects of criminal law. He first mentioned Feindstrafrecht in *Kriminalisierung im Vorfeld der Rechtsgutverletzung*, "Zeitschrift für die gesamte Strafrechtswissenschaft" 1985, issue 4, pp. 751–785.

[2] G. Jakobs, *Bürgerstrafrecht und Feindstrafrecht*, "Höchstrichterliche Rechtsprechung zum Strafrecht" 2004, issue 3, p. 89.

[3] F. Salinger, *Feindstrafrecht: Kritisches oder totalitäres Strafrechtskonzept?*, "Juristen Zeitung" 2006, p. 757.

at protecting the validity of norms[4]. Unlike "Feindstrafrecht", traditional liberal criminal law is aimed at creating spheres of freedom for the citizen; unless they interrupt the (legal) sphere of another citizen, they are free to do whatever they please. "Feindstrafrecht", on the other hand, intervenes much earlier, even at the preparation stage of a crime, as it is optimized to protect legal goods. Jakobs' justification for criminal liability is not the formal ability of the perpetrator to cause harm, but his willingness to behave in a certain way. While traditional criminal law observes the possible offender and criminalizes certain signs of behaviour, even very early ones, to prevent crimes, Jakobs suggests looking at the perpetrator himself and his intent.

This changed at the turn of the millennium when Jakobs started to show a much more positive attitude towards the concept of "Feindstrafrecht" and seemed to change from a descriptive to a rather normative point of view. The terror attacks in 2001 led to even more attention for his theories[5]. Jakobs sees these two kinds of criminal law systems as two tendencies which can be found within one legal system. In his newer texts, he makes it clear that he would prefer a separation of criminal law into "Bürgerstrafrecht" and "Feindstrafrecht" so that the state can react appropriately as against the enemies of the state as well as "normal" criminals. Otherwise, elements of both systems would become part of the criminal law and citizens who break the law once would become subject to measures of the "Feindstrafrecht", while the state would be less effective in combating its real enemies.

The philosophical base of Jakobs' concept is the social contract theory. According thereto, the state is based on a contract and breaking the law means a breach of this contract. Some philosophers, like Rousseau and Fichte, would go as far as excluding anyone who breaks the law from the social contract, making them an enemy of the society, though, according to Fichte, they become part of the contract again after they are punished. Jakobs would not go this far; since the state has an interest in keeping people who committed a crime in the society and since they should have the opportunity or even the obligation to recoup the damages they caused, it is not possible to revoke all their rights. Jakobs finds Thomas Hobbes more convincing: a citizen cannot leave the society by committing a crime, except by joining a revolt or committing treason, as this would be a direct cancellation of the social contract, making him an enemy of the society. Jakobs also cites Kant, who sees a person who is not part of the society, as a constant threat, not because of their actions, but solely because of their "natural", "unlawful" status

[4] Whether criminal law protects legal goods or the validity of norms, which were designed to protect legal goods, should not make much of a difference, one would expect. Jacobs seems to consider this differentiation relevant, as the protection of legal goods would justify an earlier intervention of the criminal law, and can therefore only be an objective of the Feindstrafrecht. (L. Greco, *Feindstrafrecht*, Zürich 2010, p. 13).

[5] L. Greco, *Feindstrafrecht*..., p. 13 *et seqq.*

(*status naturalis)*, the lack of predictability of their future actions. Such a person could therefore be forced under the social contract or would have to leave the "neighborhood". This should apply to anyone who is constantly denying the legal system of the state with their actions and is therefore a source of danger. Because they are neither a citizen nor a legal subject anymore, they become an enemy of the society which can combat them with any measures it deems necessary. Not only is the state allowed to use necessary physical force against them, it is even obliged to do so in order to protect its lawful citizens from the enemy. The state can still limit itself; it does not have to revoke all rights if it is not necessary, especially if the state wants to keep the possibility to make peace with its enemies sometime in the future alive. Unlike punishment against citizens, these measures have no symbolic character; they only aim at preventing enemies of the society from harming its members[6].

2. ELEMENTS OF "FEINDSTRAFRECHT" FOUND IN TODAY'S CRIMINAL LAW

Jakobs identified three main features of "Feindstrafrecht": Punishment comes well before any actual harm occurs; it contains disproportionate sanctions, i.e. extremely long imprisonment, and it suppresses procedural rights[7].

He mentions several elements he would relate to preventive "Feindstrafrecht" in Germany's current criminal law. Many of these norms can also be found in the laws of most other European countries, including Austria. He seems to relate any measure which limits the (supposed) offender's rights before the conviction to "Feindstrafrecht" as such measures are preventive rather than a reaction to the violation of a norm. Concerning procedural law, this includes remand or limitation of contact with the attorney. According to Jakobs, a person who respects the law would not try to flee his trial or to suppress evidence; therefore, these laws are aimed at people who pose a threat to legal proceedings, who act as enemies. The same also applies to every investigation method of which the offender is not aware, for example wiretapping and the use of undercover policemen. These actions are only preventive use of force; unlike punishments under the "Bürgerstrafrecht" they are not a symbolic interaction between the society and the offender.

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[6] G. Jakobs, *Bürgerstrafrecht*..., p. 90.

[7] C. G. J. Díez, *Enemy combatants versus enemy criminal law: An introduction to the European debate regarding enemy criminal law and its relevance to the Anglo-American discussion on the legal status of unlawful enemy combatants*, "New Criminal Law Review" 2008, Vol. 11, No. 4, p. 531.

Laws against terrorism often criminalize actions at a very early stage of the preparation of terrorist attacks. The Austrian law, for example, punishes participation in a terrorist organization as well as financial support of such an organization with one to ten years' imprisonment[8]. This is even the case if the organization has not carried out an attack yet and is only planning to do so in several years. These laws are aimed at preventing terrorists from breaking other laws which would then pose a threat to the state and its people. They are typical of "Feindstrafrecht" as they eliminate an enemy as a source of danger long before they could actually harm anybody. According to "Feindstrafrecht", it is not even the stage of preparation but the intent which makes the reaction necessary. Imprisonment of the offender would then rather be some kind of preventive custody than a punishment. The discussion about these laws has recently become more active with the rise of the IS and Europeans travelling to the Middle East to support it. This has led to the passing of § 89a Abs 2a StGB in Germany, which allows the prosecution of people simply for the fact that they are leaving their home country with the intention to join terrorist training camps.

Jakobs mentions preventive custody as a typical measure of "Feindstrafrecht"[9]. It does not look backwards at the crimes the offender committed, but forward at the damage he is likely to cause in the future. In this case detainment is only physical force to protect other citizens and is not intended to have any symbolic meaning. The Austrian law has a similar institution for repeated offenders who were already sentenced to imprisonment at least twice and kept committing serious crimes[10]. Institutions for mentally abnormal offenders also aim at protecting the public. Austrian law requires the offender to be convicted of a crime which can be punished with more than one year imprisonment. In addition to that, the law requires a high probability that the offender will continue committing serious crimes. His custody can then be prolonged unlimitedly, if necessary[11]. Austrian law also allows the compulsory accommodation of mentally ill people in mental institutions even though they have not committed a crime yet. This is only permissible if the person poses a threat to themselves or others and only pursuant to a court order. This compulsory accommodation is not part of criminal law[12].

The prime example of Austrian "Feindstrafrecht" is the "Verbotsgesetz". It was implemented in 1947 to prevent National Socialistic actions. The "Verbotsgesetz" penalizes the foundation or support of NS organizations as well

[8] See § 278b for participation in terrorist organizations and § 278d StGB for the financial support of terrorism.

[9] G. Jakobs, *Bürgerstrafrecht*..., p. 89.

[10] "Unterbringung in einer Anstalt für gefährliche Rückfallstäter" (accomodation in an institution for dangerous repeated offenders), § 23 StGB.

[11] "Unterbringung in einer Anstalt für geistig abnorme Rechtsbrecher" (accomodation in an institution for mentally abnormal offenders), § 21 StGB.

[12] Unterbringungsgesetz § 3.

as National Socialist propaganda and glorification of the NSDAP. If the act or the offender is particularly dangerous, the punishment is increased considerably. That the dangerousness of the offender is especially important for the amount of punishment demonstrates the preventive character of this law[13].

The punishment is extremely severe and seems out of proportion when compared to laws against other terrorist organizations. Even lesser crimes, like glorification of the NSDAP, are punished with one to ten years' imprisonment, or up to twenty, if the offender or the act are especially dangerous. The punishment for the foundation of a NS organization is comparable to the punishment for murder and even livelong imprisonment is possible. Until 1992, punishment under the "Verbotsgesetz" was even more severe. Such a disproportionate punishment would normally infringe the Austrian constitution. To avoid this, the "Verbotsgesetz" was accorded constitutional status. Since even the accumulation of NS propaganda material is punishable, the "Verbotsgesetz" criminalizes behaviour even earlier than most laws against terrorism. Not only does the "Verbotsgesetz" show these three characteristics of "Feindstrafrecht". It was also historically designed to combat the remaining National Socialists after they were defeated by military means during World War Two. Even though it was introduced as "Feindstrafrecht", the "Verbotsgesetz" is not used this way by today's judicature. The punishments are usually close to the minimum penalty[14]. There is also no special procedural law for proceedings under the "Verbotsgesetz".

3. "FEINDSTRAFRECHT" IN LEGAL POLICY AND POLITICS

The terms used in current legislation as well as in political discussion already suggest that some groups of criminals should be "combated" or they should be "waged war" against. This can even be found in EU framework decisions "on combating trafficking of human beings" or "on combating corruption in the private sector". This is not new; Germany passed a law to combat business crime as early as in 1976, though this language has recently become more widespread. This kind of legislation (and the jurisdiction executing it) often employs higher than usual imprisonment sanctions, makes the preparation of crimes punishable at an earlier stage or deprives the offender of some procedural rights[15].

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[13] R. Lässig, (in:) F. Höpfel, E. Ratz (eds.), *Wiener Kommentar. Verbotsgesetz*, 2nd ed., Wien 2015, p. 1 *et seqq.*

[14] Courts are even using "extraordinary mitigation of punishment" (§ 41 StGB) liberally to impose sentences below the regular minimum penalty (see Austrian Supreme Court decisions: 11Os92/89; 14Os163/93; 13Os122/95; 15Os175/97).

[15] C. G. J. Díez, *Enemy combatants versus enemy criminal law...*, p. 556.

The reasons for this may also be political or psychological. When citizens feel threatened by something, politicians will deem it necessary to find something that makes them feel safer. Whether these measures are in fact helpful to contain the actual danger is not the most important aspect. If they strengthen the citizens' trust in their government, they are still considered to be successful. Not only from the point of view of the politicians who are more likely to get reelected – trust is also important for the stability of a state and its economy.

Apart from being not effective at containing the actual threat, this symbolic legislation also has its own risks[16]. The least dangerous symbolic laws are those which are meant to show the values of the legislator without directly forcing the citizens to change their behaviour. Examples for this are some environmental laws which are rarely applied and meant to raise consciousness as far as environmental matters are concerned. But symbolic legislation can also lead to the introduction of laws with characteristics typical for "Feindstrafrecht". The aforementioned German § 89a Abs 2a StGB is an example of such a law as it allows punishing people at a very early stage of the preparation of a crime. This kind of legislation also creates vague laws and lowers legal certainty. In Austria, for example, the law against criminal organizations led to the prosecution of a group of environmental activists. The group was later discharged and the norm reformed, but these proceedings caused bad echo in the media[17].

4. TO WHOM SHOULD "FEINDSTRAFRECHT" APPLY?

It remains somewhat unclear what crimes exactly would lead to the loss of legal personality under Jakobs' theory. On a philosophical level, Jakobs would require the criminal to reject the legal system and its norms. On a more practical level, the offender would have to be a constant source of danger who cannot be expected to respect legal norms. Therefore, according to Jakobs, someone who kills their uncle to get his heritage sooner would still remain a legal subject. They do not reject the legal system, not even the norm which prohibits murder, since they still do not want himself or anyone, except their uncle, to be killed. The maxim of their action is inconsistent; such a crime would pose no danger to the state[18].

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[16] P. Kaufmann, D. Lalissidou, *Präventivstrafrecht versus Feindstrafrecht*, "Juristische Rundschau" 2016, issue 4, pp. 163–167.

[17] See http://derstandard.at/2000001711934/Tierschuetzer-Prozess-Alle-Freisprueche-rechtskraeftig (visited October 26, 2016).

[18] G. Jakobs, *Bürgerstrafrecht*..., p. 92.

As an example of someone who should be subject to the "Feindstrafrecht", Jakobs mentions people who commit crimes regularly, who are part of a criminal organization or, especially, terrorists. His definition of the subjects of "Feindstrafrecht" makes it considerably difficult to decide to whom it would really apply. This is even the case for his examples. Someone who makes a living out of pickpocketing for years is for sure someone who is constantly breaking a norm and also a constant source of danger for other people's property. Still, viewing them as an enemy of the society who needs to lose all their rights seems out of proportion. White collar criminals, on the other hand, who are causing considerably more economic damage with corruption, market manipulation and tax evasion have a serious interest in our legal system not changing because it is the base of the economic system they are operating in. Even organized criminals like drug and arms traders want *others* to abide by the law and the social and legal system in general to stay the same. Terrorists, on the other hand, often do want to change the political and legal system. Many of them, especially suicide bombers, plan on carrying out only one attack, though. Therefore, they are only a source of danger before they first commit a crime. This would make it considerably difficult to apply "Feindstrafrecht" to them.

5. PRACTICAL PROBLEMS CAUSED BY "FEINDSTRAFRECHT"

Jakobs declares "Feindstrafrecht" und "Bürgerstrafrecht" to be different ideals within the scientific discourse. In reality, none of them occurs in its pure form. Since he moved to a rather normative perspective, he argues for the existence of two separated systems, but within one legal system. The "Bürgerstrafrecht" would then be addressed at "normal" citizens who break a norm but are in general law abiding, while enemies of the society would be subject to "Feindstrafrecht". The practical application of such a system of two criminal laws would lead to numerous problems.

The main problem would be to identify the enemies that should be addressed by "Feindstrafrecht". This would have to be done by a fair trial, respecting the guarantees of Article 6 ECHR, since before being convicted, every citizen has still all his civil rights, including the right to be presumed innocent. This would make it impossible to apply measures of "Feindstrafrecht" to a (supposed) offender during investigation and trial. It would limit the efficiency considerably, especially since even detention while awaiting trial is only justified under "Feindstrafrecht". This would make it necessary that one could become subject to "Feindstrafrecht" only partly, if a judge decides that they are probably an enemy of the society and can therefore be detained. The same would apply to other investigation methods which can only be justified against enemies, like technical observation, which

in some cases would need to be arranged by executive organs to be effective. Therefore, judges in accelerated proceedings and even executive organs would have to decide whether someone is (partly?) considered an enemy and loses some (or all?) of their rights. This would mean a considerable risk that regularly "normal" citizens would have their legal personality, including their civil rights, revoked due to inevitable mistakes. Even though today's courts already make mistakes, the consequences would be much more severe. Therefore, the increase in efficiency in investigation and trial would be limited or there would be a serious risk for innocent civilians of losing all their civil rights.

"Feindstrafrecht" would also mean that as far as convicted enemies are concerned, preventive measures would take the place of punishment. This would allow for unlimited imprisonment or even execution of these people, as they have lost all rights, including basic human rights. Since most dangerous criminals who commit serious crimes already face long imprisonment, the additional use is questionable. Especially terrorists, who aim at killing people, will already face livelong sentences in prison if they get caught alive. However, criminals who only support terrorist organizations would face much more severe consequences under "Feindstrafrecht" than under "Bürgerstrafrecht". The same would be the case for people who join such organizations without taking part in attacks or who are still in the planning stage. The last two cases are probably also the reason why anti-terror-laws with the characteristics of "Feindstrafrecht" were introduced.

6. PHILOSOPHICAL ARGUMENTS AGAINST "FEINDSTRAFRECHT"

As mentioned, Günther Jakobs' "Feindstrafrecht" is based on social contract theory. However, there is not only one social contract theory and Jakobs does rather agree with Thomas Hobbes and Jean-Jacques Rousseau than John Locke. Especially Hobbes has a rather pessimistic idea of man – he is antisocial and egoistic – and therefore assumes that every human would be at war with everyone else in the natural state. To escape this, people create a social contract, found governmental structures and subordinate themselves under a sovereign. Hobbes' theory seems to be of a quite authoritarian character and to be heavily influenced by the absolutistic era it was developed in.

In Rousseau's theory, the social contract is based on common welfare. Every citizen has to give up all his egoistic interests and enter the civic state. Since Rousseau states that people are often unable to recognize what would be best for them, this creates the danger of a totalitarian determination of the common welfare. John Locke has a much more positive picture of humans and the natural state. In his *status naturalis* there is no war, but natural law, even though there

is no state to guarantee it. The social contract is created to protect these natural rights and liberties[19]. Therefore, Jakobs' theory of a constant war of the society against its enemies would not be consistent with every social contract theory, because, according to Locke, people outside the society contract would not be enemies without rights but would still have natural rights, even if they may not be guaranteed by a state.

Even more important is the question whether the social contract theory is still suitable to describe modern societies[20]. It was developed during the "Aufklärung" when a real international community and universal human rights did not exist. This leads to the question of how the social contract theory works with the idea of a global citizenship which guarantees basic human rights[21]. The first question is: which society forms the social contract? Historically, every national state would form its own social contract. Today, with international organizations like the UN and even supranational organizations like the EU which can create their own laws, this seems questionable. Therefore, to maintain the social contract theory, one possibility would be to assume that people are still only citizens of their national states, which are connected to other states by contracts and therefore only have the rights these contracts (like the ECHR) guarantee them. Therefore, if they are no longer part of the social contract of their national state, they also lose all rights these contracts give them. Many conventions on human rights apply *erga omnes*, though[22]. Therefore, violating the human rights of a non-citizen would still be an infringement of international contracts, even though not a violation of the rights of that person.

Another possible concept, which I would prefer, would be to assume that everybody is a party to two or more social contracts, a national and an international, possibly also a European one. In this concept, it becomes questionable whether a national state can exclude a citizen from the global contract. I have to admit that neither concept can reflect reality totally. One of the reasons why

[19] M. Tebbit, *Philosophy of Law*, 2nd ed., New York 2005, p. 94 *et seqq.*

[20] There is, of course, a lot of criticism on the concept of a social contract per se. As it is a theoretical concept, rather than a real event, it has its flaws and contradictions. How can there be a contract in a pre-legal society? Would the contract need the institutions it creates to already exist? John Rawls has created a new concept of the social contract in the 20th century, which I find more convincing than older theories, even though it cannot abolish all their flaws; it was not used by Jakobs, though.

[21] C. G. J. Díez, *Enemy combatants versus enemy criminal law...*, p. 559.

[22] The UN Universal Declaration of Human Rights (1948) was created to guarantee its rights to *all humans.* Though it was not binding, it was the base for the European Charter of Human Rights. The same is therefore true for the binding ECHR, even though it does not stress universality as much (C. Tomuschat, *Human Rights*, Oxford 2003, p. 30 *et seqq.*). ECHR jurisdiction is essentially territorial, though within its territory, it is not limited to citizens of member states (A. Aust, *Handbook of International Law*, 2nd ed., Cambridge 2005, p. 216 *et seqq.*).

I prefer the second one is that the first one can lead to gaps in international human right protection, since it would rely solely on public international law contracts.

Since Jakobs refers to the enemy which is at war with the state as someone who has no rights, the question arises whether they are not subject to the law of war at least. Since *ius in bello* is tailor-made to cover military conflicts, it does not protect terrorists, organized criminals and other groups which would be subject to "Feindstrafecht"[23].

7. "FEINDSTRAFRECHT" IN ACTION: COLOMBIA AND THE JUDGE WITHOUT A FACE

While "Feindstrafrecht" is usually discussed as a theoretical concept or a tendency within a legal system, in the 1990s Colombia had a criminal law specifically designed to combat its enemies, especially organized criminals. Colombia also has a history of constantly being at war with some of its own citizens[24]. In the 19th century, Colombia experienced 14 civil wars and an even higher number of regional armed conflicts. Most of them were fought between members of the liberal and the conservative party[25]. Therefore, in 1861, Colombia integrated international public law into its constitution, including the law of war. Rebels were rather seen as subjects to international law than criminal law. Even today, international humanitarian law is stated as a limit on the power of the government in case of a state of emergency[26].

In the 20th century, violence was still omnipresent. During the first half of the century constant fights for land took place, while the second half experienced a constant war against social-revolutionary guerillas. The situation became even worse with the raise of the drug trade in the 1980s. The state was unable to convict and punish members of drug cartels and paramilitary groups, as they would murder or bribe policemen and judges. Between 1989 and 1990, more than 100 government officials, especially judges, were killed. This led to the "Statute for the defence of the justice" in 1990. If someone was charged under this statute because they belonged to a "dangerous" group, there was no public trial. They did not know who the prosecutor, the judge, the witnesses were. The police had

[23] A. Aust, *Handbook of International...*, p. 216. This is especially relevant in the case of the Geneva Convention. Even though it was enlarged to cover irregular fighters, it still demands fighters to openly carry their weapons and be under proper command. It is in no way able to cover most organized or white-collar criminals who could be pushed into a "state of war" by Feindstrafecht.

[24] A. Aponte, *Krieg und Feindstrafrecht*, Baden-Baden 2004, p. 38 *et seqq.*

[25] *Ibidem*, p. 38.

[26] *Ibidem*, p. 43 *et seqq.*

considerably enlarged competencies. This system was aimed at efficiency, and efficiency meant to produce as many convictions as possible. It achieved this goal, at the expense of procedural rights[27]. High-ranking members of drug cartels and paramilitary groups were still able to escape justice. The system lead to the conviction of a considerable number of innocent people and was abused for political goals. It proved most effective against smaller criminals. However, becoming subject to the special trials and severe punishments supposedly did not lead to their social reintegration but rather made them real enemies of the state. Colombia, especially its constitutional court, has recently been removing some of these norms[28].

The limited success of the "Statute for the defence of the justice" shows that "Feindstrafrecht" is not very effective, even if there is a real threat to the state. Unlike in Colombia, in most western states the existence of the legal system is not threatened – even terrorism is far away from being as dangerous for European states as organized crime and paramilitary groups are for Colombia.

8. THE USE OF "FEINDSTRAFRECHT" FOR THE SCIENTIFIC DISCUSSION

Even if we reject "Feindstrafrecht" as a normative category, it could still be useful within the scientific discussion[29]. First of all, it could be descriptive, to identify norms or a legal system as "Feindstrafrecht". The problem here is that the language employed by Jakobs (and others) to describe "Feindstrafrecht", which became inherent to the concept, tends to cause polarization. The concept itself is so radical, labels groups as enemies, talks about "war", that the use of its vocabulary tends to make discussions emotional. The other use could be critical. It could point out tendencies towards "Feindstrafrecht" in our current legal system so they can be avoided. However, we are facing a similar problem here: the strong negative connotation of "Feindstrafrecht". If a theory is labeled as "Feindstrafrecht", its supporters are likely to feel offended. They may even consider this an attack on themselves and an accusation.

Another question is whether the introduction of "Feindstrafrecht" as a category is necessary. Norms which show the characteristics of "Feindstrafrecht" could be as well described by other, more precise terms. Instead of criticizing laws against terrorist organizations as Feindstrafrecht, it would be better to dis-

[27] *Ibidem*, p. 66 *et seqq.*

[28] A. Aponte, *Krieg und Politik – Das politische Feindstrafrecht im Alltag*, "Höchstrichterliche Rechtsprechung zum Strafrecht" 2006, issue 8–9, p. 302.

[29] L. Greco, *Feindstrafrecht…*, p. 53 *et seqq.*

cuss the problems linked with criminalization at such an early stage. Therefore, the use of "Feindstrafrecht" for the purposes of scientific discussion is limited. This does not mean that there is no use for it. Especially because it is so radical, "Feindstrafrecht" shows how our criminal law system would probably look like if we started to label groups as enemies and revoked their rights.

9. IS THERE AN ALTERNATIVE TO "FEINDSTRAFRECHT"?

There are many negative aspects of "Feindstrafrecht" as a normative concept. This is the case for the dual system of "Feindstrafrecht" and "Bürgerstrafrecht" as well as for the tendencies of "Feindstrafrecht" found in current legal systems. Should the main objective therefore be to point out such norms and abolish them? The case is not as easy as it sounds. Most of these norms were created to deal with real challenges and would rather have to be replaced than abolished. If we take Jakobs' wide definition of "Feindstrafrecht" into consideration, then it seems rather impossible to abolish all provisions that can be identified as "Feindstrafrecht" without changing the law substantially.

If we removed remand from our legal system, many criminals would flee their trial or commit further crimes. This is similar as far as anti-terror-laws are concerned. What should we do if we find out that somebody is planning a terror attack or acquiring accomplices to do so? Should we just let them go into hiding until they carry out an attack in another country? The laws against terrorist organizations are often the only possibility to stop them. We probably should try to either solve these problems with other means or try to minimize the negative side-effects of these laws. In my opinion, it is not possible to remove remand from our criminal law. We can only try to minimize it and grant appropriate compensation to victims of unjustified remand. Despite philosophical arguments against it, its existence still benefits our society. Pointing out that it is "Feindstrafrecht" is of little use. However, the effects of detaining a possibly innocent person, on the one hand, and the function of the justice, on the other hand, need to be taken into careful consideration.

Laws against criminal or terrorist organizations are an even more complicated matter. They lead to severe prison sentences and are actually designed to stop an "enemy of the society". I would prefer to "combat" such dangerous people with police law wherever it is possible. If this does not prove to be sufficient, holding on to preparatory crimes could be the only valid option. Whether this would be legitimate depends on our understanding of criminal law.

Summary

In Günther Jakobs' terminology the term "Feindstrafecht" (enemy criminal law) means a special criminal law designed to fight enemies of society. Unlike traditional criminal law, it is not aimed at regular citizens but at those who deny the legal system, e.g. terrorists and organized criminals. The idea of declaring some people to be enemies of the society leads to new legal, political and philosophical questions: Who are these enemies? How can we identify them? Can these enemies be deprived of their human rights? Answers to these questions need to be found, since elements of "Feindstrafrecht" already exist in today's criminal law.

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KEYWORDS

Feindstrafrecht, Bürgerstrafrecht, Jakobs, enemies of the society

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prawo karne obcych, prawo karne obywateli, Jakobs, wrogowie społeczeństwa

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REGULATIONS OF CHILD PORNOGRAPHY – THE IMPACT OF EUROPEAN UNION LEGISLATION ON THE AMENDMENTS TO THE POLISH CRIMINAL CODE

1. INTRODUCTION

The sudden technological development and the spread of electronic devices are the integral features of the 21st century. These conditions lead to the facilitation of production and distribution of pornographic material and thus cause its easy availability. The problem of pornography on the Internet has arisen almost with the moment of its invention and because of the false conviction that the users of the Internet are anonymous it is still an alarming problem[1]. It is hard to ascertain whether the consumption of pornography results in an excessive interest in sex or the opposite – the consumption of pornography is one of the effects of a sexual disorder[2]. The problem of child pornography appears to be essential while discussing the issue of pornography itself since it causes controversy both in Poland and other European countries. The reason for the controversy is a conflict between two opposite interests – the good of the child and free market which derives profit from pornographic material[3]. Child pornography is considered socially harmful due to three main reasons – it can be used by perpetrators to facilitate sexual exploitation of children because it suggests that paedophilia is a common occurrence. Moreover, if it involves the participation of a child it leads to exploitation which can cause serious and long-lasting psychological trauma. Finally, child pornography promotes actions which are considered illegal by the criminal law[4].

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[1] F. Radoniewicz, *Pornografia w Internecie (aspekty wybrane)*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 260.

[2] M. Budyn-Kulik, *Psychologiczne i społeczne następstwa konsumpcji pornografii*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 192.

[3] J. Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystywaniem seksualnym*, Warszawa 2012, p. 65.

[4] J. Warylewski, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności*, (in:) A. Wąsek (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 117–221*, Warszawa 2006, p. 958.

Since the 1990s the dynamic process of technological change has entailed new regulations of child pornography which are intended to protect minors in the most effective way. There is a noticeable tendency in Europe to adopt more and more precise tools to prevent children from sexual exploitation[5]. The criminal law in Poland fits into that tendency – it is created on the basis of international law, conventions of the Council of Europe and finally, the European Union law. The purpose of this article is to display the development of regulations of child pornography in the EU and in Poland since 1996. Its aim is also to show that the amendments to the Polish Criminal Code are strictly connected with the changes in the EU law and they reflect the tendency of specifying tools to protect children. This thesis will be supported by comparing the most important EU legal acts after the Green Paper of 1996 and the amendments to the Criminal Code concerning child pornography of 2004 and 2005, 2008 and 2014.

2. THE ESSENCE OF CHILD PORNOGRAPHY

There is no legal definition of "pornographic material" nor "child pornography" in the Polish legal system. M. Filar claims that pornography is such a way of presenting sexual acts that is incompatible with the acceptable behaviour models. That definition surely includes child pornography[6]. The understanding of this expression has been changing over the years as a result of amendments to the Criminal Code from 1997[7]. Those amendments were conditioned by the necessity of meeting international commitments, implementing EU law and reacting to different realities[8]. Nowadays, it is generally assumed that the definition of child pornography includes all of the visual material (photographs, videos or even texts) as well as produced or processed images of a minor involved in a sexual act. It also refers to adults looking and acting like minors who are involved in sexually explicit conduct. Furthermore, the definition includes the display of a minor's sexual organs themselves[9]. The expression "minor" refers to every person under the age of 18. This wide definition is based especially on the Directive of the European Parliament and of the Council of December 13, 2011 on combating sexual abuse and sexual exploitation of chil-

[5] K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego w polskim i amerykańskim porządku prawnym*, Warszawa 2015, p. 41.

[6] B. Czyż (opr.), *Dzieci w prostytucji i pornografii – wybrane materiały ze Światowego Kongresu Sztokholm 1996*, Helsińska Fundacja Praw Człowieka, Warszawa 1996, p. 20.

[7] Criminal Code of June 6, 1997 (Journal of Laws of the Republic of Poland from 1997, No. 88, item 553)

[8] M. Filar, *Nowelizacja kodeksu karnego w zakresie tzw. przestępstw seksualnych*, "Prokuratura i Prawo" 2004, issue 11–12, p. 23.

[9] J. Warylewski, *Pornografia – próba definicji*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 25.

dren which will be discussed afterwards. However, originally the Polish Criminal Code included a different description of child pornography and a minor itself. The amendments which have changed the meaning of the above-mentioned expressions are worth presenting especially in the context of modifications of the EU law.

3. FIRST ATTEMPTS AT SPECIFYING INSTRUMENTS OF CHILD PROTECTION (AMENDMENTS OF 2004 AND 2005)

One of the first documents released with the aim of effecting the protection of minors in the EU was the Green Paper on the protection of minors and human dignity in audiovisual and information services from 1996. It was published by the European Commission to stimulate discussion on sexual exploitation of minors online at the European level. Its goal was to find a common approach of member states to combating illegal and harmful material on the Internet. The Green Paper divides pornography into *illegal* and *harmful*. Illegal pornography includes child pornography and pornographic material associated with the use of violence. Because of it being a violation of human dignity, it should be forbidden for people of any age. The second type of material, harmful pornography, such as adult erotica, is considered destructive for the development of minors, thus they cannot gain access to such material. However, it should be fully accessible to adults[10]. Moreover, the EU invented the first multiannual Community action plan which aimed to protect minors by promoting safer use of the Internet. It was created on January 25, 1999 on the ground of the Directive of the European Parliament and of the Council and lasted till 2004. The Action Plan for a Safer Internet provided measures including promotion of industry self-regulation and content-monitoring schemes. It also presented filtering tools which allowed parents and teachers to select content appropriate for children, and rating systems, for example the platform for Internet content selection (PICS) standard launched by the international World Wide Web consortium with Community support[11]. The plan was later adopted by decision No. 276/1999/EC. But what played a significant role in protecting minors in this period was the Council decision of May 29, 2000 to combat child pornography on the Internet on the initiative of the Republic of Austria (2000/375/JHA). On the ground of the decision member states were obligated to take necessary measures to encourage Internet users to inform law enforcement authorities of suspected distribution of child pornography on the Internet if they come across such material. Member states committed to ensure the widest

[10] Green Paper on the protection of minors and human dignity in audiovisual and information services, Brussels, October 16, 1996, COM (96) 483 final, p. 4.

[11] Decision No. 276/1999/EC of the European Parliament and of the Council of January 25, 1999 (OJ L 33, February 6, 1999), p. 3.

and speediest possible cooperation with each other and with Europol to facilitate an effective investigation and prosecution of offences concerning child pornography as well as to exchange experience and information on that matter[12]. The decision obliged member states to regularly verify whether technological developments require, in order to maintain the efficiency of the fight against child pornography on the Internet, changes to criminal procedural law[13].

M. Filar, while discussing the problem of pornography, claimed that provisions on that matter in Poland are 200 years younger than the European regulations but they have never caused a serious judicial action as in other countries in Europe[14]. In 2004 the Polish legislator made the first attempt to prepare an amendment which would reflect the process of creating more effective measures to protect minors from child pornography. On March 18, 2004, the first amendment on pornography after 1997 was included in the Polish Criminal Code. It distinguished two types of pornographic material – softcore and hardcore. The hardcore type, beside material associated with the use of violence or the use of an animal, included child pornography. This issue has been regulated in art. 202 § 3−5, which is shown in the table below.

Art. 202

1997	2004
§ 3. Anyone who produces with the aim of distribution, imports or distributes pornographic material with the participation of a minor under the age of 15 or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between three months and five years.	§ 3. Anyone who produces with the aim of distribution, **preserves**, imports, distributes or **publicly displays** pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between **six months and eight years**.
	§ 4. Anyone who preserves, imports, stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years.
	§ 5. The court may decide upon forfeiture of means or other items that were intended to be used or were used to commit offences described in § 1–4, even if they were not owned by the offende[15].

[12] B. Kunicka-Michalska, *Przestępstwa przeciwko wolności seksualnej i obyczajności popełnione za pośrednictwem systemu informatycznego*, Wrocław 2004, p. 22.

[13] Council decision No. 2000/375/JHA of May 29, 2000 to combat child pornography on the Internet (OJ L 138 of June 9, 2000), p. 2.

[14] J. Warylewski, *Przestępstwa seksualne*, Gdańsk 2001, p. 279.

[15] Act on Amending the Criminal Code, the Code of Criminal Procedure and the Petty Offences Code of March 18, 2004 (Journal of Laws from 2004, No. 69, item 626).

As we can observe, in the revised § 3 the legislator for the first time penalised preservation and public display of pornographic material with the participation of a minor. This wider penalisation was the result of meeting international commitments, but its basic purpose was to enhance the protection of minors. However, M. Filar has pointed to a huge inconsistency in the new regulation on how the minor should be defined[16]. In § 3 the legislator penalises actions against a minor (by implication – a child under the age of 18) taken only with the aim of distribution while § 4 penalises preservation, import, storage and possession of child pornography without any specific aim but with the participation of a minor under the age of 15. Distribution in this context means making pornographic material commonly available by, for example, copying, publishing, sharing with an unspecified and wide group of people. In the judgment of September 1, 2011, the Supreme Court of Poland held that for assigning criminal liability for distributing child pornography on the Internet it does not matter what precisely the number of users who got familiar with the content was and whether the number can be regarded as significant[17]. What matters is that the way of downloading pornographic material and sharing it by using a special program makes it available for an indefinite number of people to acquaint themselves therewith. Showing and sharing such material with a small and clearly specified group of people is not distribution in the light of the Criminal Code[18].

The inconsistency in the new regulation also concerns the relation between art. 202 and art. 200 of the Criminal Code. Article 200 penalises subjecting a minor under 15 years of age to sexual intercourse and making him submit to another sexual act. This leads to a bizarre situation in which having sexual intercourse with a sixteen years old girl is legal while importing such material with the aim of distribution is a crime. The higher age limit complies with the view of the European Commission which indicated that "depictions of persons under the age of eighteen involved in sexually explicit conduct constitute sexual exploitation of children[19]". The Commission remarked that the age of eighteen is in conformity with the Convention of the Rights of the Child and children under that age should be put under special protection even though they may reach the maturity to take an informed decision about involving themselves in sexual activities. The amendment of 2004, although not perfect, started a process of specifying measures to protect minors from child pornography and indicated the need for such regulations.

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[16] M. Filar, *Nowelizacja kodeksu karnego*..., p. 29.

[17] Resolution of the Supreme Court of Poland of September 1, 2011, V KK 43/11.

[18] A. Choromańska, D. Mocarska, *Dewiacje i przestępstwa seksualne – klasyfikacja, aspekty prawne*, Szczytno 2009, p. 55

[19] Communication from the Commission to the Council and the European Parliament, Combating trafficking in human beings and combating sexual exploitation of children and child pornography, Brussels, December 21, 2000, COM (2000) 854 final, p. 22.

Just one year later, on July 27, 2005, art. 202 of the Criminal Code was revised again. Changes from 2004 and 2005 can be treated as a whole because the amendment of 2005, called the "anti-paedophilia amendment", did not penalise any actions different than those from 2004. It was only intended to eliminate flaws of the earlier amendment. The legislator added storing and possessing pornographic material with the participation of a minor with the aim of distribution to § 3. Moreover, § 4 was divided into two paragraphs. The *ratio legis* of this change was to condemn preserving child pornography in a particular way because of the acute immorality of this action. As a result, preserving pornographic material with the participation of a minor under the age of 15 became liable to imprisonment between one and ten years.

Art. 202

2004	2005
§ 3. Anyone who produces with the aim of distribution, preserves, imports, distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between six months and eight years.	§ 3. Anyone who produces with the aim of distribution, preserves, imports, **stores** or **possesses** distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between six months and eight years.
§ 4. Anyone who preserves, imports, stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years.	§ 4. Anyone who preserves pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between one year and ten years.
	§ 4a. Anyone who imports, stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years[20].

Article 202 of the Criminal Code lacked penalisation of the act of gaining access to child pornography without possessing it nor importing. In the judgment of September 27, 2012, the Court of Appeals for Wrocław held that the act of entering a site and getting familiar with pornographic material with the participation of a minor is not "importing" in the light of art. 202 § 4a of the Criminal Code[21].

[20] Act on Amending the Criminal Code, the Code of Criminal Procedure and the Executive Criminal Code of July 27, 2005 (Journal of Laws from 2005, No. 163, item 1363).

[21] Court of Appeals for Wrocław judgment of September 27, 2012, II AKa 171/12, LEX No. 1238629.

4. WIDENING THE SCOPE OF THE DEFINITION OF CHILD PORNOGRAPHY (AMENDMENT OF 2008)

In the opinion of the EU organs, expressed in Decision No. 854/2005/WE[22], the Action Plan for a Safer Internet has successfully encouraged a variety of initiatives and thus they decided on further seeking to improve the work already accomplished. The decision introduced a new multiannual action plan called the Safer Internet Plus which lasted from 2005 to 2008. The aim of the plan was to fight against illegal content, tackle unwanted and harmful content, promote a safer environment and raise awareness of the Internet users[23]. It included an annex which provided a group of actions that must be held to fulfil provisions of the European Parliament and of the Council. Measures to fight against illegal content include hotlines which pass reports to an Internet Service Provider, the police or a correspondent hotline. Rating systems and quality labels, in combination with filtering technologies, can help enable users to select the content they wish to receive and thus they can be used to tackle unwanted and harmful content. Promoting a safer environment, in the light of the decision, needs a fully functioning system of self-regulation which involves a number of factors: consultation and appropriate representation of the parties concerned, codes of conduct, national bodies facilitating cooperation at the European level and national evaluation of self-regulation frameworks. And finally, the annex included measures to raise awareness of the Internet users such as starting public awareness campaigns and establishing partnerships with government agencies, user organisations, press and media groups[24]. The next plan, Safer Internet programme, established by Decision No. 1351/2008/EC of the European Parliament and of the Council of December 16, 2008[25] for the period 2009–2013, pursued the objectives of "Safer Internet Plus". It aimed to improve the safety of children on the Internet by increasing the knowledge of the use of new technologies by children and identifying and combating the risks to which they are exposed.

Not only have the legal acts influenced the amendments to the Criminal Code, but they have also been a base for establishing awareness-raising campaigns and organizations. The Polish Safer Internet Centre was launched in 1999 and is run by the Empowering Children Foundation and by the Research and Academic Computer Network (NASK). The Centre organizes educational projects, such

[22] Decision No. 854/2005/EC of the European Parliament and of the Council of May 11, 2005 establishing a multiannual Community Programme on promoting safer use of the Internet and new online technologies (OJ L 149 of June 11, 2005), p. 2.

[23] K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego...*, p. 33.

[24] Decision No. 854/2005/EC, Annex 1 (OJ L 149 of June 11, 2005), pp. 5–9.

[25] Decision No. 1351/2008/EC of the European Parliament and of the Council of December 16, 2008 establishing a multiannual Community programme on protecting children using the Internet and other communication technologies (OJ L 348 of December 24, 2008).

as *Watch your face – facebook campaign* and media campaigns – *Every move online leaves a trace* and *Keep it fun, keep control.* It also runs conferences and training sessions with the aim of improving the safety of children using the Internet and new technologies[26]. There has also been established a team called *Dyżurnet.pl*, functioning within the framework of NASK. It responds to anonymous reports about potentially illegal material received from Internet users. They can report one of four types of content: child sexual abuse material, extreme adult content, racism – xenophobia and other illegal content[27]. *Dyżurnet.pl* also runs campaigns, organizes conferences and trainings. A report from 2015 shows that it is an important initiative because of the fact that during 2015 the number of reports classified as material presenting minors for sexual purposes has increased over twice[28].

In connection with the constant development of new information and communication technologies the European Parliament and the Council came up in 2006 with a recommendation on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (2006/952/EC). They concentrated on three basic aspects – considering by the member states of the introduction of measures into their domestic law, promoting actions to enable minors to make responsible use of audiovisual and on-line information services and promoting a responsible attitude on the part of professionals, intermediaries and users of the Internet[29]. The recommendation laid emphasis on the role of constructive and on-going dialogue between national and European legislators, regulatory authorities, industries, associations, citizens and civil society. None of these goals could be achieved without highlighting education of the society in the subject of safe usage of the Internet. The aim was fulfilled by organizing training for children and their parents as well as national campaigns increasing awareness. The duty of monitoring the progress of completing these tasks was repeated in Directive No. 2007/65/EC of the European Parliament and of the Council on December 11, 2007[30]. Acts mentioned in subsection 2 considered a minor as a child under the age of 18. Moreover, they penalised three types of child pornography, including

[26] See http://www.saferinternet.pl/en/about/safer-internet-in-poland (visited September 29, 2016).

[27] See https://dyzurnet.pl/en/formularz.html (visited September 29, 2016).

[28] See https://dyzurnet.pl/en/aktualnosci/11 (visited September 29, 2016).

[29] Recommendation No. 2006/952/EC of the European Parliament and of the Council of December 20, 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (OJ C 87E of April 1, 2010), p. 124.

[30] Directive No. 2007/65/EC of the European Parliament and of the Council on December 11, 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332 of December 18, 2007), p. 27.

produced or processed images of a minor involved in a sexual act without the participation of a real child. Material presenting produced and processed images of a minor involved in a sexual act includes the Japanese *hentai manga* and *hentai anime* (cartoon images of paedophiles, sexual perversions and violence), European and American hardcore products as well as simulated imagery with the participation of adults made to look as children[31].

However, till 2008 the Polish legislator had not penalised virtual child pornography at all. On the ground of the amendment of October 24, 2008, new § 4b was added to the Criminal Code and it finally distinguished virtual child pornography.

> Art. 202 § 4b. Anyone who produces, distributes, presents, stores or possesses pornographic material presenting a **produced or processed image of a minor** involved in a sexual act is liable to a fine, restriction of liberty or imprisonment for up to two years[32].

This amendment showed that before 2008, occasional views of some experts that expressions such as "minor" or "a minor under the age of 15" should be interpreted widely as including computer animations presenting children, had been wrong. They had been inconsistent with the linguistic interpretation of the law, but most importantly – they had violated the constitutional and criminal principle of *nullum crimen sine lege*[33].

In the opinion of *Dyżurnet.pl*, the amendment of 2008 was really needed and it was an accurate response to the problem of material using images of a minor. It highlights the fact that because of the unstoppable development of computer graphics a virtual image of a minor can precisely resemble a real person[34]. A different point of view is presented by sociologist L. Nijakowski who finds the amendment of 2008 bizarre and claims that although the regulation reflects the public perception of sexual exploitation of a child, it obviously restrains freedom of expression[35]. It is hard to agree with that strong of an opinion. Produced images of minors involved in sexual acts may not violate legal interests of a child such as sexual freedom or decency, but they have a secondary effect. Such material confirms the conviction that sexual interest in children is acceptable and it may lead to a rapid growth in paedophilia. That is why the amendment of 2008 serves a great goal and must be treated as a positive change in regulations of child pornography. However, the amendment did not change § 4 of art. 202 which puts under protection children under the age of 15. This deci-

[31] J. Warylewski, *Rozdział XXV. Przestępstwa przeciwko wolności seksualnej i obyczajności*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Warszawa 2015, p. 1307.

[32] Act on Amending the Criminal Code and Other Laws of October 24, 2008 (Journal of Laws from 2008, No. 214, item 1344).

[33] J. Warylewski, *Rozdział XXV...*, (in:) R. A. Stefański (ed.), *Kodeks...*, p. 1307.

[34] *Raport – 10 lat Dyżurnet.pl*, Warszawa 2015, p. 26.

[35] L. M. Nijakowski, *Pornografia – historia, znaczenie, gatunki*, Warszawa 2010, p. 449.

sion led to a violation of international commitments included in such acts as the Convention on Cybercrime which considers a child every person under the age of 18 but allows to lower the age to 16[36]. This considerable flaw was removed in the next amendment of 2014.

5. STIFFENING SANCTIONS FOR CHILD PORNOGRAPHY (AMENDMENT OF 2014)

One of the most significant EU regulations on the subject of child pornography was the Council Framework Decision No. 2004/68/WSiSW of December 22, 2003 on combating the sexual exploitation of children and child pornography[37]. On December 13, 2011, it was replaced by the Directive No. 2011/92/EU of the European Parliament and of the Council[38]. Its aim was to establish minimum standards concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes that could be approved by all of the member states. It also introduced provisions to strengthen the prevention of those crimes and the protection of victims. The directive defines "child pornography" and as a part of the EU legal system it must also be considered in the context of Polish legislation[39].

Article 2c defines child pornography as:

a) material that visually depicts a child engaged in real or simulated sexually explicit conduct;
b) depiction of the sexual organs of a child for primarily sexual purposes;
c) material that visually depicts a person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of a person appearing to be a child, for primarily sexual purposes;
d) realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes[40].

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[36] A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 327.

[37] Council Framework Decision No. 2004/68/WSiSW of December 22, 2003 on combating the sexual exploitation of children and child pornography (OJ L 13 of January 20, 2004).

[38] Directive 2011/92/EU of the European Parliament and of the Council of December 13, 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/WSiSW (OJ L 335 of December 17, 2011).

[39] J. Warylewski, *Pornografia*..., p. 25.

[40] Directive 2011/92/EU (OJ L 335 of December 17, 2011), p. 7.

As earlier acts, the decision considers a child as any person below the age of 18 years.

The result of the Council Framework Decision, which has been replaced by the Directive No. 2011/92/EU, had already appeared in the amendments of Polish Criminal Code. The amendment of 2008 distinguished three basic forms of child pornography highlighted above: depiction of a real minor involved in a sexual act, depiction of an adult made to look as a minor involved in a sexual act and produced or processed image of a minor involved in a sexual act. However, the directive claimed that it should be in the discretion of a member state to decide whether art. 2c would apply to cases involving people appearing to be a child and processed images of a child engaged in sexually explicit conduct. It indicated that actions such as: acquisition and possession, knowingly obtaining access, distribution, dissemination and transmission, offering, supplying or making available as well as production of child pornography should be punishable in member states. It also determined maximum terms of imprisonment for the above-mentioned crimes. It provided minimum sanctions for acquisition, possession and knowingly obtaining access to child pornography (1 year), distribution, dissemination, transmission, offering, supplying and making available (2 years) and production of child pornography (3 years). What is more, the decision stated that also legal persons may be held liable for any of the offences committed as well as inciting or aiding and abetting committing those crimes. As the Polish Criminal Code had already provided in art. 202 § 5, competent authorities were entitled on the ground of the decision to seize and confiscate instrumentalities and proceeds from the offences. It placed member states under an obligation to establish and strengthen policies to prevent sexual exploitation of children including information and awareness-raising campaigns, research and education programmes[41]. It also obligated them to provide necessary assistance and support to the victim and their family even without the child's willingness to cooperate.

The last amendment partially implementing the Directive No. 2011/92/UE was introduced to the Polish legal system on April 4, 2014[42]. As a result, it increased penalties for crimes described in art. 202 § 3 of the Criminal Code. It also eliminated the inconsequence in defining the age of a minor – it put under the protection of the criminal law every person under the age of 18. The legislator added § 4c, in which it penalised participating in presenting pornographic material with the participation of a minor. He also added the action of gaining access to such material as liable to imprisonment, behaviour referred to in the Directive No. 2011/92/UE as "knowingly obtaining access".

[41] K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego...*, p. 39.

[42] Act on Amending the Criminal Code and Other Laws April 4, 2014 (Journal of Laws from 2014, item 538).

Art. 202

2008	2014
§ 3. Anyone who produces with the aim of distribution, preserves, imports, stores or possesses distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between six months and eight years.	§ 3. Anyone who produces with the aim of distribution, preserves, imports, stores or possesses distributes or publicly displays pornographic material with the participation of a minor or pornographic material associated with the use of violence or the use of an animal, is liable to imprisonment for between **two and twelve years**.
§ 4. Anyone who preserves pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between one year and ten years.	§ 4. Anyone who preserves pornographic material with the participation of a minor is liable to imprisonment for between one year and ten years.
§ 4a. Anyone who imports, stores or possesses pornographic material with the participation of a minor under the age of 15 is liable to imprisonment for between three months and five years.	§ 4a. Anyone who stores, possesses or **gains access** to pornographic material with the participation of a minor is liable to imprisonment for between three months and five years.
§ 4b.	§ 4b. no changes
	§ 4c. Anyone who, with the aim of sexual satisfaction, participates in presenting pornographic material with the participation of a minor, is liable to restrictions described in 4b[43].

As we can notice, the amendment led to increased penalties and widened criminalization. This implementation is considered rather negatively in the criminal law literature in Poland. It is assumed that the amendment led to the final "partition" of art. 202 and provided a casuistic form thereof[44]. A huge flaw is also the inaccuracy of the recent regulation, which leads to a situation in which the prohibited act from 202 § 4a can also be committed by experts and law-enforcement agents who possess and store child pornography to conduct evidence activities and criminal proceedings[45]. Moreover, changes in regulations run counter to the necessary process of decriminalization and depenalization, not only in the context of sex crimes[46].

Increased penalties is a solution that may only appease the conscience of the legislator, but it will not lead to the elimination or even alleviation of the problem of child pornography. It is necessary to choose a penalty in order to minimize

[43] *Ibidem*.

[44] M. Mozgawa, P. Kozłowska-Kalisz, *Analiza dogmatyczna przestępstw związanych z pornografią (zagadnienia podstawowe)*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 85.

[45] A. Adamski, *Karnoprawna ochrona dziecka w sieci Internet*, "Prokuratura i Prawo" 2003, No. 9, p. 63.

[46] J. Warylewski, *Rozdział XXV*..., (in:) R. A. Stefański (ed.), *Kodeks*..., p. 1311.

the risk of committing a similar crime by the convict in the future. According to research, imprisonment itself may not have a positive impact on the personality of the convict[47]. Preventive actions to be effective often shall include isolation, medical treatment and special therapy because without that the risk of committing sex crimes in the future is extremely high. That is why the amendment of 2014 should be considered as disappointing and alarming as it proves that changes of regulations of child pornography go in a fundamentally wrong direction.

6. CONCLUSIONS

Since 1997, the Polish Criminal Code has changed several times and regulations of child pornography are now noticeably different – the impact of the EU law on the amendments is undeniable with regard to defining child pornography as well as in establishing tools to eliminate that problem. The Polish legal system is based on the same values as the EU legislation which leads to cross-fertilization between those two systems. It is a mutual dependency because the effectiveness of EU regulations depends on efficient and comprehensive implementation into legal systems in Poland and in other European countries[48]. However, in the case of child pornography this may not result in a success.

The *ratio legis* of changing Polish criminal law on this matter has been to improve the measures to protect minors from sexual exploitation and to highlight the position of the child as protected by the Constitution. The first amendments of 2004 and 2005 were based mostly on the Council decision of May 29, 2000 (2000/375/JHA) and they proved that the legislator wanted to specify instruments of child protection. It added actions to art. 202 of the Criminal Code such as preserving and publicly displaying pornographic material with the participation of a minor and penalised them. The child's good was initially the main object of protection in art. 202 § 3 and § 4, however that became more complicated after the change in 2008. The second amendment of 2008 resulted from Directive No. 2007/65/EC of the European Parliament and of the Council on December 11, 2007. It widened the definition of child pornography as it included in art. 202 § 4b produced or processed image of a minor involved in a sexual act. This called into question the subject of protection in art. 202 as no exploitation of a real child takes place while breaching the regulation in art. 202 § 4b[49]. The last amendment of 2014 aimed to stiffen sanctions for actions connected with child pornography.

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[47] P. Marcinek, A. Peda, *Terapia sprawców przestępstw seksualnych w warunkach izolacji więziennej,* "Seksuologia Polska" 2009, issue 7(2), p. 60.

[48] K. Kudyba, *Cyberprzestępstwa seksualne na szkodę małoletniego...*, p. 45.

[49] M. Filar (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 1260.

It also increased the age level of children put under protection and equated it to the age of 18. For that reason, the thesis that the child's good is considered the main subject of protection in art. 202 has been corrected. It is assumed that one of two explanations should be taken into consideration – the good of the child is still the subject of protection either because the perpetrator might try to convince a minor that sexual interest in children is acceptable using virtual child pornography, or because as his sexual needs could be awakened by watching such material the perpetrator might search for satisfaction in a real intercourse with a child[50].

Taking all that into consideration, it must be highlighted that the trend of changes of regulations on child pornography cannot be considered as positive. The casuistic form of provisions makes combating sexual exploitation of children less effective. Because of the number of amendments to the Criminal Code, a comparison of statistics showing the number of crimes before and after the changes is impossible. However, the research of M. Marczewski[51] has shown that between 2006 and 2009 there was a considerable increase in crimes involving pornography, but a relatively small group of perpetrators was prosecuted, which calls into question the effectiveness of the current tendency of regulating child pornography. Also, a report prepared by the Cybercrime Research Centre in 2015 shows that detection of perpetrators and the number of convictions is relatively low. This is a consequence of imperfect regulations, organizational conditions and inappropriate methods in legal proceedings[52]. It is worth indicating that the process of harmonization and Europeanization of the law pertaining to child pornography does not fulfil the goal of protecting children in a more effective way. The term "harmonization" refers to the necessary process of making legislation in European countries similar, with the aim of ensuring cooperation in combating especially dangerous "crimes without borders" such as child pornography. The harmonization has been treated as a stage of Europeanization of law for a long time, but nowadays the perspective of unification seems unlikely to occur[53].

However, improving legislation in Poland on that matter is still possible. M. Siwicki claims that the current provisions lack penalisation of the action of "sending" pornographic material as Peer2mail is becoming more popular. It is also a deviation from the standards described in the Convention on Cybercrime[54]. What is more, art. 202 § 4b should be revised again – it is so because deciding whether a virtual child that does not exist might be 18 years old or just 17 years

[50] *Ibidem*.

[51] M. Marczewski, *Obraz statystyczny przestępstw z art. 202 k.k.*, (in:) M. Mozgawa (ed.), *Pornografia*, Warszawa 2011, p. 165.

[52] A. Adamski, A. Lach, J. Kosiński, M. Rocławska, S. Bakalarz, *Współpraca w zwalczaniu nielegalnych treści w Internecie – raport z badań*, Toruń 2015, p. 251.

[53] A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Filar, P. Girdwoyń, *Prawo karne i wymiar sprawiedliwości państw Unii Europejskiej*, Toruń 2007, p. 431.

[54] M. Siwicki, *Cyberprzestępczość*, Warszawa 2013, p. 211.

and 6 months old is too subjective and cannot be easily proved. Adding exceptions excluding criminal liability to art. 202 § 4 of the Criminal Code should be considered as well. It could help eliminate problems such as intentional placing of child pornography in the computer of the suspect or possessing pornographic material because of one's profession, which refers to police officers or court experts[55]. However, some find that thesis unjustified and describe it as an overinterpretation[56]. M. Skórzewska-Amberg claims that possessing child pornography by experts and police officers does not cause a situation which leads to an intentional attack on any good of a child and thus it cannot be treated as a crime.

Summary

The aim of this article is to present the development of Polish and EU regulations on child pornography. Four amendments to the Polish Criminal Code, which were passed with the purpose of effecting tools to protect children, are strictly connected with the changes in the EU law – from the Green Paper of 1996 to Directive No. 2011/92/EU of the European Parliament and of the Council. The paper presents the current definition of child pornography, the understanding of which has evolved since the 90s. Changes in the EU law and the Polish regulations can be divided into three stages – first attempts at specifying instruments on child protection, widening the scope of the definition of child pornography and stiffening sanctions for child pornography. Amendments tothe Polish Criminal Code reflect the actual tendency to adopt more precise tools to prevent children from sexual exploitation. However, it does not lead to desired effects. Child pornography is a growing problem due to the relentless technological development but current regulations in their casuistic form are not a suitable tool to combat sexual exploitation of children.

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[56] M. Skórzewska-Amberg, *Zwalczanie niegodziwego traktowania w celach seksualnych i wykorzystywania seksualnego dzieci oraz pornografii dziecięcej (na tle dyrektywy 2011/92/UE)*, "Państwo i Prawo" 2013, issue 8, p. 58.

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KEYWORDS

child pornography, amendments to the Polish Criminal Code, criminal law of the EU, cooperation in combating child pornography, protecting children's rights

SŁOWA KLUCZOWE

pornografia dziecięca, nowelizacje kodeksu karnego, unijne prawo karne, współpraca w zwalczaniu pornografii dziecięcej, ochrona praw dziecka

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IS A WORLD-WIDE CONCEPT OF CRIMINAL LAW POSSIBLE IN A MULTI-CULTURAL WORLD?

1. INTRODUCTION

Change lies in the very nature of all things – that is a certain conclusion which must occur during an observation of our contemporary reality. Our world is constantly transforming, evolving and becoming a more and more complex organism, as a result of multiple political, cultural and technological processes. All sciences must embrace rapid progress if they want to remain up-to-date and accurate. However, due to being on the front line of change, the tasks for social studies in this realm seem particularly challenging and demanding. Obviously, law is in constant development and in the 21st century we can observe many modifications and metamorphoses in the once solid and only ostensibly irrebuttable world legal order. But what direction is the law going in? Are those who predict imminent creation of a supranational global system of law right? Or are their visions only a product of utopian thinking, so well-known in history, and real development in this matter needs an unpredictable amount of time?

The paper strives to describe some problematic aspects of globalization and harmonization concerning criminal laws around the world. First, it offers a closer look at the relationship between law and culture, focusing on problems revolving around how culture views aspects of criminal law. Later, it examines actual trends of globalization and their direct impact on the various legal systems. Finally, the author gives an account of the current condition of international criminal law, its challenges and prospects. Last but not least, the key question is answered: is a universal, world-wide concept of criminal law – covering different cultures and societies – really possible?

2. LAW AS A PART OF CULTURE

2.1. CULTURE AND ITS LEGAL ASPECT

The first and obvious obstacle while thinking about the possibility of establishing a universal order of law is, without a doubt, the contingencies of culture. Law functions in a bilateral relation with culture because, in spite of being one of its components, it also contributes to the development thereof. The world is full of cultural diversity, but nevertheless similarities between people from different parts of the globe are discernible. Anthropologists confirm that we have the same needs of communication, production, consumption, procreation, and common need for keeping order and harmony using an instrument of law for this purpose[1]. So why has all diversity never truly vanished and keeps existing throughout history?

From ancient times humans have been creating a mosaic of various cultures, often consisting of people whose beliefs and ways of thinking do not fit with each other[2]. Levi Strauss believed that culture is "neither natural or artificial" and that it is "made up of rules of conduct". According to Strauss, some of them are "instincts inherited from genotype", and others "the rules inspired by reason". However, the most important issue for him is that humans are not even conscious of the rules which they are following, because these rules are likely a product of cultural evolution of humans[3]. Convergence of cultures and legal systems surely can be accomplished by a tool of axiology – crucial here is an exact division between universalism and particularism. In the light of that, academics point out two ways of convergence between legal systems – one by tools of creating new laws and regulations (on a supranational level) and one by multidimensional borrowing and transplanting a foreign legal solution from various systems[4]. Most important, from a philosophical point of view, are two conceptions referring to cultural divisions and pluralism of societies. The first one is cultural relativism, in which every culture is equally valuable, and there is no true objective. That is the basis of the ideology of soft multiculturalism which accepts the necessity

[1] R. Tokarczyk, *Współczesne kultury prawne*, Warszawa 2005, p. 67.

[2] B. Wojciechowski, *Interkulturowe prawo karne: filozoficzne podstawy karania w wielokulturowych społeczeństwach demokratycznych*, Toruń 2009, p. 23.

[3] L. Strauss, *View from Afar*, "The Unesco Courier" 2008, issue 5, p. 34, at http://unesdoc.unesco.org/images/0016/001627/162711e.pdf (visited November 27, 2016).

[4] L. Leszczyński, *Konwergencja w prawie a uniwersalizacja aksjologii prawne. Przykład recepcji prawa i dialogu orzeczniczego*, (in:) O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Konwergencja czy dywergencja kultur i systemów prawnych*, Warszawa 2012, pp. 104–105.

to make culturally relative judgments[5]. In that case, talking about expanding a culture is impossible without the danger of being trapped in a paradox – an inability of saying, at the same time, that relativism should be tolerant of diversity of culture and believing that it is a system of values which should be adopted across the world[6]. An alternative point of reference here is universalism, in the meaning that there is a common moral code for every culture (for example in Europe it may be the Christian set of values)[7]. When we want to talk about a possibility of forging cultural integration of the world – universalism is surely a more optimistic conception. However, it also raises serious doubts and questions[8].

Another important aspect of the cultural background of the law, worthy of consideration, is the problem of colonialism. For the notion of colonialism highlights possible dangers coming from integration between cultures. Lauren Benton believes that it shaped a framework for the politics of legal pluralism. He observes that when a new legal system is forced upon a conquered territory, it must be done with extreme caution, with efforts to retain some elements of existing institutions because it is crucial to preserve social order and prevent possible rebellion[9]. But it still remained an instrument of legal contest, transferring specified cultures to other places, together with legal standards and concepts, so we can see colonialism as an important step in the evolution of legal standards in the world, creating larger patterns of a global structure[10]. Society never lives in complete isolation, the dominant culture always exerts indirect influence on peripheral ones, creating room for mutual assimilation. To make a cultural exchange successful, traditions of two interacting cultures must not be radically different from each other on a basic axiological level[11]. The importance of culture in constructing law on an international level is clearly borne out by the example of European law. Europe's integration is undoubtedly built on the foundation of culture in which we reduce "some cultural continuum" to an aggregate of diversity, defining the European culture as multicultural and polycentric[12].

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[5] B. Wojciechowski, *Justifying Punishment in Multicultural Societies*, (in:) B. Wojciechowski, M. Zirk-Sadowski, M. J. Golecki (eds.), *Between Complexity of Law and lack of order. Philosophy of Law in the era of globalization*, Beijing, Toruń 2009, p. 262.

[6] B. Wojciechowski, *Interkulturowe prawo karne*..., p. 25.

[7] L. Rosen, *Law as culture*, Oxford 2008, p. 197.

[8] *Ibidem*, p. 198.

[9] L. Benton, *Law and colonial cultures. Legal Regimes in World History 1400–1900*, Cambridge 2002, p. 3.

[10] *Ibidem*, p. 8.

[11] B. Kruszewska, *Wpływ kultury na aksjologię porządku polityczno-prawnego*, Olsztyn 2010, p. 124.

[12] J. Helios, W. Jedlecka, *Kultura jako czynnik legitymizujący prawo europejskie*, (in:) O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Konwergencja czy dywergencja kultur i systemów prawnych*, Warszawa 2012, p. 191.

Some academics have even attempted to reconstruct the influence of popular culture on law. It may look like an over-interpretation but after reconsideration, the thought that there exists a path between local and global identities established by pop culture deserves some attention. For Thilo Tetzlaff, this connection is achieved by transmitting cultural icons which are shared to a greater extent for people around the world. He postulates that more energy should be expended not towards an intuitional and organizational focus, but centred around the autonomy of people. In that world, universalism of normative standards can only arise from singular decisions[13]. In a bigger picture, law can also be seen as an instrument of social control, but Lawrence Rosen has posed a question of how a moral code can become part of a larger culture and find its reflection in many different legal systems[14]. By doing that and seeing law as a culture, some myths of immanence can be replaced by a perfectly legitimate argument: something may not be right for you in an absolute sense but it can be good for us, in terms of common good.

Legal institutions are definitely a part of a bigger culture, in a universal sense. They can be seen as "a marvellous entry to the study of most important of human features – culture itself"[15]. Rosen sees that also as an invitation to "thinking about what and who we are" and this is borne out by the example of European (and a large percentage of other) societies which become more multicultural, and the character of national states becomes – in some places fast, in others rather slowly – more transnational.

2.2. RELATIONSHIP BETWEEN CULTURE AND CRIMINAL LAW

Culture is an internal consistent conglomerate of accepted and routine types of behaviour[16]. So if we approach the law as a cultural phenomenon in all aspects, if we appreciate the diversity that permeates our world, we can examine the cultural background of criminal law, especially that concentrated around the concepts of crime and punishment. Every moral, social and political theory must be based on a reflection about the nature of human beings. The criminal law is no different – significant questions such as the proportionality of punishment, estimating the social harmfulness of a crime, the placement of guilt, engage with social and cultural views on justice. Penal culture is extremely important in every society, as it gives us an image of its approach to classifying and singling out socially unwanted acts. Penalization of specific crimes tells us a lot about moral

[13] T. Tetzlaff, *Why Law Needs Pop: Global Law and Global Music*, (in:) M. Freeman (ed.), *Law and popular Culture*, Oxford 2005, pp. 317–318.

[14] L. Rosen, *Law as...*, p. 24.

[15] *Ibidem*, p. 198.

[16] M. Filar, *Współczesne kultury prawne*, (in:) M. Filar, J. Utrat-Milecki (eds.), *Kulturowe uwarunkowania polityki kryminalnej*, Warszawa 2014, p. 45.

values of a given community. Also, a reflection on criminal punishment must be based on the complexity of human life and always be rooted in the specific cultural circle. The most important concept here is proportionality, one which draws an impassable barrier of criminalization. Proportionality partially depends on the moral and ethical basis of the legal culture of a society[17]. Every penal system needs widespread approval so the reflection about the philosophy of criminal justice is in fact a reflection about the definition of ourselves and society, as well as our cultural and political identity[18].

Condition of every community, its lasting and survival depend on mechanisms of cultural reproduction and preservation. In that way, criminal law delineates the boundaries of tolerance of diversity and imposes a particular vision of the common good on every member of society[19]. Criminal law, as it corresponds with themes such as punishment, guilt and retribution, simply cannot be morally indifferent, so every concept of a morally neutral universal criminal code is – from the very beginning – doomed to sore failure. If one wishes to have a precise image of cultural differences around the world, in different societies and groups, one must consider one's views on such controversial topics as death, life, sexuality and others. Cases concerning human sexuality and relations with both genders will surely make it almost impossible to establish a world-wide criminal law applicable worldwide, also in the future[20]. If we stated that universal criminal law should protect only fundamental values – how do we want to marshal a particular sanction? Could it really be believed that it would cross beyond the boundaries of various communities with specific lifestyles? The answer shall not be pessimistic, but the existence of a pan-human criminal law ground here seems highly questionable[21]. To honestly consider universalism of criminal law, it is necessary to think about the dangers emerging from current trends. It can be taken for granted that changes in culture make a serious impact on criminalization, for example the modern obsession with risk and safety and the urge to distance ourselves from the source of dangers lead to the progressing depersonalization of crime[22].

Some scholars also raise an alarm that populistic punitiveness (understood as a tendency to widely use harsh instruments of criminal justice in order to limit and prevent unwanted processes), especially present in the USA, may lead, they

[17] M. Królikowski, *Sprawiedliwość karania w społeczeństwach liberalnych. Zasada proporcjonalności*, Warszawa 2005, p. 154.

[18] *Ibidem*, p. 163.

[19] M. Peno, *Filozoficzne podstawy karania – uzasadnienie istnienia kary we współczesnych społeczeństwach demokratycznych*, (in:) O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Konwergencja czy dywergencja kultur i systemów prawnych*, Warszawa 2012, p. 245.

[20] M. Królikowski, *Sprawiedliwość karania...*, p. 48.

[21] M. Peno, *Filozoficzne podstawy karania...*, p. 250.

[22] E. Claes, M. Królikowski, *Criminisalition, plurality, constitutional democracy*, (in:) B. Wojciechowski, M. Zirk-Sadowski, M. J. Golecki (eds.), *Between Complexity of Law and lack of order. Philosophy of Law in the era of globalization*, Beijing, Toruń 2009, p. 227.

warn, to cultural and systemic changes creating too-loose legal and axiological legitimism[23].

Surely, it is worth noticing that criminal law works at the margin of people's behaviour. Normatively, criminal law is used to stop harmful social practices – like the Hindu rite of *sati*[24] (the practice of self-inflicted widow death on the funeral pyre). The custom was criminalized by the British government in 1821 and could be seen as an example of colonial adjustment of foreign law to European standards, but – as contemporary historical accounts tell us – *sati* could have been merely an expression of rebellion against British domination. And it shows us how easily criminal law can be used in a political sense.

The literature also points out a ritual function of punishment, which relies on condemnation by the structure of authority. Moreover, punishment always has a religious aspect, in the same way as religion creates a cultural framework. It plays a crucial role in stabilizing and guaranteeing a legal order – because it protects a universal set of principles and values. It seems that in the multicultural world, with differing lifestyles, believes and preferences, there is a need to establish a mutual place, some kind of a constructivist community, and it is the criminal law where the desirability of conjuring up such a community is stronger than anywhere else. If something is an offence to the foundation of a culture, criminal law cannot resign itself to merely relying on the relativism of values. The author sees punishment as a useful institution which can create symbols and patterns inside a framework of cultural boundaries[25]. But how can that important role of penal law in a pluralistic and multicultural society be safely achieved? We need to state that some values deserve protection but rather than restrictive criminal law what is needed is a far-reaching social and interpersonal reaction which satisfies more than the simple idea of revenge[26]. Only such an approach is liable to contribute to real preservation of multiculturalism.

Another danger, well-known for many years, is an outcome of advancing globalization, processes of migration and mixing of cultures – justice systems often must confront cases often underpinned by different systems of cultural values. It is a long-known tendency by which criminal law cannot pass indifferently. Legal problems often are an outcome of adjustment processes of immigrants from other cultural spheres into the legal system. The important issue here is a problem of "cultural defence" which helps to resolve a conflict between the rule of law and values coming from another culture. There are two possible ways of dealing with such s conundrum – one, when we simply state that everyone must submit to the

[23] J. Utrat-Milecki, *Kara w nauce i kulturze*, Warszawa 2009, pp. 233–240.

[24] H. Stacy, *Criminalizing Culture*, (in:) L. May, Z. Hoskins (eds.) *International criminal law and philosophy*, Cambridge 2014, p. 76.

[25] B. Wojciechowski, *Justifying Punishment...*, pp. 286–289.

[26] *Ibidem*, p. 291.

current law[27]. In that case of simplification, we strip people of their identity but preserve the authority of the law and the state. On the other hand, we can present a more modern view and demand from the court consideration of a person's cultural belief[28]. If one wonders about the importance of that dilemma – what kinds of criminal cases may be in dispute here – it is enough to mention the Japanese custom of parent-child suicide, or the tradition of marriage by capture still alive in many communities. So, the stakes are high and the judicial system should act here – because the matter is delicate – with extreme prudence and caution, not to start an ideological war[29].

In spite of almost 30 years since the signalization of that problem, it has not lost its topicality. One problem in contemporary Europe is crimes committed by members of other cultures, for instance the phenomenon of honour killing[30]. Such murders often go unpunished because instruments of criminal justice may not be employed in this regard, or criminal justice is not enough to prevent harm arising from cultural practices which are deeply rooted in foreign traditions[31]. Criminalization can have an impact on social and cultural transformations and in an unstable, globalized world it may be a remedy for growing anxiety. But we need to remember that people are at the same time social beings (so they create moral values which underpin the society), as well as rational beings as they look for opportunities to cooperate if they can benefit therefrom[32]. So, the areas where criminal cooperation can be achieved with benefits surely are the places where we will see growing integration of penal systems.

3. LEGAL ASPECTS OF GLOBALIZATION

3.1. GLOBALIZATION OF LAW

The current time of progressing globalization seems to inspired by Kant's idea of the state of the future, where all wars have vanished and freedom is the most precious value spread all over the world. But what is globalization at its core? The increasing speed of changes happening in the world seems as an undisputable

[27] M.-M. Sheybani, *Cultural Defense: One Person's Culture is Another Crime,* "Loyola of Los Angeles International and Comparative Law Review" 1987, issue 9, p. 779, at http://digitalcommons.lmu.edu/ilr/vol9/iss3/8 (visited November 27, 2016).

[28] *Ibidem*, p. 781.

[29] M. Filar, *Współczesne kultury prawne*..., p. 46.

[30] H. Stacy, *Criminalizing Culture*..., p. 87.

[31] B. Wojciechowski, *Justifying Punishment*..., p. 288.

[32] M. Królikowski, *Sprawiedliwość karania*..., p. 154.

fact, some even believe that they are faster than the evolution of our cognition[33], so are we able to find a satisfying meaning for that word? Globalization can be seen as a multidimensional process occurring on almost every level of human activity, sometimes defined as a process of becoming "worldwide" or "global"[34]. It is also defined by the internationalizing of social relations, a new phase of modernization and development of capitalism. The spheres where it develops are various: from markets, economics, technology, research, consumption, lifestyle to legal regulation[35]. In some respects, globalization means a break between the law and the state, with a view to establishing normative legal standards on a global scale[36]. That observation seems to make sense due to the fact that legal culture is always a tool conducive to modernization and one that bridges gaps between the development levels of civilizations[37]. So – another question arises – how that development affects the law?

We can discern three main trends of globalization, observable in the integration of legal orders – European, American and international (through bodies like the UN)[38]. Progressing internationalization and unification of the law is here an unavoidable, albeit weak, conclusion. To precisely distinguish between concepts it is important to mention that internationalization of law can take the form of cooperation, harmonization or unification[39]. Every unification, the concept with the most direct power, brings legal systems closer to each other but does not necessarily amount to full integration. Still, unification steadily becomes a more important trend, especially – like we have observed for many years now – at a time of peaceful coexistence. Among obstacles to unification are prejudices and noticeable reluctance of lawyers to adjust to new legal standards[40], hence legal education, as a factor that facilitates unification, plays an important role. If it is based on a common set of ideals, institutions, principles – unification is just simpler[41]. Possibilities of harmonization of law are real, particularly within a regional dimension, where countries are bound by common culture and tradition, which is perhaps why Europeanization remains the main example of fast

[33] M. Szyszkowska, *Prawo jako czynnik kształtujący nową świadomość obywateli w dobie globalizacji*, (in:) T. Giaro (ed.), *Prawo w dobie globalizacji*, Warszawa 2011, pp. 15–16.

[34] C. Nowak, *Wpływ procesów globalizacyjnych na polskie prawo karne*, Warszawa 2014, p. 35.

[35] Z. Galicki, *Globalizacja stosunków międzynarodowych a uniwersalizm prawa międzynarodowego*, (in:) T. Giaro (ed.), *Prawo w dobie globalizacji*, Watszawa 2011, pp. 103–104.

[36] B. Kruszewska, *Wpływ kultury na aksjologię porządku prawnego*, (in:) T. Giaro (ed.), *Prawo w dobie globalizacji*, Warszawa 2011, p. 123.

[37] *Ibidem*, p. 130.

[38] R. Tokarczyk, *Komparatystyka prawnicza*, Warszawa 2008, p. 234.

[39] C. Nowak, *Wpływ procesów globalizacyjnych*..., p. 35.

[40] R. Tokarczyk, *Komparatystyka*..., p. 216.

[41] *Ibidem*, p. 229.

diminishing of differences between nations[42]. But as the reality of cooperation shows us, it should be concluded that every instance of acculturation needs both systems involved to take a step back, for without that exists a serious danger that transplantation of foreign legal tissue would be rejected by one of the legal orders[43]. Globalization and reflection thereupon are without doubt present in legal discourse. But what about the problem of unification? Scholars venture to say that problems of unification do not have a proper place in international discourse, and states should concentrate more on finding meeting points between one another. Unification can be seen as a remedy for maintaining world justice, prosperity and peace. But even if it fails to fully achieve its goals it also plays a positive part, it helps one reflect on the differences and similarities between legal systems, which may conduce to adopting best possible solutions[44].

There is no homogeneous system of international law, for it contains elements extracted from different systems as well as bilateral sub-systems or under-systems with various levels of legal integration. As a result, it represents fragmentation to a larger extent than consistent unification[45].

3.2. COMPARATIVE LAW AND DANGERS OF COMPARISON

In order to reach closer for a fitting answer, it is absolutely imperative to analyse the law comparatively, because only through the lens of actual differences between systems can jurists predict the possibilities and trends of further globalization. One of the main reasons for comparing legal cultures is a search for similarities and differences[46]. Our times, often named the "age of comparison"[47] and the reality surrounding us often look like "consisting of sets of particles bound together in an endless interconnection by the chain of causality or quasi causality"[48].

The main current legal cultures in the world are civil law, common law, legal cultures related to Judaism, Christianity, Islam, Hinduism, Buddhism, Confucianism, animism and European law. Distinctions between systems are not strict and rigorous, as they often interfere with each other by virtue of blurred boundaries

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[42] M. Wąsowicz, *Globalizacja prawa czyli renesans metody porównawczej w prawie*, (in:) T. Giaro (ed.), *Prawo w dobie globalizacji*, Warszawa 2011, p. 64.

[43] M. Rogacka-Rzewnicka, *Zjawisko integracji prawodawstwa w sprawach karnych i jego oddziaływanie na politykę wewnątrzkrajowa*, (in:) M. Zubik (ed.), *Prawo a polityka*, Warszawa 2007, p. 159.

[44] R. Tokarczyk, *Komparatystyka...*, p. 234.

[45] Z. Galicki, *Globalizacja stosunków międzynarodowych...*, (in:) T. Giaro (ed.), *Prawo...*, p. 146.

[46] R. Tokarczyk, *Współczesne kultury...*, (2007), p. 110.

[47] C. Varga, *Comparative Legal Cultures*, New York 1992, p. 31.

[48] *Ibidem*, p. 77.

concentrating around moral and religious concepts. If we look beyond our closest cultural references, we can see constant exchange between legal systems. A good example is Canadian law – a meeting point between the traditions of common law and continental civil law, a legal order transformed by perpetual interplay between the systems[49]. In addition, the phenomenon is strengthened by there existing two official languages in Canadian legal circulation. All this has not led to harmonious convergence but to an emergence of a habit of creating legal pronouncements in a neutral or "bi-juristic" language[50]. Universal axiology in law cannot be used as a bunch of ethical postulates regulating the behaviour of subjects coming from different cultures. The world is not monocentric, instead it is torn between a variety of cultures and conflicts, a circumstance which often rules out any possibility of cooperation. Significant here is the example of criminal law in Japan which is often pointed to as a perfect adjustment of local standards to a wider pattern. The reform of the legal system in Japan, with its practical approach, closed off their regulation from western legal concepts while not abandoning respect for local tradition and beliefs[51]. The complete otherness of the Japanese society, a mix of religious systems – most of which do not share the European dichotomy of evil and good – did not hinder changing the law. The reason why that was possible partially lies in the Japanese "culture of shame" where every conflict represents something negative. But the price of transition and low criminal rates is also high. In Japan, we can observe a phenomenon of not executing a law, thus abandoning the principle of legalism in favour of opportunism, where crimes are not sanctioned by proper punishment (regardless of harsh institutions written into relevant legislation)[52]. Another seemingly marginal example of a legal culture can be Tibet. Suffering from many historical storms, its law has been almost entirely imposed by China and for people living in Tibet it is a symbol of oppression, and a constraint upon their tradition and culture. Chinese authorities are also, at the same time, extremely tolerant of criminal actions[53]. Fortunately, Tibet's culture still has contact with other cultures through the government in exile – and that interplay cuts both ways[54].

The trend of harmonization and accommodation of legal differences is likely to continue because contacts between citizens and different countries become

[49] *Ibidem*, p. 130.

[50] A. Doczekalska, *Wielojęzyczność prawa a konwergencja kultur prawnych w Europie i Kanadzie*, (in:) O. Nawrot, S. Sykuna, J. Zajadło (eds.), *Konwergencja czy dywergencja kultur i systemów prawnych,* Warszawa 2012, pp. 180–181.

[51] J. Widacki, *Przestępczość i wymiar sprawiedliwości karnej w Japonii. Zarys problematyki*, Lublin 1990, p. 5.

[52] J. Izydorczyk, *Kulturowe uwarunkowania stosowania prawa karnego w Japonii*, pp. 77–85, at http://archiwum.ivr.org.pl/darmowe-artykuly/pl_005_6.pdf (visited November 27, 2016).

[53] D. Ferenc-Kopeć, *Kultura prawna Tybetu na tle kultur prawnych buddyzmu, konfucjanizmu i hinduizm*u, Przemyśl 2005, pp. 251–255.

[54] *Ibidem*, p. 345.

more intensive[55]. But a question arises – in a theoretical sense – as to what would happen after absolute internalization of all standards and cultures occurs? Jarrod Wiener has commented on the danger of a "hollowed out state", "incapable of exercising authority in a globalized system". He has warned of risks associated with creating a law which is detached from local values, one that, due to its universalism, is not capable of representing any code of values. It could be "a symphony for the devil", he adds, or "a new kind of Leviathan, an empire of Law built of postmodern hegemony"[56]. An extinction of all the differences and varieties.

4. INTERNATIONAL CRIMINAL LAW

4.1. CRIMINAL LAW AND LEGAL HARMONIZATION

Law and legal systems are linked to the cultures they function in, and globalization processes certainly affect that relationship. But there is another question that is pertinent for the purposes of this article, that is: how reluctant criminal law, with all its specificity, is to such changes. Even though more success has been observed within private law, international cooperation in the field of criminal law has been more fruitful than that in labour, administrative or constitutional law[57]. What are the reasons for that state of affairs? Criminal law has a public character and belongs to the *dominium* of state authority. The possibility and severity of the usage of criminal penalties also demand prudent action. It is hard to tell at this point if the modern penal culture has universalistic and international ambitions. Perhaps dreams about a universal criminal law applicable worldwide or at least Europe-wide are exaggerated wishes[58]. The source of that pessimism seems plain, as states are not ready to give up their sovereignty, a concession that international criminal law demands.

For now, no indications signal an optimistic beacon for rapid structural changes in criminal proceedings around the world. Some hope may lie in the replacement of traditional criminal proceedings by private practices (settlements being one example) in the field of resolving conflicts[59].

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[55] S. Zamora, *Nafta and the harmonization of domestic legal systems: the side effects of free trad*e, "Arizona Journal of International and Comparative Law" 1995, Vol. 12, pp. 401–427.

[56] J. Wiener, *Globalization and harmonization of Law*, London 1999, p. 198.

[57] J. Warylewski, *Wybrane zagadnienia problemów wymiaru sprawiedliwości karnej w Polsce wobec zróżnicowania kulturowego społeczeństwa*, pp. 225–226, at http://apcz.pl/czasopisma/index.php/SIT/article/view/SIT.2014.033/5082 (visited November 27, 2016).

[58] M. Filar, *Współczesne kultury prawne*..., p. 46.

[59] *Ibidem*, pp. 287–296.

4.2. INTERNATIONAL CRIMINAL LAW – CONDITION AND CHALLENGES OF THE FUTURE

The most active forum in the realm of harmonization of criminal law is international criminal law, widely understood. But what is its current state and upcoming challenges related to the process of globalization? The first foundation for international criminal justice systems was laid in Nuremberg and since then the scope of criminal law has been expanding through various conventions and international treaties making relevant cultural and social changes. For example, more than half of the nation states of Africa have adopted criminal legislation to sanction the practice of genital cutting[60].

Every development in international criminal law comes from the intensification of globalization and a need to combat transborder crimes and organized groups, one that becomes more and more problematic for individual states. Globalization opens up new opportunities for transnational crimes – new markets for stolen goods, new supply lines for drugs[61] – and it is logical that when crimes are international, control and prevention thereof must also be international[62]. The number of normative regulations in that realm is growing, and new crimes are invented due to dependencies related to technology as well as social and economic life, e.g. market crimes. Developments in technology have given rise to a chance for more integration in the criminal justice system. Making access to and processing of information faster and cheaper will support, in the opinion of some, integration between criminal agencies[63] that can prove useful in order to stave off the threat of cyber-terrorism[64].

The most significant challenges of the modern world, which can result in expanding the borders of an international jurisdiction, are also related to regular terrorism. One may propose to recognize some acts of terrorism as crimes against humanity and subject them as such to the jurisdiction of ICC[65]. The question of jurisdiction is highly controversial. The core rationale for crimes against humanity seems indisputable but in reality, jurisdiction does not reach far enough and produces a plethora of shortcomings. It seems that it will remain unchanged until the concept of sovereignty is seriously revolutionized[66]. But conversely, some

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[60] H. Stacy, *Criminalizing Culture*..., p. 75.

[61] J. Gerber, X. Hu, *Transnationalization of formerly local crime*, (in:) E. W. Pływaczewski (ed.), *Current problems of the penal law and criminology*, Warsaw 2014, p. 373.

[62] *Ibidem*, p. 380.

[63] A. Pattavina, *Information technology and the criminal justice system*, Thousand Oaks, London, New Deli 2005, p. 261.

[64] A. Podraza, P. Potakowski, K. Wiąk, *Cyberterroryzm zagrożeniem XXI wieku. Perspektywa politologiczna i prawna*, Warszawa 2013, p. 50.

[65] K. Wiąk, *Terrorism and criminal law*, Lublin 2012, p. 85.

[66] W. Lee, *International Crimes and Universal Jurisdiction*, (in:) L. May, Z. Hoskins (eds.), *International criminal law and philosophy*, Cambridge 2014, p. 48.

crimes (following the implementation of a tribunal's statute by a given state) – may be prosecuted, even when they are not crimes under national jurisdiction[67]. Harmonization in that field in the European Union is slowly progressing – as fast as the need for preventing international criminality increases[68] – firstly in the third pillar (Police and Judicial Co-Operation in Criminal Matters) and from 2009 in the area of freedom, security and justice. The compromise around the European Arrest Warrant is a good example of a consensus between civil law and common law, even though the Court of Justice of the European Union does not often decide in criminal matters (the first sentence was delivered in 2005)[69].

What holds back the process of internationalization? In international criminal courts and tribunals, parties typically come from different legal cultures and they must find some common ground within the dogmatic language to come to any kind of agreement about proceedings and the elements of criminal responsibility[70]. Other deficiencies of tribunals include the need to conduct proceedings in multiple languages and the question of financing[71]. An optimistic and good prognostic for further development is the fact that in the 1950s the inception of any international system of criminal law was not even a subject of daring consideration[72]. Inevitable growing of mutual dependence between states, an increase in the amount of criminal regulation on the worldwide level – these are all products of globalization. Changes touching criminal law are only a small fraction of that universal process transforming legal system into a complex pluralistic web, but evolution of the national state model does not detract from the fact that it is still the states that play the main role in every international system. And regardless of the fact that there is much negative influence of globalization on the criminal law (e.g. the danger of "hypercriminalization"[73]) – the main goal is to establish an order of universal values, a universal human rights system whilst boosting the reassuring role of criminal law – seems like an effort worth risking for the sake of the future of internationalization[74].

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[67] K. Kittichaisaree, *International criminal law*, Oxford 2001, p. 326.

[68] H. Tendera-Właszczuk, *Ewolucja i ocena funkcjonowania trzeciego filaru Unii Europejskiej*, Kraków 2009, pp. 214–216.

[69] Judgment of the Court of Justice of the European Union of September 13, 2005, *Commission v Council* C-176/03, ECLI:EU:C:2005:542.

[70] M. Królikowski, *Podstawy prawa karnego międzynarodowego*, Warszawa 2008, p. 26.

[71] K. Stasiak, *Trybunały umiędzynarodowione*, Lublin 2012, p. 120.

[72] J. Nowakowska-Małusecka, I. Topa, *Międzynarodowe i europejskie prawo karne: osiągnięcia, kierunki rozwoju, wyzwania*, Katowice 2015, p. 88.

[73] C. Nowak, *Wpływ procesów globalizacyjnych...*, p. 380.

[74] *Ibidem*, pp. 378–381.

5. IS A WORLDWIDE SYSTEM OF CRIMINAL LAW POSSIBLE?

The conclusion that there can be no global system of criminal law is safe to achieve. Differences in cultural background and everything that comprises a culture are not insignificant and simple to overcome. These questions, in turn, are linked to the process of globalization. Significant transformations are being effected by the so-called information revolution. People from different ethnic and cultural groups become more similar to each other, start to have common habits, they watch, read and have access to the same content – but certainly the boundaries shaped by culture, history and social diversity still exist.

Existing institutions of international criminal law prove that there is a slight possibility of evolution in the direction of assimilation. But not revolution – and this is what it would take to create a global system of criminal law. In areas where criminal cooperation is useful (drug market, financial crimes, searching for serious criminal offenders), there can be observed constant heading in the direction of making it tighter, whilst where it seriously interferes with state sovereignty changes are extremely cautious. Nonetheless, evolution of supranational legal order is more spontaneous than if it were to be precisely programmed[75].

It seems that there are no strong conclusions here – internationalization is occurring at the same time as part of the globalization process and as a result of diminishing diversity of people. There are many possible outcomes and dangers, but it is difficult to predict tendencies in the development of international criminal law. It may transpire that one global system of criminal law improves the efficiency of the whole system and it represents a normal consequence of progress (at least if it happens in the near future or in the next millennia). But on most views, the scenario that people are able to find one universal system of values and justice is improbable.

Summary

The article tries to provide an answer to whether it is possible and viable to establish a universal criminal law applicable worldwide. The author focuses on the relationship between culture and law. Special attention is devoted to the area of criminal law and the influence of cultural backgrounds in different societies, which makes an impact on controversial topics, and sometimes becomes a subject matter of penal law. The article considers issues linked to philosophy of law and comparative law, seeking answers

[75] G. Skąpska, *Law in postmodern society*, (in:) B. Wojciechowski, M. Zirk-Sadowski, M. J. Golecki (eds.), *Between Complexity of Law and lack of order. Philosophy of Law in the era of globalization*, Beijing, Toruń 2009, p. 69.

in various doctrines and worldviews. It contains some reflections about globalization, considering it as a material process related to the evolution of legal orders. In conclusion, the author sets out to describe the evolution that has led to the creation of the existing system of international criminal law, and attempt to predict the future of legal cooperation in criminal matters.

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SŁOWA KLUCZOWE

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THEORETICAL UNDERPINNINGS OF THE DOCTRINE OF TRANSFERRED MALICE

1. INTRODUCTION

Transferred malice[1] is a concept the definition of which has proven elusive for both academic writers and judges. In its classic forms, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder. The paper contends that the theoretical rationale for transferred malice rests upon three pillars: first, the intent of the defendant; second, the consequence that befalls the unintended victim; and finally, public intuitions with regard to resulting harm. My purpose is to signal a handful of theoretical and philosophical conundrums which inevitably spring up to existence upon a closer examination of the doctrine. I will express my personal inclinations with regard to some of the questions, whilst others will remain open.

One notable feature of transferred malice is that it is a legal fiction which effectively conflates the *actus reus* (or, to be precise, the act) performed towards the unintended victim and the *mens rea* towards the intended or foreseen object[2]. Even though the phenomenon of transferred intent has not featured heavily in the case law, a lot of academic ink has been spilt on the subject. In this article, drawing more from judicial consideration of the topic, I will argue that in practice

[1] In this article, terms "transferred intent" and "transferred malice" are used interchangeably, the latter being more common in English law. In the literature, the term "transferred *mens rea*" can also be encountered. *Cf.* J. Richardson (ed.), *Archbold: Criminal Pleading, Evidence and Practice*, London 2011, paras 17–24; D. Ormerod, A. Hooper (eds.), *Blackstone's Criminal Practice*, Oxford 2011, paras A2.13.

[2] The term "legal fiction" in the context of transferred malice has gained ground even among the judiciary. See, for instance, *Pederson v Hales* [2000] NTSC 74.

only a few questions are pertinent to deciding whether a particular defendant shall be held liable.

As I will seek to demonstrate below, there is a significant amount of confusion around the proper conceptual treatment of the doctrine. In particular, a number of academic writers have advanced opinions that terms "extension" or "replication" of intent better reflect the real operation of the concept. Also, there are difficulties in transferring intent where *mens rea* and *actus reus* of the offence do not correspond perfectly. Additional problems are triggered by differing outcomes in cases where the defendant is more deserving of punishment, in the eyes of the jury or the judges, taking account of the particular set of facts in play and the identity and circumstances of the victim. Several alternative explanations have also been suggested to rationalize the exact workings of the concept of transferred malice, particularly centred around negligence, recklessness or remoteness. In short, it is conceivable to argue that instead of talking about transferring or replicating intent (or other form of *mens rea*) the correct and more practical manner of spelling out the particulars of the phenomenon is to accept that defendants should be liable not only for the immediate consequences of their actions but also for more long-term, far-fetched ramifications that their actions brought about.

2. INTENT. TRANSFER AND EXTENSION

The phenomenon of transfer pertains to "*mens rea*, whether intention or recklessness"[3]. Traditionally, two types of transferred intent cases are distinguished: those of so-called "bad aim" and mistaken identity. In the former scenario, A intends to cause harm to B but misses and injures C. In cases of mistaken identity A intentionally harms C thinking they are harming B.

As P. Westen observes, commentators have put forward two contrasting viewpoints concerning bad-aim cases. First, it is urged that bad-aim actors be punished for crimes of intentional harm against C, whether by means of transferred intent or the impersonality doctrine. The second idea suggests that bad-aim actors be punished for attempts of causing harm to B[4]. For the purposes of the article, we could reduce those positions to saying that it is either intent or the actual consequences which befall the unintended victim that govern liability in transferred malice scenarios.

[3] J. C. Smith, K. Laird, D. Ormerod, B. Hogan (eds.), *Smith and Hogan's Criminal Law*, Oxford 2015, p. 151.

[4] P. Westen, *The Significance of Transferred Intent*, "Criminal Law and Philosophy" 2013, Vol. 7, issue 7, p. 337.

The division between intent and the actual consequence is perhaps displayed most vividly in the contrast between the impersonality doctrine and what M. Bohlander has termed the concretization approach[5]. It is here that the interplay between intent and consequences for the eventual victim comes to light. For A, according to the impersonality doctrine, is guilty of murdering a third party C so long as he intended to murder (or, in English law, cause grievous bodily harm) anybody whatsoever. The exact identity of B is irrelevant – intent to murder a human being is sufficient to attribute culpability to A who, having misaimed or mistaken the identity of his victim, harmed another person[6]. Concretization, on the other hand, stipulates that it is a crime to harm a person while acting with intent to harm that particular person[7].

With some caution, the corollaries prompted by our discussion of bad aim cases may be applied by analogy to the mistaken identity context. Here, it is impossible, in my view, to conceive of a scenario where the impersonality doctrine would find its application[8]. For A will always determine the identity of their intended victim B before attempting to harm them, eventually causing injury to C. Within the category of specific intent, an important question to ask is whether, in order for intent to transfer, we need object-specific intention or type-specific intention. Andrew Ashworth adopted the object-specific view, i.e. based on an intention to harm a particular object. In his opinion, the defendant in a mistaken identity case in fact intends to harm the actual object (the eventual victim), whilst in bad aim scenarios there are two separate objects[9]. In this connection, however, he appears to overlook the fact that in reality there are two different people in a mistaken identity situation too: A has an object-specific intention to harm a particular person B, yet by mistake injures C. It is evident that he only has a type-specific intention to harm C – in plain terms, even though he intended

[5] M. Bohlander, *Transferred Malice and Transferred Defenses: a Critique of the Traditional Doctrine and Arguments for a Change In Paradigm*, "New Criminal Law Review" 2010, Vol. 13, No. 3, p. 555 *et seqq.* Other writers have espoused a dichotomy of general intent (impersonality) and specific intent (concretization), e.g. J. Horder, *Transferred Malice and the Remoteness of Unexpected Outcomes from Intentions*, "Criminal Law Review" 2006, p. 383.

[6] J. Horder invokes the classic *Agnes Gore's Case* (1611) 9 Co Rep 81 as an example of the impersonality paradigm. There, A put poison in a drink intended for her husband, but it ended up killing another man who drank it by accident. *Cf.* J. Horder, *Transferred Malice and the Remoteness of Outcomes from Intentions*, (in:) J. Horder (ed.), *Homicide and the Politics of Law Reform*, Oxford 2012, p. 179.

[7] M. Bohlander, *Transfer of Defences*, (in:) A. Reed, M. Bohlander (eds.), *General Defences in Criminal Law: Domestic and Comparative Perspectives*, London, New York 2016, pp. 58–59.

[8] In line with A. J. Ashworth, *Transferred Malice and Punishment for Unforeseen Consequences*, (in:) P. R. Glazebrook (ed.), *Reshaping the Criminal Law – Essays in Honor of Glanville Williams*, London 1978.

[9] *Ibidem*.

to harm a human being (a specific type), it was not the particular human being (the specific object) he intended[10].

It is pertinent to note that courts at times purport to rely on general intent to invoke transferred malice for the purposes of finding a particular defendant guilty, whilst they in fact merely interpret a statute. In other words, it is the intricate wording of a statute that truly governs a case. A principal example appears to be *Latimer*[11], which, coincidentally and in my view, mistakenly, is often considered a clear-cut, if not outright classic, case of transferred malice[12]. There, A aimed a blow at B but missed and hit C, resulting in an accusation of malicious wounding, contrary to section 20 of the Offences Against the Person Act 1861. The court appeared to employ the impersonality doctrine as it found A guilty without taking into account the precise content of A's intention[13]. However, what it in fact did was to purposively interpret an element of the *actus reus* of the offence – wounding "any other person" to render guilty an attacker who had an intention to wound anybody whatsoever[14]. Even though intent does play an important role in bad aim and mistaken identity cases (for it is the intent that is transferred from one victim to another), its impact should not be overstretched to cover cases which can be explained by adopting a wider, purposive definition of an offence. Neither should such cases be interpreted as examples of impersonality *per se*. I believe it is conducive to the cogency and purity of the doctrine itself to confine it to cases where statutes are silent as to its potential operation. Otherwise, we could talk about Parliament's intention to favour either impersonality or concretization, which, it is submitted, would be misplaced.

For intent to transfer, *actus reus* and *mens rea* of the eventual offence committed by the defendant must correspond. This means that, for example, A who intended to inflict property damage but mistakenly struck a person B, would not be liable on the basis of transferred malice[15]. For a combination of the *actus*

[10] To the same effect S. Eldar, *The Limits of Transferred Malice*, "Oxford Journal of Legal Studies" 2012, issue 32(4), pp. 637–638.

[11] (1886) 17 QBD 359.

[12] N. Monaghan, *Criminal Law Directions*, Oxford 2014, p. 74; J. Martin, T. Storey, *Unlocking Criminal Law*, London 2015, pp. 72–73; T. Storey, A. Lidbury, *Criminal Law*, London, New York 2012, p. 23.

[13] (1886) 17 QBD 359, Lord Coleridge CJ: "It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call general malice, and that is enough".

[14] M. Seneviratne, *Pre-Natal Injury and Transferred Malice: The Invented Other*, "The Modern Law Review" 1996, Vol. 59, issue 6, pp. 886–887; M. Molan, *Cases & Materials on Criminal Law*, London, Sydney, Portland 2005, p. 91.

[15] An interesting case in point is *Blackburn v Bowering* [1994] 3 All ER 380, where the defendant was convicted of assaulting a bailiff, contrary to section 14(1)(b) of the County Courts Act 1984. His defence was that he genuinely believed the victim was a trespasser, against whom he was using reasonable force. Whilst this was rejected by the court, with the offence in issue held

reus of battery (application of unlawful physical force) and *mens rea* of criminal damage (intention or recklessness as to the destroying or damaging of property belonging to another) does not constitute a separate offence[16]. A point akin to that has been raised by professors Smith and Hogan in the context of abortion, where they argued that a person who kills an unborn child whilst intending to kill or inflict grievous bodily harm (*mens rea* for murder) does not have the *mens rea* for murder in this particular case, since the intention is not directed against what they termed a person in being[17].

Some authors prefer to talk about extension of intent[18] or replication of intent[19] instead of transfer of intent. G. Williams has formulated a proposition that "The actor can be taken to intend not only the consequence that he positively desires, but also other consequences known to be inseparable from the consequence he desires, even though they are not themselves desired"[20]. According to this view, intent (or recklessness) covers not only the crime originally intended, but also consequences, whether foreseeable or ones which have "immediate physical effect" upon the actual victim. If we were to accept the phenomenon of finding defendants guilty of and punishing them for hurting unintended victims, in both bad aim and mistaken identity cases (more on this below), and label it as extension of intent rather than transfer of intent, the problem outlined above, where *actus reus* and *mens rea* must correspond for the doctrine to function, could be eliminated. Instead of delving into the details of an offence's elements, we could objectively second-guess what consequences the attacker should have contemplated whilst perpetrating the offence, and punish him accordingly. Therefore, in a case like *Blackburn v Bowering*[21], where the defendant assaulted an officer of the court believing it was an ordinary citizen, such a belief should not have been a defence. The judge's opinion in that case excessively stressed the genuineness of the belief, instead of its reasonableness – it made the exercise of attributing

to be one of strict liability (assault of an officer of the court), Sir Thomas Bingham MR held that if the defendant had been charged with an "ordinary" assault (or indeed any offence against the person not of strict liability) he would have had a defence.

[16] J. Child, D. Ormerod, *Smith and Hogan's Essentials of Criminal Law*, Oxford 2015, p. 132; N. Monaghan, *Criminal Law...*, p. 75; R. Heaton, C. de Than, *Criminal Law*, Oxford 2011, p. 85; M. Molan, Bloy D., Lanser D., *Modern Criminal Law: Fifth Edition*, London, Sydney, Portland 2013, p. 81; M. J. Allen, *Textbook on Criminal Law*, Oxford 2015, pp. 105–106.

[17] *Smith and Hogan's Criminal Law*, London 1992, p. 329.

[18] According to M. Tebbit (*Philosophy of Law: An Introduction*, Hove 2005, p. 172), such ideas were prominent as early as in mid-19th century in the works of Jeremy Bentham, who considered extending intention and liability beyond the confines of the directly intended results of acts to include those that are "contemplated as likely". Also, in the literature it has been suggested that mistaken identity cases shall be subsumed under the category of extension of intent. *Cf.* H. Morris (ed.), *Freedom and Responsibility: Readings in Philosophy and Law*, Stanford 1961, p. 226.

[19] Phrase used most notably by M. Bohlander, *Transfer of Defences...*, pp. 58–59.

[20] G. Williams, *The Mental Element in Crime*, Jerusalem 1965, pp. 12–13.

[21] [1994] 3 All ER 380.

liability too subjective, giving defendants an easy way out in case of all defences except those of strict liability. Also, a transposition of this principle to almost any other facts exposes its unfairness. Suppose defendant D fires a sniper rifle at V1 believing him to be the head of a bank which D owes a substantial amount of money. That the person shot turns out to be a beggar should not have, I would argue, any bearing upon D's liability.

3. CONSEQUENCES FOR THE ACTUAL VICTIM

W.R. LaFave distinguishes four general types of cases where a consequence of an offence is unintended: unintended victim, unintended manner, unintended type of harm and unintended degree of harm[22]. The question of unintended victims is best dealt with by discussing intention (see my discussion of impersonality and concretization above). For proponents of impersonality would argue that it is the very function of transferred malice to show liability where an unintended victim is harmed, by transferring (or extending) the defendant's intent to harm another onto the third party. To put it plainly, unintended victims are clearly covered by the doctrine in question, and it lies at the core of its nature and purpose that it pertains to them. LaFave treats the problem of unintended manner as an issue of causation, and one where a policy question appears as to the desirability and fairness of the imposition of liability on the defendant[23]. The last two questions LaFave perceives as "a matter of the required concurrence between the mental state and harm"[24]. In specifying his line of thinking, he argues that, similarly to the principle that *actus reus* and *mens rea* of an offence must correspond with each other for transferred malice to operate, "the rule is that ordinarily an intention to cause one type of harm cannot serve as a substitute for the statutory or common-law requirement of intention as to another type of harm"[25], with the exception of constructive liability offences (e.g. felony murder in US law or straight murder in English law since *R v Cunningham*[26]). Arguably, the matter of consequences for the unintended victim could be understood through the prism of the need for *actus reus* and *mens rea* to correspond. Suppose A intends to hit B but misses and hits C. A intended to merely batter B by slapping him on the forehead, however with C, since she's shorter, A's hit landed in her eye, causing her grievous bodily harm by stripping her of sight. LaFave would say two things:

[22] W. R. LaFave, *LaFave's Criminal Law, 5th (Hornbook Series)*, St Paul 2010, pp. 264–266.
[23] *Ibidem*.
[24] *Ibidem*.
[25] *Ibidem*.
[26] [1981] 3 WLR 223.

first, *mens rea* for the offence was not present (intention or recklessness as to the causing of some harm, according to s. 20 of the Offences Against the Person Act 1861); second, even if A, following the incident, intended to cause grievous bodily harm to either B or C, but lacked this intent at the moment when C was struck, there was no concurrence between the mental state of A and harm he caused, and therefore intent could not transfer (or extend) to cover C. Doubtless, this is correct from a theoretical point of view. I would suggest, however, that there is at least one alternative explanation: there is no causation between the consequence the victim sustained, and the source of that consequence (i.e. A's hit)[27].

Even though I do believe that both this and the next category constitute the "policy aspect" of transferred malice, I have distinguished the two, for two principal reasons. First, there are differences in treatment of cases based on the identity of the actual victim. The weaker the eventual victim, the more inclined the courts are to hold the defendant liable for the harm they sustained. Second, I have discovered that discussion of resulting harm is often more general, addressed to and aimed at the "public" at large, and not reduced to a particular victim. For the sake of brevity, I will only tentatively illustrate the weight accorded to the consequences for the actual victim by the judges by reference to a few seminal cases.

In *R v Kingston*[28], a defendant with a propensity for paedophilia was involuntarily intoxicated to then perform a sexual act on a child. Interestingly, transferred intent was in this case applied not in relation to an intended victim and a third party, but in relation to two malicious acts of one defendant: subjection to severe intoxication and performing a sexual act on a child. Lord Mustill remarked: "First that the absence of the necessary consent is cured by treating the intentional drunkenness (or more accurately, since it is only in the minority of cases that the drinker sets out to make himself drunk, the intentional taking of drink without regard to its possible effects) as a substitute for the mental element ordinarily required by the offence. The intent is transferred from the taking of drink to the commission of the prohibited act. The second rationalisation is that the defendant cannot be heard to rely on the absence of the mental element when it is absent because of his own voluntary acts. Borrowing an expression from a far distant field it may be said that the defendant is estopped from relying on his self-induced incapacity"[29].

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[27] LaFave admits this is a possibility (W. R. LaFave, *LaFave's Criminal Law*, 5th (Hornbook Series), St. Paul 2010, p. 288), however he goes on to say that "the more fundamental question is whether the required mental states of recklessness and negligence should somehow be interchangeable from crime to crime, so that one who knows or should know of a particular kind of risk might on that basis be held liable when the harm that actually occurs is of an unhazarded type or unexpected degree".

[28] [1994] 3 All ER 353.

[29] *Ibidem*, p. 369.

The case of *Farrant*[30] will be used as an example of employing the doctrine of transferred intent where the exact circumstances in which the victim was hurt are uncertain. It appears that a defendant is punished for their negligence or recklessness in bringing about a dangerous situation which materialized into an infliction of harm, even if unintentional. Although *Farrant* was nominally a case of constructive murder and not transferred intent *per se*, it can be explained in terms of the latter. The defendant arrived at the victim's house and drove the victim's friends away with a rifle, forcing the victim to stay. Then, according to the defendant's account, he strove to have a conversation with the girl, having put the rifle in the kitchen. Since she cried and could not calm down, he put the rifle back in his pocket. At some point, the rifle fired. The Supreme Court of Canada upheld the defendant's conviction of constructive murder on the basis that he first brought about the victim's confinement, an offence in and of itself which then culminated in the victim being killed[31]. The Court did not delve into the details of how exactly the victim was killed, or indeed whether the defendant had the requisite *mens rea*. It is clear that the defendant's negligence in not keeping the rifle away from the victim influenced the court's decision – if death had not eventuated, the defendant would still have been tried and potentially convicted of a lesser offence (e.g. false imprisonment), but death was a contingency which escalated the defendant's liability.

In this context *R v Gnango*[32] has broken new ground. A shooting between the defendant and an unidentified man (called "the Bandana Man" in the judgment) ended abruptly when a shot fired by the Bandana Man killed a passer-by. Here, the court also accorded significant weight to the fact that having a shootout in daylight in a public place is so beyond the realm of reasonable, socially acceptable behaviour, that the defendants should bear responsibility for the ramifications of their actions[33].

The most theoretically challenging proposition Gnango stands for is the construction adopted by the majority in that case which goes as follows: by tak-

[30] (1983) 46 N.R. 337 (SCC).

[31] In first instance, the judge said (this was approved in the Supreme Court): "So the question you must determine first of all is whether or not this accused was confining Shannon Russell. If you do so find, I suggest to you that there has been no indication that he had any lawful authority to so confine her (...). The second requirement is that there must be a death of a human being and I think you will find that this did take place. But most important is the third requirement, and that is that the death must be caused while he was either committing or attempting to commit the offence of unlawful confinement" ((1983) 46 N.R. 337 (SCC), para 11).

[32] [2011] UKSC 59.

[33] In technical terms, the majority opined that the initial encounter between Gnango and the Bandana Man constituted an affray (an offence under section 3 of the Public Order Act 1986), from which intent was transferred to the killing of the unintended victim. In case of Bandana Man, an alternative explanation would be that his intention to kill Gnango was transferred to the third party that ended up being killed.

ing part in the affray with Bandana Man, Gnango was an accessory to his own murder. Therefore, by virtue of joint enterprise and transferred malice, he was liable for the offence that the principal (Bandana Man) committed, i.e. killing the eventual victim[34]. Even though it is Bandana Man who fires the crucial shot, by this structure Gnango could be convicted of murder. Without going too deeply with critical analysis, the same result could be achieved by holding that Gnango's participation in an affray created a dangerous situation and, since an unintended victim was hurt as a result of it, he should bear responsibility regardless of who actually dealt the decisive blow.

Another difficulty from a moral point of view was that it was Bandana Man, and not the defendant, who fired the fatal shot that killed the victim. In *Commonwealth v Gaynor*[35], in the course of a duel between A and B, A shot a third party. The court concluded that intent was referred based on the principle of transferred intent. Whatever basis of liability one chooses to espouse – be it liability for foreseeable consequences, negligence, replication of intent – the conviction seems safe, provided an objective assessment of the defendant's *mens rea* is maintained. On no account can the court inquire into the actual state of mind of the attacker.

Apart from the question of intent, there is a logical argument to make that the consequences which befall the victim may be less serious in cases of bad aim, as opposed to mistaken identity. Suppose a following set of circumstances: in a crowded place, defendant D, a sniper placed on the rooftop of a nearby building, is aiming at V1, yet he is aware of the fact that he may miss the intended target and hit V2. This may prompt D to apply less force to his attack. Contrast this with a situation where D is aiming at V1 and is absolutely positive that he can target V1 precisely. Convinced that V1 is the intended target, he will not shy away from using maximum force, unaware of the fact that V1 is in fact an unintended victim V2.

4. PUBLIC PERCEPTION OF RESULTING HARM

P.H. Robinson has it that "there are two ways that the criminal justice system may deviate from the community's intuitions about appropriate criminal laws: by failing to punish actions that the community thinks are morally wrong, and by punishing actions that the community regards as morally innocent"[36]. Following a survey of case law from common law jurisdictions, it seems indisputable that

[34] *Gnango*, paras 53–54.

[35] (1994) 538 Pa. 258, 648 A.2d 295.

[36] P. H. Robinson, J. M. Darley, *Intuitions of Justice: Implications for Criminal law and Justice Policy*, "Southern California Law Review" 2007, Vol. 81, issue 1, p. 23.

a judge's subjective moral assessment of the facts of a particular set of facts, where transferred malice could potentially apply, often proves a decisive factor in determining the basis of a defendant's liability. To coin a phrase, this "policy aspect" of transferred malice has been described thus in the literature: "an actor is not guilty of 'murder' unless, in addition to acting with a murderous intent that often suffices for attempted murder, he actually brings about the fearful harm of causing another person's death. Rape, kidnapping, battery, maiming, and destruction of property are also explicitly predicated on resulting harms. And the public is aware of it. The public understands that when the state condemns an actor for 'murder' it is stigmatizing him for actually killing a human being, not merely for trying to kill him. And the public understands that when the state condemns a person for attempted murder, it spares him the stigma that accompanies murder"[37].

The Alberta Provincial Court in Canada has ruled on one occasion that a defendant who, whilst trying to violently pour beer onto another person lost grip of their mug and hit a third party with it, causing them severe injuries, was guilty on the grounds of transferred malice, however the court did devote a sizable amount of space to discussing how people ordinarily behave in pub establishments and how this particular defendant's actions constituted "moral opprobrium"[38]. A suggestion that the defendant ought to be liable for the harm that ultimately results from his behaviour was based on an assumption that it was so egregious and so out of place that, for the sake of justice, such a person shall bear responsibility for all the consequences of their actions. Examples of such egregious behaviour, as demonstrated by notable case law, include: spitting on a police officer[39], engaging in a shootout in the middle of which an innocent by-stander is shot and killed[40], killing another whilst attempting to commit suicide[41], or setting fire to a piece of paper which ultimately resulted in a house being burnt down[42]. It is almost universally accepted that attempting or colluding to murder another is a sufficient basis for extending liability to cover unintended victims. Not surprisingly, public intuitions concerning resulting harm, or, to be more precise, concerning the justifiability of making the defendant liable for resulting harm, apply to both bad aim and mistaken identity cases.

The courts do not seem to put excessive emphasis on the way in which unintended victims sustained harm. J. Horder has argued that "What should matter (...) is not only that the actual victims were unintended victims, but also that they died

[37] P. Westen, *The Significance...*, p. 327.

[38] *R. v Davis (M.)* (1995), 170 A.R. 238. The judge in that case remarked: "Where the intended assault is only with the contents of the mug, a charge of assault with the mug itself does not preclude the intent accompanying the contents transferring to the unintended victim, always assuming that the underlying crime is of sufficient gravity to import significant moral opprobrium".

[39] *Pederson v Hales* [2000] NTSC 74.

[40] *R. v Gnango* [2011] UKSC 59.

[41] *R. v Spence (George)* (1957) 41 Cr. App. R. 80.

[42] *Byrne v HM Advocate* (2000) S.C.C.R. 77.

in an unanticipated way"[43]. Therefore, according to this proposition the defendant would be expected to apply their mind not only to potentially harm an unintended victim, but also to the manner in which that harm is brought about. Not surprisingly, this would narrow the scope of liability and would result in acquitting defendants in numerous high profile transferred intent cases, most notably *Gnango* where the defendant could not anticipate the eventual victim to die from a gunshot to her head.

The degree of premeditation appears to be one element judges hold highly in determining whether a defendant should be liable for harm suffered by the actual victim. So, if the defendant contemplated killing another, shared his plans with others or attempted to contract a murderer to kill another, the courts have been quick to assume that such a level of moral depravity points towards liability for harm to an actual victim[44]. The notion of culpability is often utilized. To quote a classic exposition of criminal law philosophy, "intending to cause some harm H is more culpable than merely foreseeing that some act A will cause H, or being willing to risk that A will cause H"[45].

5. ALTERNATIVE EXPLANATIONS FOR TRANSFERRED INTENT

It is submitted that cases, where typically the doctrine of transferred has been applied, could be conceptualized as situations where the defendant is liable for causing harm to a third party (unintended victim) where that harm was, objectively speaking, likely to occur or foreseeable[46]. The standard of foreseeability coupled with causation was embraced by Glanville Williams in his early work. He proposed that the defendant should be found liable only if he was negligent in harming the actual victim[47]. The entire test, therefore, would be objective:

[43] J. Horder, *Transferred Malice and the Remoteness of Unexpected...*, pp. 385–390.

[44] *R. v Droste* (1984) 52 N.R. 176 (SCC).

[45] M. S. Moore, *Intention as a Marker of Moral Culpability and Legal Punishability*, (in:) R. A. Duff, S. Green (eds.), *Philosophical Foundations of Criminal Law*, Oxford 2013, p. 184.

[46] See the Scottish case of *Roberts v Hamilton* 1989 JC 91 (High Court of Justiciary), where the plaintiff was mistakenly struck by a pole "some 4 feet in length" whilst trying to separate the defendant's cohabitee and her son who had been fighting with each other. The Court held that that whether the matter was approached from the point of view of transferred intent or whether it was approached from the point of view that the result which happened was likely to occur the sheriff had been entitled to find the appellant guilty in this case.

[47] G. Williams, *Criminal Law: The General Part*, 2nd ed., London 1961, pp. 133–34. It is worth noting that G. Williams subsequently changed his view on the subject, holding in his *Textbook of Criminal Law* (2nd ed., London 1983), p. 181 that the preferred test for the application of transferred malice ought to be based on the "immediate physical effect" of the defendant's action upon the actual victim.

"D's capacity to behave reasonably or to appreciate the risk in question should not be taken into account in determining whether D was negligent"[48]. A question to be answered in this connection is: in a case like *Gnango*, at what point in time should we proceed to assess the reasonableness of the steps the defendant took or should have taken to meet the standard of negligence applicable? Is the mere fact of engaging in an exchange of gunfire a breach of reasonableness? Or should a snapshot be taken later on, when the altercation is underway, and we should demand from its participants that they do all they can to prevent resulting harm from happening? In line with what appears to be opinion of the Supreme Court of the United Kingdom, I believe the former proposition is sounder[49]. Dogmatic doubts aside, and there could be many, if we accept that both Gnango and the Bandana Man fell short of the standard of reasonableness at the moment they started shooting, holding them liable for any resulting harm is just a consequence of that fact. This should be correct especially since the presence of negligence is assessed objectively, and it is undeniable that an officious bystander would consider a setting where guns are brandished by two men likely to shoot a breach of conduct rules giving rise to potential liability in negligence should harm eventuate.

Horder's approach favours remoteness over foreseeability as a way to curtail the influence of the doctrine of transferred malice. However, just as Williams, he does not question the conceptual basis of the doctrine (even when reformulated as extension or replication of intent). What both of those writers have done is seeking to find a justice-based tool to correct the often unfair results of rigid application of the concept. In the literature, it has been forcefully argued that in reality it is the factor of probability that directly affects the level of foreseeability[50]. The choice

[48] R. Card, J. Molloy, *Card, Cross and Jones Criminal Law*, Oxford 2016, p. 105.

[49] As I made it clear above (see note 34), the Court held that the initial affray between Gnango and Bandana Man could provide a foundation of Gnango's liability for the killing of the unintended victim.

[50] S. Eldar, *The Limits of Transferred Malice...*, pp. 653–654. Eldar stresses that the question whether remoteness should be allowed to govern cases of transferred intent is not only one of policy, but also of logic. He considers two examples given by Williams and Horder respectively. In Williams's hypothetical, D shoots at V1 intending to kill him, but the shot misses V1 and injures V2 who, unknown to D, was behind a curtain at the time. Horder envisages a situation where D aims at V1 but hits a munitions factory hidden behind a curtain, causing the death of V2. Eldar suggests that the latter example stretches the principle of remoteness further "because the mathematical probability of there being both a munitions factory and a person behind the curtain is, logically, lower than the probability of there being just a person behind the curtain, since the first possibility is contained in the second". As much as this conclusion fits the rather improbable model, let me suggest a slight modification of Horder's example: D shoots at V1 but misses and hits V2 after the bullet bounces off a wall which was behind the curtain. In such circumstances, it seems Eldar's argument does not hold – it is not on the grounds of logic that a difference in probability between there being a person or a wall behind a curtain should be discerned. Admittedly, it is difficult to point to anything more consistent than public intuitions with regard to resulting harm and the gravity of consequences suffered by the victim.

of remoteness purports to signal a shift from objective factual and causal contingencies that govern foreseeability to the difference between what the defendant intended or envisaged as a consequence of his actions and what materialized in reality.

Mary Seneviratne has contended that the *mens rea* in most offences is so broadly delineated that transferred malice is in a vast majority of cases obsolete[51]. What this proposition in fact constitutes is an endorsement of the impersonality doctrine. Here, I believe, we have encountered the crux of the difficulty in laying out the particulars of the theory of transferred intent. Williams, Horder, Seneviratne and other writers, in striving to find alternative explanations for cases where the question of *mens rea* on the facts is not straightforward, in fact suggest either applying a strictly literal, if not pedantic construction of statutes, a purposive interpretation, or confining the limits of transferred malice by putting more emphasis on such concepts as remoteness, foreseeability and negligence. The matter gets particularly convoluted with regard to the extension of the concept of intention since *R v Woollin*[52]. The defendant's actions which would normally be subsumed under negligence or recklessness, now fall under the stretched definition of intention, provided that death or serious bodily harm was a "virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case"[53].

6. CONCLUSION

It is high time academic commentators and judges accepted that there is a significant policy aspect which comes into consideration when deciding cases where an unintended victim was harmed in the process or as a consequence of a defendant behaving recklessly or negligently, or simply not foreseeing his actions could have an anticipated, long-term effect. Far from providing a definitive account of all applicable rationalizations, it is at least arguable that intent has been transferred (or replicated or extended) in cases where other more practical and less theoretically convoluted devices could have been proffered. Notably, as *Latimer* shows us, at times a meticulous construction of a criminal statute spares an interpreter the plight of striving to differentiate general intent from specific intent. Similarly, *Gnango* mistakenly resorts to the idea that one's intention to kill themselves (even though no such intent was shown on the facts) can be transferred to the killing of a third party, instead of simply proclaiming that participation

[51] M. Seneviratne, *Pre-Natal Injury and Transferred...*, p. 888.
[52] [1998] 3 W.L.R. 382.
[53] *Ibidem*, p. 96.

in an affray creates a dangerous situation and if, as a result, an unintended victim is hurt, the defendant's liability covers that evil too. It is the intention or recklessness as to the participation in an affray that should transfer to the killing of a third party. Whilst it remains undisputed that the courts continue to refer to transferred intent in their judgments, I have sought to shed some light on the influence the circumstances of an immediate case have upon their reasoning. Understandably, it is the situation of the victim, i.e. their identity and the resulting harm they happen to sustain, that have their place in explaining why defendants should be held liable for inflicting harm they never contemplated to inflict, on victims they were not even aware they existed at the time they committed a lesser offence. The main advantage of allowing factual contingencies to impact the courts' treatment of transferred intent scenarios is staying true to what offences should be charged, and therefore – promoting justice.

Summary

Mistaken identity and bad aim have been traditionally accepted as the two textbook situations where the doctrine of transferred malice has found application. By reference to a cross-section of academic sources as well as case law from a number of common law jurisdictions, three core elements of transferred malice are identified: the intent of the defendant, the consequence that befalls the unintended victim, and public intuitions with regard to resulting harm. The overarching conclusion of the considerations consists in reaffirming the role of factual contingencies in deciding cases as well as the existence of a significant policy element which has caused, the paper submits, judges to subsume under the umbrella term of transferred malice cases which could satisfactorily be explained by means of other legal concepts, most notably remoteness, foreseeability or negligence.

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SŁOWA KLUCZOWE

zboczenie działania, aberratio ictus, strona podmiotowa przestępstwa, umyślność, usiłowanie

Criminal Justice
and
Criminal Procedure

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PHILOSOPHICAL ROOTS OF PUNISHMENT IN MODERN CRIMINAL LAW AND ITS PRACTICAL LIMITS (WITH SPECIAL REGARD TO FOREIGN CULTURES AND TERRORISM)

1. INTRODUCTION

This article originates from my participation in the 21th Polish-Austrian Seminar on Criminal Law, held at Warsaw University in June 2016. The leading subject of that seminar was *Current challenges for criminal law: foreign cultures and terrorism*. It is already a tradition to view the same subject from the viewpoint of Polish and Austrian lawyers. The inquiry is not limited to Polish and Austrian criminal law, yet we are aware that practice, place and time as well as local professional experience shape the perception. I was assigned the same subject as Anna Maria Blamauer from the Faculty of Law at Salzburg University. We both spotted the limits that the criminal law and punishment can play in regulating unwanted behaviour. The difference in our approach to the issue is partly the result of the legal branch each of us represents. Whilst Professor Blamauer concerns herself primarily with dogmatic criminal law, criminology, but also the impact of feminist jurisprudence, serves as my chief point of focus[1]. The different political economies that shape penal tendencies in Poland and Germany also play a role. What we share, however, is a similar opinion on efforts to solve the danger of a terrorist air attack. It is the story of two legal acts: the German Air Security Act Luftsicherheitsgesetz (Aviation Security Act of January 11, 2005), and the Polish State Security Borders Act, particularly its art. 122a in the amended form (of October 12, 1990, Journal of Laws of the Republic of Poland from 1990, No. 78, item 461, as amended). In both cases constitutional courts took a stand we agree with. Yet the fact that such laws were created indicates an actual danger of loss of control while giving room to panic and fear. Employing criminal law to fix a problem

[1] L. A. Haney, *Feminist State Theory: Application to Jurisprudence, Criminology, and the Welfare State*, "Annual Review of Sociology" 2000, issue 26, pp. 641–666.

is not necessarily a correct solution if what we are seeking is minimizing damage and ensuring the values of democratic society as well as observing human rights.

Decisions of both Polish and German Constitutional Courts provide an adequate platform for discussing the philosophical roots of punishment in modern criminal law and its practical limits (with special regard to foreign cultures and terrorism). Foreign cultures in a global multicultural world can have a positive impact by enriching our horizons and contributing to cultural diversity that, in turn, helps strengthen democratic open society. Within the narrowing space of nationalism, calls for security and insatiable religious fanaticism hint towards public acceptance of erecting walls and closing the borders[2]. A similar sentiment and reaction may be invoked by the word "terrorist"[3]. It does not raise so much awareness. It often favors exclusion and prevents humanitarian aid from being tendered to those in need. What otherwise would be found grossly improper, is let off where reason is replaced with fear and panic[4]. This is not the exclusive but only an additional reason to blame for the rise of punishment. It also promotes an expanded use of criminal labels with regard to behaviour otherwise located rather within social policy than criminal law. The discussion concerning philosophical roots of punishment often overlooks consideration of the nature of crime. What, why and for what purpose something is labeled as a crime is equally important. In the case of a hijacked plane we will see that one's mere presence on the plane might be enough to turn such an individual into a dangerous person.

The above proves that the more space is given to criminal law, the more neglected adequate social policy might be[5]. This is the case because time, money, efforts, and hope for solutions are transferred to the area of crime. Nils Christie has questioned taking such steps as well as the existence of "real" crime and "real" criminals[6]. What is "a crime", and who is "a real criminal"? It seems necessary to go back to the roots of punishment to grasp an essence of the label we use. This is especially vital today when we tend to identify people as dangerous based merely on their shared refugee status, religious identity or ethnicity. The format of the article leaves no space for even a summary of the theory of philosophical roots of punishment[7]. It does, however, leave space for an idea

[2] I. Jakubowska-Branicka, *O dogmatycznych narracjach. Studium nienawiści*, Warszawa 2013, pp. 92–113.

[3] V. Klemperer, *LTI. Notatnik filologa*, translated by J. Zychowicz, Kraków, Wrocław 1983, pp. 206–207.

[4] E. Traverso, *Europejskie korzenie przemocy nazistowskiej*, translated by A. Czarnacka, Warszawa 2011, pp. 51–65.

[5] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford 2002, pp. 1–26.

[6] N. Christie, *A suitable amount of crime*, London 2004, pp. 101–105.

[7] See L. Lernell, *Podstawowe zagadnienia penologii*, Warszawa 1977, pp. 20–27; M. M. Feeley, M. Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, "Criminology" 1992, Vol. 30, issue 4, pp. 449–474; A. R. Ackerman, M. Sacs,

that philosophical roots play a minor, secondary role in shaping the actual level of criminal sanctions. They do play a major role in disguising the real factors behind a specific criminal system. Retributive arguments, which see punishment as a means of deterrence, may serve to justify both expansion and restriction of the scope of criminal law and its sanctions. The same conclusion applies to arguments which stress rehabilitation and corrective justice[8]. Most systems are not explicitly orientated towards any one of those but rather a mixture of several ones. In the Polish Criminal Code, there is space for retribution, incapacitation, deterrence, rehabilitation (art. 53) and, in the Code of Criminal Procedure, for restoration (see art. 4). Despite philosophical similarities, criminal justice systems differ from each other. Philosophical roots tend to serve as an excuse to justify specific political needs and policy – the Hammurabi Code and the phenomenon of misreading its retributive justification is a good example of that process.

2. HAMMURABI AND THE PHILOSOPHICAL ROOTS OF PUNISHMENT IN MODERN CRIMINAL LAW

Hammurabi is often called upon in a discussion on the philosophical roots of punishment. Unfortunately, his achievements are often misread. It has been accepted that the idea of "an eye for an eye" embodies approval of strict punishment and proves its efficiency. This conviction is so entrenched that a proper interpretation of the rule has eluded most people. Consistent application of the "eye for an eye" rule would leave us all blind. "An eye for an eye" read as an invitation for harsh punishment is wrong. It is also wrong to argue that repression is an adequate tool to deal with foreign cultures and terrorism. It's time to re-read the idea of "an eye for an eye".

Hammurabi's code is widely known, not only among lawyers[9]. Yet it is loudmouthed lawyers advocating an increase in the intensity of sanctions that point with *braggadocio* upon his name and recall "an eye for and eye, and a tooth for a tooth". But it is time to contest the fairness of that argument. Exploiting Hammurabi as an advocate of harsh punishment is a mistake; commonly repeated, but a mistake. When advocates of harsh punishment take to the floor they call for increase and for more punishment. With what almost makes an impression of a sadistic pleasure, they argue for changing the law and provide for more, longer, stricter punishment. Proposed new sanctions exclude space for leniency

R. Furman, *The New Penology Revisited: Criminalization of Immigration as a Pacification Strategy*, "Justice Policy Journal" 2014, Vol. 11, issue 1, pp. 1–20.

[8] M. Platek, *Systemy penitencjarne państwa skandynawskich*, Warszawa 2007, pp. 485–489.

[9] *Kodeks Hammurabiego*, translated by M. Stępień, Warszawa 1996, pp. 5–7.

and welcome life imprisonment and even death punishment[10]. Hammurabi is supposed to be a good patron of the idea and an illustrative example thereof. The point, however, is that such an interpretation is utterly wrong. Hammurabi did not ask for anything more but proven injury, and he certainly did not welcome excess. On the contrary, he favored limiting the gravity of possible punishment. Revenge, albeit civilized, was acceptable. No butchery, bloodshed or cruelty was invited. What was acceptable under the disguise of justice was limited to not more than "an eye for and eye"". At the same time, behind bold and scrupulous *ius talionis*, a financial resolution rather than actual "eye for an eye", was common and invited. Hammurabi satisfied social sentiments in a way that strengthened his position. The limits, though, were clearly delineated; not more for an eye than an eye. It could look severe and was meant that way. It was supposed to look severe. And had to stay under control. The catalog of those sanctions and ways of legal reasoning applied in that era differed from contemporary ones[11]. It was justifiable in the harsh conditions people endured at that time. It took time to transition from the Hammurabi era to the concept of human rights and a rise of social sensitivities[12]. Yet the fact is that Hammurabi put emphasis on inevitability of punishment rather than on its harshness[13]. Hammurabi's aim to render the perspective of a sanction unavoidable could make an impression of harshness. It was well sold. We have bought that impression neatly. Yet in "an eye for an eye" there is no trait of general prevention. Once more – revenge is welcome but within the limits of retribution.

The distinction between wrongdoing and attribution (accountability, culpability) raises a critical set of issues questioning the rationale of punishment[14]. The revival of the retributivist approach to punishment has led many to advocate for just deserts. Originally, just deserts represented the idea that punishment should correspond with the crime. Fair and appropriate punishment should be related to the severity of the committed crime. Later, however, just deserts in some coun-

[10] See a proposition of the Polish Minister of Justice to amend the criminal law and introduce a sanction of 25 years of imprisonment for fiscal offences (at http://kurier.pap.pl/depesza/167393/ (visited August 15, 2016)); a proposition to re-introduce death penalty for some offences, at K. Majak, *Dyrektorka telewizji Republika chce kary śmierci dla Tuska. Ewa Stankiewicz: należy się najsurowsza z możliwych kar*, at http://natemat.pl/176857,dyrektor-telewizji-republika-chce-kary-smierci-dla-tuska-ewa-stankiewicz-chcialabym-moc-realizowac-sie-zawodowo (visited August 15, 2016).

[11] J. Warylewski, *Kara. Podstawy filozoficzne i historyczne*, Gdańsk 2007, pp. 101–103.

[12] P. Spierenburg, *The Broken Spell: A Cultural and Anthropological History of Preindustrial Europe*, New Brunswick, 1991, pp. 1–10; S. McGlynn, *By Sword and Fire. The savage reality of so-called "Age of Chivalry"*, London 2008, pp. 91–140.

[13] C. Beccaria, *O przestępstwach i karach*, translated by E. S. Rappaport, Warszawa 1959, pp. 75–79; K. L. Montesquieu, *O duchu praw*, Vol. 1, translated by T. Żeleński (Boy), Warszawa 1927, pp. 262–284.

[14] M. A. R. Kleiman, *When Brute Force Fails. How to have less crime and less punishment*, Princeton, Oxford 2009, pp. 117–148.

tries (USA & Poland included) became an argument for increased and harsher punishment than one people got used to [15]. Trying to back up such a stance with the authority of ancient Hammurabi is not justified. It is misleading to read Hammurabi as one who opts for escalation of criminal sanctions. Criminality, crime, punishment and justice – those aspects played a secondary role. The political role in promoting "eye for an eye" rule was vital. It was necessary to prevent excessive revenge that could threaten the leader's political and military position. "An eye for an eye" formula was all that could be accepted. It constituted a limitation on popular rage and a measure that could be accepted as justice. Justice was just a word. A word used as a tool to keep together the vast kingdom Hammurabi formed.

The Babylonian king Hammurabi reigned from 1792 to 1750 B.C. He inherited a small kingdom from his father. It was some 150 km long, and 50–60 km wide with Babylon as the capital city. He started his term as a king with liberating many. Lauded at the outset of his reign as a liberator, he could have in fact perceived freedom as a precious value, however sources to that effect are scarce. What is certain is that he was aware of the concept of freedom. To bring his plans to fruition he needed devoted and dedicated people. Following decades of conquer and expansion, Hammurabi, once the king of a small kingdom, became the ruler of Mesopotamia[16]. With the expansion of the city-state of Babylon along the Euphrates River he united all of southern Mesopotamia. The territory of his kingdom was vast enough to include diverse customs, mores and practices. One way to strengthen a king's position was to declare local rituals, routines and practices as one's own and call them the law given to the people. Criminal sanctions bore the potential of dominance and supremacy. Permission to allow unlimited retaliation in the name of retribution can easily undermine the actual power of a ruler and imperil his position. Hammurabi was smart enough to know that. Therefore, he was accepting of the tradition of the conquered lands, adopting the relevant local customs as his law. It was a smart way of winning public compliance with his rule. Respect for old tradition gained acceptance for the new king. Generally, no new laws were imposed aside from the "eye for an eye" rule[17].

The new authority was better off with less rather than more changes. Criminal law, though, was a notable exception. The king could have his emissaries, legates and clerks, but in order to sustain the power he had to be the one and mighty.

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[15] G. P. Fletcher, *Rethinking Criminal Law*, Boston 1978, pp. 459–460.

[16] Hammurabi was the sixth king in the Babylonian dynasty, which ruled in central Mesopotamia (present-day Iraq) from c.1894 to 1595 B.C. His family descended from the Amorites, a semi-nomadic tribe in western Syria, and his name reflects a mix of cultures: Hammu, which means "family" in Amorite, combined with rapi, meaning "great" in Akkadian, the everyday language of Babylon. Hammurabi expanded his kingdom up and down the Euphrates, until all of Mesopotamia was under his sway.

[17] Hammurabi's Code includes many harsh punishments, sometimes demanding the removal of the guilty party's tongue, hands, breasts, eye or ear. But the code is also one of the earliest examples of the idea of the accused being considered innocent until proven guilty.

He could not allow for the military and political prevalence of local knights, which could conceivably materialize under the disguise of justified revenge. When unleashed and powerful it could prove superior to the king, which is why there was a need for it to be limited. Therefore 'an eye rule' could raise a claim for no more than an eye, and a tooth could not cost and justify decapitation. All that justified taking out a tooth was a tooth only. Big words like "crime" and "justice" are just words. They are useful for one in power to justify one's actions, yet not necessarily so for subjects who have to obey and live in line with them. That is why financial compensation was permissible and could be easily exchanged for an eye or a tooth (of course bearing in mind class, social status and pecuniary chances).

The Hammurabi code is not a code in the sense that it consists of a set of methodological systematizations of a body of laws. Rather, it is a collection of 282 laws and standards, rules stipulated for the purposes of commercial interactions which set fines and punishments with a view to meeting the requirements of justice. Carving it into a massive, finger-shaped black stone "stela" was meant to make an impression and it did[18]. At the top of the column there is a bas-relief depicting the god Shamash, an ancient god of light and darkness, god of justice and the whole universe. He rules the Earth, the sky and the underworld. He is mighty, just and merciful. Shamash is pictured seated on a throne, wielding the emblems of power, justice and righteousness and passing them to Hammurabi. The symboiml is clear and serves the strengthening of Hammurabi's position. The god not only grants Hammurabi the power, but also makes him his equal. Now Hammurabi can exercise the power to divide light from darkness, good from evil, and judge his people.

The legend that the Babylonian king received his code of laws from Shamash also was to help impress the people and shut off possible discussion about the imperfections of the law carved in stone.

We are not sure to what extent Hammurabi replicated the patterns of his predecessor while carving the laws in stone and backing up his position with the might of a god. Yet aspiring to the role of a god's kin is evidently what humans do to lure and seduce the audience. History proves this pattern to be a stable one. Human beings are very much like each other. We look the same. We share dreams and needs. We are born and we die. There is no exemption and no exclusion from that rule. To justify excess consisting in abuse of power and position we create distinctions aimed at substantiating the otherness, exceptionality of a given person and their position[19]. The story of gods and being a god's relative serve as an argument to validate and defend excess of power as "natural". Divine anointment may be one form of a rationalization for the elevation that we feel entitled to.

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[18] It was looted in 12 BC by invaders and rediscovered in 1901 by a French archaeological team in present-day Iran.

[19] P. Bourdieu, *Dystynkcja. Społeczna krytyka władzy sądzenia*, translated by P. Biłos, Warszawa 2005, pp. 129–151.

It was Jean Rostand, a French philosopher and biologist, who observed that "When you kill one man, you are a murderer. When you kill millions, you are a conqueror. Kill them all, and you are a god". Hammurabi would most probably not welcome involvement in such a discussion. People in his kingdom could be granted freedom, yet they were still his people. Their life was very much in his hands, and they were his subjects and serfs. The notion of individual freedom, social contract and democratic state of law were long ahead to come. But the notion of collusion of church, gods and the state present in Hammurabi's days is still preserved in some countries. It is so even despite constitutionally declared separation of state and religion. It is so because political interdependence and personal profits prevail over the letter of the law. And the motivation goes back in time and is similar to that in play under Hammurabi's time. When credibility is otherwise feeble, sanctity is to be harnessed. Gods are useful, also to put blame on. Wars, human massacres, production and selling of arms, violence and intolerance – these are human actions where blame is shifted to one or the other god. It is said to be done "for God", "in the name of God", "under God's command" etc., etc.

Hammurabi, while expanding his territories, set double standards – it is not life that matters, but who controls death. When he was killing legions he was a conqueror. A carved stela and a place in history beside Alexander the Great and Napoleon was the judgment he received. It gained him a name of a chieftain and leader and never a murderer and a mass killer. It is different when death comes as a result of an unhappy, tragic or imprudent, impulsive event. Then, we start a discourse of crime, law and justice. We are tempted to talk about justice but in fact we have law and order in mind. It is an emperor's commandment that one shall not kill. Life is not what matters here. What matters is an order, one that has to observed. The quality of life is not what we are after. A crime is associated with its victim, but neither is the victim relevant here. A conversation about punishment concentrates on power. There must be a breach of an order which commands to follow the law. And the emperor's whim is part of it. You can kill when it pleases the ruler, and you will be killed when it does not. And it does not please the ruler when your action undermines his status. This is why the price for an eye is no more than an eye. This illustrates the structure of power so brilliantly described by Michel Foucault in his *Discipline and Punishment*. Punishment, as Foucault stresses, belongs to a political technology. "In the darkest region of the political field the condemned man represents the symmetrical, inverted figure of the king"[20]. The point is not to advocate refraining from punishing or excusing inaction. On the contrary, what Hammurabi did shall be examined from Nils Christie's perspective. He has remarked that there are horrible events, displays of unwanted

[20] M. Foucault, *Discipline and Punishment. The Birth of Prison*, translated by A. Sheridan, New York 1982, pp. 29–31.

behaviour and people who commit outrageous, horrific deeds. Yet "crime" and "offence" as such do not exist, as they have no material form. A dead body is dead no matter if we call the killer a murderer or a hero. It will not bring back the life. And the label applied to a killer most probably does not respect the killed person's opinion. It is not naiveté but a fair observation. Crime is not a fixed concept. Acts considered criminal vary between societies and over time. Any act can be defined as criminal. Any act that can be defined as criminal can cease to be that when committed by a person in power. Crime is otherwise in endless supply and so is punishment. Nils Christie on purpose used with regard to "crime" and "punishment" the word "supply" otherwise associated with trading goods to make us aware of the potential resting in those terms. It seems, though, that the Hammurabi rule drew limits at least in relation to punishment. "An eye for an eye" should be read as: no more than an eye for an eye. Nils Christie, on the contrary, drew limits to crime. It is up to us how many criminal offences we codify – there can be as many as we want. In the light of this, it is our responsibility to determine the kind of behaviour which deserves the label of "crime". We have as many of them as we want, as many as it suits us. The number has nothing to do with actual harm caused by unwanted behaviour. Being unwanted does not necessarily point towards terming a particular manifestation of behaviour an "offence". There are many ways to deal with what is unwanted in society. Criminal law and criminal policy is the last resort, and should not be the first. It is an issue centered around making a political decision on a suitable amount of crime[21]. A suitable amount of crime is correlated with the role that punishment plays in society. What is a suitable amount of control through the penal apparatus? And eventually, what is a suitable number of officially stigmatized sinners?[22] This has less to do with the actual amount of unwanted behaviour, more with penal policy. Penal policy, in turn, depends on socio-economic indices.

3. THE STRUCTURE OF PUNISHMENT IN MODERN CRIMINAL LAW

As Nils Christie observed, "Penal systems carry deep meaning. They convey information on central features of the state they represent. Nothing told more about Nazi Germany, about the USSR or about Maoist China than their penal apparatus – from their police practice, via courts to prison, camps and Gulags. In concrete cases, we can evaluate states according to their penal systems"[23]. Different coun-

[21] N. Christie, *A suitable amount...*, p. 75.
[22] *Ibidem*, p. 101.
[23] *Ibidem*.

tries criminalize different behaviour. That alone is an argument for an absence of a solid, incontrovertible catalogue of crime. An effort to recall the Ten Commandments as proof of a hard, universal and unanimously approved set of forbidden acts proves fable and weak. No profound studies are needed. It is visible at first sight. Polish philosopher Maria Ossowska in her now classic work *Moral Norms*, demonstrates and explains the misleading nature of such a conviction[24]. "Do not kill" and "sanctity of life" have their appeal and it is universally acknowledged that this should be the case. And yet monuments are crowded with killers whom we call heroes and preach that this is a different story. People, as Ossowska points out, have a tendency to pass simple, unequivocal judgments. "It is well known that people do not want to see the virtues of their opponents or the flaws of an ideology dear to their heart. We would like to love or hate, admire or condemn. Adolf Hitler was fully aware of this tendency when in his *Mein Kampf* he advised that it should be fully exploited in propaganda"[25]. A simple evaluation attitude and clear-cut judging might be more common but change no fact; there is nothing like a standard crime. This also applies to punishment. There is nothing like standard punishments that represent worldwide moral collective ideas. In most cases, both crime and punishment are local, read and practiced in relation to resident socio-economic conditions[26]. Crime and punishment alike change their form, with time passing by. The great US justice Oliver Wendell Holmes, Jr. leaves us with no mercy – we exercise rules and bans not because they are effective but simply because we got used to them. "A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, an ingenious minds set themselves to inquire how it is to be accounted for"[27]. The way we use a set of customary measures are well described by Michael Cavadino and James Dignan. Measures applied by criminal law might depend on its philosophical roots. Yet the philosophical roots themselves are not free from contingent, local socio-economic settings. The way we think, create and apply ideas is determined by the conditions that create grounds and are the soil for our thinking. The philosophical roots we call upon expand the idea of interdependency of criminal sanctions, criminal law and state economy. It is not however clear to what extent philosophical roots are the right justification for ignorance of actual factors that shape a given criminal system. They are alike in the countries with diametrically different criminal systems. Therefore, it is not enough to look into ideas behind the choice of a sanction. It is more than

[24] M. Ossowska, *Moral norms, a tentative systematization*, translated by I. Gułowska, Warsaw 1980, pp. 22–44.

[25] *Ibidem*, p. 4.

[26] L. Svendsen, *A Philosophy of Fredeom*, London 2014, pp. 25–90.

[27] O. W. Holmes, Jr., *The Common Law*, Toronto 1991, p. 5.

that. The shape of a penal system, as Dignan and Cavadino claim, depends on the features of a specific society. It is not a one-way process, but a two-way one. It is not only a specific socio-economy system that shapes a local criminal law system. A local criminal system shapes a local socio-economy (although this process is less recognized)[28]. The local socio-economy equally shapes the existing penal system. It is both a result and a cause. Heavy dependence on punishment and criminal law affects economy and social integrity. It is only ignorance and a failure to see the real forces molding a penal policy that are strengthened by perceiving the structure of punishments as an effect of a well-established philosophy. The actual penal policy has more to do with social economy and with the system of power that happens to be in place. More stringent and autocratic regimes as well as democratic ones are supported by the same philosophical ideals. The emphasis might differ though. Cavadino and Dignan explain the process, basing their findings on a study of twelve penal systems of contemporary capitalist societies. Based on political economies of the countries, they locate the countries in several categories: neo-liberal, conservative-corporatist, social democratic and oriental-corporatist. Neo-liberal, as for example USA. Conservative corporatist, as in the case of Germany. Social democratic, as e.g. Sweden. And oriental corporatist, as in the case of Japan.

Dignan and Cavadino point out that punitiveness of a penal culture and rates of imprisonment are strongly associated not with the amount of crime but with the political economy of a country. As mentioned above, countries might share the same philosophical roots of punishment; they might share an interpretation of Hammurabi rules. They might even share a similar reported crime rate, and at the same time their scale of applied punishment might very much differ. For one country might be extremely reluctant to impose imprisonment, whilst another might be equally unwilling to restrain the use of imprisonment[29]. Punishment is a complex phenomenon. Dignan and Cavadino are not the first and not the only ones that point at this interdependence[30]. I have already mentioned Foucault's *Discipline and Punishment.* Dignan and Cavadino refer to the pioneering work of Emile Durkheim, *Two laws of penal evolution*. Durkheim formulated his idea as follows: "The severity of punishment is greater where societies are of less advanced type and where the central power is more absolute in character"[31]. Durkheim observed that philosophical roots are just an element of a sanction system,

[28] M. Platek, *Partial justice. On collateral consequences of imprisonment*, (in:) T. Elholm, P. Asp, F. Balvig, B. Feldtmann, K. Nuotio, A. Strandbakken (eds.), *Ikke kun straf. Festskrift til Vagn Greve*, Copenhagen 2008, pp. 519–530.

[29] M. Cavadino, J. Dignan, *Penal policy and political economy*, "Criminology and Criminal Justice" 2006, Vol. 6, No. 4, pp. 435–456.

[30] See also: H. Mannheim, *The Dilemma of Penal Reform*, London 1939, pp. 213–228; G. Rusche, O Kirchheimer, *Punishment and Social Structure*, New York 1939, pp. 193–207.

[31] E. Durkheim, *The Two Laws of Penal Evolution*, "University of Cincinnati Law Review" 1969, Vol. 38, issue 32, p 32. Durkheim's essay, entitled *Deux lois de l'évolution pénale*, was

and not necessarily the most influential thereof. J. Dignan and M. Cavadino rely on the work of David Garland and others who tried to explain differences between criminal justice systems in countries sharing philosophical roots of punishment[32]. To understand the differences in the way we approach criminal sanctions, they include a broad spectrum of factors that are shaped by and influence the level of punishment prevalent in local systems.

The differentiation factors are: economic and social policy organization, income differentials, status differentials, citizen-state relations, social tendency to inclusivity/exclusivity, political orientation, dominant penal ideology, and receptiveness to prison privatization.

It is interesting that all formerly slave countries included in the study (USA, England and Wales, Australia, New Zealand and South Africa) bear the colonial and slavery past. With free market and residual welfare state, extreme income differentials and merely superficial, formal egalitarianism, as well as social conservatism and pronounced tendency to social exclusion, these are societies with an exclusionary mode of punishment and state politics heavily dependent on severe punishment and criminal law. In the study, they were placed in the neo-liberal category. On the other hand, states like Sweden, Norway or Finland (counted as social democratic welfare states) with generous welfare programs, relatively limited income differentials, broadly egalitarian with a limited propensity towards social exclusion, gravitate towards an inclusionary mode of punishment and therefore rely on criminal law in their social policy to a rather limited extent[33].

Poland fits into the neo-liberal category, whilst Austria fits into the category of conservative corporatist states (together with Germany, France, Italy, the Netherlands). The economic and social policy organization in those countries is status-related, with moderately generous welfare state. The income differential is significant but not extreme. The status differential is moderately hierarchical, based on traditional occupational rankings. Social rights are moderately observed as moderate social inclusion is exercised. The dominant penal ideology is not based on the idea of rehabilitation and resocialization. It therefore differs from that prevalent in the USA and Poland, neo-liberal conservative mode, as well as from citizen right-based mode of punishment as in Sweden or Finland. In all those countries, despite their different socio-economic régimes, the historical and philosophical roots of punishment are the same. Yet criminal and penal policies in those countries do not have much in common. Understandings of what is deserved, how long is long enough, and how much is too much vary in the context of different regimes. Six-month imprisonment is perceived as a short time

originally published in "Annee Sociologique" 1900, issue 4, pp. 65–95; English translation: W. Jeffrey, Jr.

[32] D. Garland, *Punishment and Modern Society*, Chicago 1990, pp. 249–276.

[33] *Ibidem*, p. 441.

in a neo-liberal country (e.g. Poland). Major discrepancies lie not in the scale or nature of crimes, but in political economy regimes.

The level of unwanted behaviour has a tendency to decline, regardless of the regime of a country[34]. Steven Pinker explains this phenomenon by reference to changes in cultural norms. Popular rise in empathy and regard for human rights is one of them[35]. It does not necessarily coincide with modern criminal justice and the penal welfare state. Crime rates are falling down, the eagerness to criminalize more and punish more severely is rising. The problems of order and density of crime might have little in common. Robert P. Burns, professor at Law Faculty, Northeastern University (Evanston, Ill.), in his great book titled *Kafka's Law: "The Trial" and American Criminal Justice*, describes the odd centrality of issues of crime and punishment in American politics. No country is immune to tendencies to abuse power. The ideal way to prevent the abuse is risk awareness that it might happen. R. Burns finds many of the same characteristics of the law that Kafka satirized as marks of a system of pure dominance. The practice of controlling crime tries to adapt marginalized sections of the population to an insecure economy. R.P. Burn points out that a sovereign state is in fact incapable of controlling and preventing crime. It purports to do just that by expanding criminal law sanctions mostly towards marginalized section of the population. The more neoliberally oriented the state is, the more it is devoted to do less in the realm of social services and strive more towards a harsh criminal justice system. This is when incarceration reaches higher levels and calls for death penalty are welcome[36].

The category of crime is called upon when serving a political need, and invisible where that interest is gone. An approach to criminalize the so-called defamatory statement that World War II Poland was home to "Polish death camps" instead of "Nazi death camps" represents the first approach. Under a disguise of defending the truth and honor the proposed law is to mute the discussion of crimes for which Poles were responsible, such as the 1941 murder of Jews by their Polish neighbors in the village of Jedwabne. Although the crime is well documented by Polish authorities, Anna Zalewska, the education minister, in July 2016 shied away from an admission of Polish responsibility, saying it was "a historical truth in which there were many misunderstandings"[37]. When, however, crime does not serve political needs; declining both the fact and existence of applicable law

[34] S. Pinker, *The Better Angels of our Nature. Why Violence has Declined*, New York 2011, pp. 108–110.

[35] *Ibidem*, pp. 129–188.

[36] R. P. Burns, *Kafka's Law: "The Trial" and American Criminal Justice*, Chicago 2014, pp. 76–87.

[37] C. Kroet, *Poland to prosecute for the phrase Polish Death Camp*, "Politico", August 17, 2016, at http://www.politico.eu/article/poland-to-ban-phrase-polish-death-camps-nazi-germany/ (visited August 18, 2016).

is possible. In this connection, it is sufficient to invoke the official denying of the existence of a domestic violence problem in Poland and efforts to undermine and eliminate a rationale for an anti-violence convention[38].

With regard to philosophical roots of punishment, it shall be concluded that with human capacity for compassion growing, one should reinterpret the idea of "an eye for an eye" as an idea that limits sanctions rather that bolsters the abundance thereof.

Similarly, a reference to foreign cultures and terrorism should not be treated as an excuse or invitation to pass laws that under the disguise of threat of a terrorist air attack grossly curb civil liberties and human rights. Criminal law might have a positive impact when its scope is limited to basic unwanted behaviour. It fails to be effective when granted a role of solving major problems like cultural differences and explaining the reasons for a terrorist act. Criminal law is specific, and that is why it is to be treated as the last resort. If turned into the first port of call, undesirable consequences may ensue.

4. PRACTICAL LIMITS OF PUNISHMENT (WITH SPECIAL REGARD TO FOREIGN CULTURES AND TERRORISM)

In the Biblical story of the punishment inflicted on the sinners of Sodom God hears about its people's outrageous conduct. He does not, however, accept hearsay evidence of a serious crime. He decides to descend from the skies and check the evidence[39]. Even with regard to God it is accepted that before making sense of what is happening its intentions must be discerned. Yet German and Polish legislators decided they can give up on this verification stage. A law passed at one point both in Germany and in Poland legalized shooting down of civil aircraft when hijacked by a terrorist. The law approved of killing innocent passengers just because they happened to be on the plane with a terrorist. In such circumstances, from an innocent passenger's point of view, mere buying of a plane ticket becomes evaluated as outrageous enough to shoot the airplane in case it is hijacked. When the word: "terrorist"' springs into the picture, the passenger's fate and character diametrically changes.

Words matter. The word: "terrorist" raises fear and panic. To recognize someone as a human being you need to have a concept of a human being. To recognize someone as a fellow human being, you have to make sure not to strip the person of his/her human elements. Applying a scary label might dehumanize a person.

[38] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, CETS 210, Istanbul May 11, 2015, in force in Poland from August 1, 2015.

[39] A. M. Dershowitz, *Abraham*, New York 2015, p. 12.

The word: "terrorist" connotes terror. David Livingston Smith has studied the causes of demeaning, enslaving and exterminating others and concluded that in order to be successful in such an endeavor there are three crucial factors that have to coincide[40].

It starts with authorization. When one is in a position of authority and endorses acts of violence, whilst another just does what he is told to do – a perpetrator of slander and abuse of others is less inclined to feel responsible. He therefore feels less guilty of performing any such acts. This is strongly supported by Stanley Milgram's 1961 experiment on obedience to authority, proving that "the person with inner conviction, loathes stealing, killing and assault may find himself performing that acts with relative ease when commanded by the authority. Behaviour that is unthinkable in an individual who is acting on his own may be executed when carried out under orders"[41].

Obedience paves the way to routinization. Doing what one is said to do becomes everyday reality. Even if it is breaking the law, torturing, killing. It becomes just workday activity, a job. It helps to overcome moral inhibitions. Following the rules eliminates the need for making awkward yet brave decisions and leaves no space for moral doubts. Single-minded focus on one's job helps to hide the actual meaning of an action.

Passive submission requires overcoming moral resistance to break the law and spread violence. Here is where dehumanization matters. "Terrorist, "parasite", and the one that carries protozoa[42]. It serves the purpose of moral disengagement; presenting a human as a filthy, loathsome and perilous object[43]. Livingston does not see any other way to justify atrocities than by representing the intended victims as vermin, parasites, or diseased organisms that must be exterminated for the purpose of hygiene. Or to present that person as "terrorist", or dangerous enough to contaminate the environment to the extent that justifies extermination, killing, murdering in fact innocent people[44].

This is not a theoretical exercise. We are talking about a law that was passed both in Germany and in Poland. A law amending the applicable aviation rules and permitting shooting down a hijacked civil plane with innocent passengers on board was passed in both parliaments. People's representatives elected in democratic

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[40] D. Livingston Smith, *Less than human. Why we demean, enslave and exterminate others*, New York 2011, p. 127.

[41] S. Milgram, *Obedience to authority*, p. 6, at http://www.shimer.edu/live/files/338-obediencemilgrampdf (visited August 18, 2016).

[42] See J. Kaczynski's statements concerning refugees. His comments caused an immediate stir, with some of his political rivals saying Kaczyński's language smacked of the terms Nazis used to describe Jews: J. Cienski, *Migrants carry "parasites and protozoa", warns Polish opposition leader*, "Politico", October 14, 2015. Available at http://www.politico.eu/article/migrants-asylum-poland-kaczynski-election/ (visited August 18, 2016).

[43] D. Livingston Smith, *Less than human...*, pp. 127–130.

[44] *Ibidem*, p. 130.

elections to represent their interests voted to kill them if by chance they happened to be on a plane hijacked by a terrorist. It was § 14.3 of the German Aviation Security Act of January 11, 2005 that permitted shooting down of so-called renegade planes, which are civil aircraft that have been taken command of by people who intended to abuse them as weapons for targeted crash. Once an aircraft has been classified as renegade – be it by NATO or by the national Air Security Center itself – responsibility for the measures required to avert the danger in the German air space rested with the competent authorities of the Federal Republic of Germany[45]. The term "competent authorities" has a dual meaning. First, it denotes authority as prescribed by the law. Second, it denotes authority that has competences to make an adequate decision, namely that they have know-how and are aware of the costs of their decision. A law that authorizes shooting down, by direct use of armed force, of hijacked aircraft with innocent civilians on board when the aircraft is suspected to be used as a weapon in crimes against humanity, is intrinsically wrong and in a sense incompetent, yet created by people claiming competence. A similar regulation was adopted in Poland. It was article 122a of the Aviation Act of July 3, 2002. The law regulated the permissibility of shooting down a civil aircraft with innocent civilians on board when used for unlawful acts, in particular as a means of a terrorist attack. The two laws emerged in the aftermath of September 11, 2001 when terrorist hijackers attacked the World Trade Center in New York, with one of the planes crashing into Pentagon, home of the Department of Defense of the United States. The crash of the fourth plane that did not hit the White House occurred following an intervention of the passengers on board which resulted in a change of the plane's course. More than 3,000 people died in the area of the World Trade Center and in the Pentagon as a consequence of the attack. There is however one distinct circumstance – for the crashes were caused by hijackers, not by an order of "competent authorities". It took a year in Germany and four years in Poland to strike down the law enabling and authorizing the killing of innocent people that would happen to be on a hijacked plane. In Germany, it was declared contrary to art. 1(1) of the German Constitution, with the Constitutional Court remarking that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority". Article 2(2) protects the right to life and personal integrity, and freedom of the person shall be inviolable and interfered with only pursuant to the law.

The German Constitutional Court recognized that a reading of the Aviation Act authorizing the killing of innocent people on hijacked aircraft is contrary

[45] See *Aviation Security Case, Federal Constitutional Court (Germany) Judgment of the First Senate of 15 February 2006* in the proceeding on the constitutional complaint against § 14.3 of the Aviation Security Act of January 11, 2005, p. 2. Available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2006/02/rs20060215_1bvr035705en.html (visited May 15, 2016).

to German law. German Armed Forces can be employed to save people's lives and not kill them on purpose.

The Polish Constitutional Court found there was a violation of the principles of "democratic state ruled by law" and human dignity as read in conjunction with the principle of protection of human rights. Wojciech Sadurski is right in pointing that in this case the Court was clearly inspired by the similar judgment of the German Constitutional Court of February 15, 2006[46].

Both courts stated that the legislature might not, by establishing a statutory authorization for intervention, give authority to operations of the nature regulated in the appealed laws against people who are not participants in a terrorist crime.

No crew member nor passenger boarding the aircraft in question was ever asked if they accept to be shot down and killed, in the case of the aircraft being hijacked by a terrorist. No passenger was informed that between 2004–2008 in Poland, while boarding an airplane, they were under a threat of losing their lives, a threat buttressed with relevant authority. This is the same authority that adores deliberation on the sanctity of life, especially when it comes to depriving people of their reproductive rights[47].

The laws, as well as the decisions of the Polish and German Constitutional Courts, have been subjects of much commentary[48]. Therefore, I would like to concentrate on the technique used by a "competent authority" to overcome moral doubts and separate the license to kill innocent from philosophical roots of punishment and the "you shall not kill" commandment. As already mentioned, David Livingston Smith pointed out that in order to demean, enslave and kill others dehumanization is required. The legislature, in enacting the laws discussed above,

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[46] W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, New York 2014, p. 181.

[47] Vide efforts of the Polish Parliament to criminalize access to reproductive rights: J. Mishtal, *The Politics of Morality: The Church, the State and the Reproductive Rights in Postsocialist Poland*, Athens, Ohio 2015.

[48] See J. Kulesza, *Czy państwo może mordować własnych obywateli? Zestrzelenie samolotu typu renegade w świetle prawa karnego – zarys problemu*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2009, Year XIII, Vol. 3, pp. 5–33; M. Bainczyk, *Ochrona przyrodzonej godności człowieka, a ustawy "antyterrorystyczne" (na przykładzie wyroków FTK i TK w sprawie zestrzelenia samolotów typu renegade*), "Państwo i Społeczeństwo" 2008, Vol. VIII, No. 3, pp. 7–21; P. Szczepański, *Trybunał Konstytucyjny a terroryzm – analiza wybranych tez z uzasadnienia wyroku TK 44/07*, "Acta Universitatis Lodziensis, Folia Iuridica" 2012, issue 71, pp. 113–124; M. Beltran de Felipe, J. M. Rodriquez de Santiago, *Shooting Down Hijaked Airplanes? Sorry, We're Humanist. A Comment in the German Constitutional Court Decision of 2.15.2006, Regarding the Luftsicherheitsgesetz (2005 Air Security Act),* "ExpressO Preprint Series" 2007, pp. 1–25; O. Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorist Provision in the New Air-transport Security Act*, "German Law Journal" 2006, Vol. 7, issue 9, pp. 761–776; R. A. Miller, *Balancing Security and Liberty in Germany*, "Journal of National Security Law and Policy" 2010, Vol. 4, pp. 369–396.

must have assessed that a person on board of a hijacked plane is lost anyhow and turns into an assault weapon. The legislature deprives such a civilian of their human status and not simply objectifies them but in addition turns them into a dangerous object – a weapon[49]. Were the members of the Parliament conscious of that process? I do not know. But I know that acting under pressure and believing that they deal with a beast helped to pass the law – that is how symbolical deprivation of human character works. It is not a human being anymore – it is a beast. And the beast is to be annihilated at any cost; even at the cost of some victims. Yet they are not victims anymore, but "tools" in the beast's hands. It helped to stay indifferent to the disparity between the enacted act that legitimizes killing innocent people that happened to be on the hijacked plane and the principles of human dignity and sanctity of life. This cannot be reconciled, as the German Constitutional Tribunal observed, with basic concepts of human rights – the right to preserve dignity, life and the idea of a human being as a creature whose nature it is to exercise self-determination in freedom, and who therefore may not be made a mere object of state action[50].

It does not matter the law was never put into action and civilian air craft was not shot down and people murdered, otherwise than in Ferdinand von Schirach's theater play "Terror" built upon the text and the consequences of the law[51]. It is worth recognizing how easy it was to cross the line Milgram and Livingston pointed out.

When authority is open to using dehumanization techniques in the name of security, innocent people are facing the danger of being deprived of humanity, turned into objects and killed in the name of necessity and state interest. Association of foreign cultures as well as Islam with terrorism has the effect of narrowing the focus and depleting the perspective. Prevention is always better than punishment, which always comes too late, after atrocities have already happened. Prevention rarely goes hand in hand with criminal law and punishment. When it comes to foreign cultures, understanding and respect do better than mockery, scorn and disgust. A broader perspective helps and two accounts are available to an academic eye. Saskia Lutzinger in her qualitative studies on the biographies of extremists and terrorists looks for the other side of the story, as she puts it. In her study, she sheds light on social and personal circumstances that lead to extremist and terrorist behaviour. Yet another side of the story is to reckon that when terror is at stake it is not limited to foreign cultures and religions. It is also part of what "our" culture and "our" religion are, considering the roots thereof[52].

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[49] D. Edmonds, *Would You Kill the Fat Man?*, Princeton 2014, pp. 94–124; T. Cathart, *Dylemat wagonika*, translated K. Bażyńska-Chojnacka, Warszawa 2013, pp. 45–72.

[50] *Aviation Security Case*..., p. 6.

[51] F. von Schirach, *Terror*, available at http://www.zeit.de/2015/41/ferdinand-von-schirach-terror-deutsches-theater (visited May 12, 2016).

[52] S. Lützinger, *The other side of the story*, "BKA series" 2010, Vol. 40, p. 6.

Chris Hani, a South African freedom activist and one of the political leaders of the African National Congress (ANC), was assassinated in 1993 by Janusz Waluś, a Pole (born in 1953 in Zakopane), who in 1981 immigrated to South Africa to join his father and brother. Waluś also planned to kill Nelson Mandela and other opponents of apartheid. Waluś, a devoted Catholic, perceived ANC activists as communists who were on the way to squandering all that was built by Whites. He combined hate and racism with Catholicism. Christian values and the "do not kill" commandment are of solemn character as they produce a feeling of superiority over other people and cultures, which often do not universally approve of them.

78 people were killed in 2011 in Norway by Anders Behring Breivik, a Norwegian, another devout Christian and a defender of white race and fascism.

Yet when talking about terrorists we rarely have in mind "our own" people. We tend to identify "others" from foreign cultures and distant religions. The study of Lutzinger is also concentrated on those whom we tend to perceive as "the other" and who are foreign to the European mainstream religious background. Lutzinger tries to understand the role of foreign cultures and foreign religion behind terrorist attacks. It is valuable work. Understanding the underlying social processes conduces to strengthened prevention better than expanded criminal measures. Yet the first necessary step to prevent atrocities is to understand that we are not immune from committing them. Atrocities are not limited and restricted to foreign cultures and foreigners.

Summary

The article deals with three main ideas. (1) The philosophical roots of punishment in modern criminal law are the same in countries that very much differ among each other as far as the level of severity of their systems is concerned. It is therefore something else than just philosophical roots that have an impact on criminal and penal policy of a country. Those other possible elements are then discussed. (2) The philosophical roots of punishment in modern criminal law often refer to the Hammurabi rule: "eye for an eye", and are read as a justification for severe punishment. The article questions this assumption and proposes an interpretation which seems to be much closer to Hammurabi's original idea. (3) Countries with differences in criminal and penal policy might introduce equally wrong laws abridging the core human rights when they resort to dehumanization practices and moral disengagement. It is especially possible when fear of foreign cultures and terrorism prevails. An example of such legislation, an aviation law in German and Poland, is discussed.

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IS IT POSSIBLE AND WORTHWHILE TO PROMOTE A WORLD-WIDE MODEL OF CRIMINAL PROCEDURE?

The aim of this paper is to present some of the limitations and possible negative consequences of globalization of criminal procedure. Due to its limited scope the paper does not aspire to be a comprehensive systematic study of the problem. The references to specific examples in this paper assume generally the framework of the legal systems of the European Union and its member states. This, however, is done with the idea in mind that at least some of the remarks made here could be also relevant in a wider international context, when other legal systems are taken into consideration. In the paper, particular attention is paid to possible negative consequences of globalization tendencies. Assuming this perspective was intentional, in order to draw the reader's attention, I refer to those issues which are especially important from the point of view of legal certainty of an individual but seem to attract less attention in the literature on the subject than general analyses of the phenomenon of synergy of legal systems and the benefits stemming therefrom.

The development of standardization tendencies in criminal procedure seems to be a worldwide process, which should not be expected to stop, and even less reverse. Wherever the progress of globalization can be seen and social, political and economic contacts between different countries become more intense, leading to closer and closer cooperation between them, there the need also arises for wider and better mutual adjustments of procedural regulations necessary for the application of criminal law. Thus, unless some unexpected extraordinary events reverse the trend and lead to a substantial setback in international cooperation, it should be expected that it will be considered in the best interest of individual states to harmonize their regulations in this area of law in order to combat crime more effectively. It is a well-known observation, so much so that it has become a cliché to say that criminal law and, consequently, criminal procedure, must keep pace with the globalization of criminal activity. The development of the mechanisms of international cooperation in the sphere of criminal procedure is a direct consequence of the development of trans-border crime, which is to a large extent attributable to the negative side effects of the development of economic relations between different countries.

A very good example of promoting and improving cooperation in the sphere of criminal procedure is offered by the European Union. It is not possible within the scope of this paper to even briefly characterize the development of legal institutions in this area. It is however unquestionable that in recent years, the most visible manifestation of this process has been offered by the work on the European Public Prosecutors Office, whose aim is to prosecute offences against the financial interests of the European Union[1]. Although the draft EPPO regulation does not propose a common criminal procedure, but relies on national regulations, it introduces a catalogue of harmonizing procedural principles and instruments of automatic mutual recognition[2]. The importance of such instruments lies not only in that they directly regulate the issues which they refer to, but also in that they create grounds for further unification of criminal procedure regimes between European Union member states. The philosophy supporting the idea of creating a common supranational prosecutorial agency within the European Union is based on the assumption that breaching financial interests of the Union should be treated as a problem of the whole community and not merely as a sum of individual problems of its member states. Therefore, financial offences affecting the European Union should be investigated throughout its whole territory, with the possibility of taking direct actions by one specialized agency, possessing possibly uniform investigation powers. Such an approach of the European Union officials may be clearly observed if one analyses the characteristics of the offences against the financial interests of the Union, which become significantly more supranational, benefiting very broadly from the European Union's four freedoms and composed of networks largely exceeding territories of individual member states[3]. Applying a traditional, purely national attitude to the prosecution of such criminal activities may result in grasping only fragments of the full picture of a crime[4]. Instead of looking for the sources of criminal activity and fighting it swiftly according to the common supranational interest, it may just

[1] See the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, July 17, 2013, COM/2013/0534 final – 2013/0255 (APP).

[2] See Article 30 and Articles 32–35 of the EPPO proposal (visited July 17, 2013).

[3] For more details compare: The OLAF Report 2012 – Thirteenth report of the European Anti-Fraud Office, January 1 to December 31, 2012, at http://ec.europa.eu/anti_fraud/documents/reports-olaf/2012/olaf_report_2012_en.pdf (visited July 10, 2016). For a more general overview of the problem of trans-border crimes in Europe see U. Sieber, *Euro-fraud: Organised Fraud Against the Financial Interests of the European Union*, "Law and Social Change" 1998, Vol. 30, pp. 1–42; E. Velkova, S. Georgievski, *Fighting trans-border organized crime in Southeast Europe through fighting corruption in customs agencies*, (in:) E. Athanassopoulou (ed.), *Fighting organised crime in Southeast Europe*, New York 2005, pp. 64–77; M. Den Boer, *The fight against organised crime in Europe: a comparative perspective*, "European Journal on Criminal Policy and Research September" 2001, Vol. 9, issue 3, pp. 259–272.

[4] For analogical remarks compare: K. Ligeti, M. Simonato, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?*, "New Journal of European Criminal Law" 2013, Vol. 4, p. 9.

concentrate on investigating the individual, national manifestations of the criminal conduct, leaving the very core aside[5].

There is, however, an obvious and very big difference between strengthening procedural cooperation between individual countries in order to combat trans-border crime as well as protect common financial interests more efficiently and creating a common model of criminal procedure. While cooperation and, sectoral at least, mutual adjustments take place practically all the time, creating and establishing common comprehensive legal solutions of the status of law codification constitutes an extreme manifestation of the standardization and unification of the systems of criminal procedure. It is in this context that the question arises whether creating a common model of criminal procedure on a supranational scale should be considered a possible and worthy of pursuing goal. Putting the same question differently, we could ask if a common model of criminal procedure should be considered an optimal solution, an ultimate end that would be the crowning achievement of international cooperation in this sphere of law, or whether such far-reaching changes in the legal system are perhaps not at all necessary, or perhaps even not desirable, in the cooperation between different states.

In the first place, we should notice that any attempts to establish some common international model of criminal procedure that goes beyond the formula of purely theoretical fragmentary proposals will encounter a lot of obvious and fundamental problems ranging from those resulting from socio-cultural differences to basic constitutional issues concerning the sovereignty of individual states. As can be seen from the example of the European Union, in spite of very close international cooperation within the EU, standardizing rules of criminal procedure among its member states, even in a such relatively limited area as the prosecution of offences against the financial interests of the European Union, encounters serious difficulties, including direct opposition on the part of some of the member states against assuming additional responsibilities[6]. Consequently, we have no reliable reference point which could be used for estimating the odds of having such regulations introduced, and even less their quality and efficiency if they are adopted.

As far as socio-cultural differences are concerned, we can see already in the limited European context that a look at traditionally recognized major tradi-

[5] For more detailed remarks compare: S. Pawelec, *Implications of Enhanced Cooperation for the EPPO Model and Its Functioning*, (in:) L. H. Erkelens, A. W. H. Meij, M. Pawlik (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon?*, Hague 2014, pp. 214–216.

[6] *Cf.* S. Pawelec, *Uwagi na temat zakresu kompetencji przyszłej Prokuratury Europejskiej*, "Palestra" 2014, issue 5–6, pp. 25–41. See also: *Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office – Report on the State of Play*, Council of the European Union, Interinstitutional File: 2013/0255 (APP), December 18, 2014, at http://data.consilium.europa.eu/doc/document/ST-16993-2014-INIT/en/pdf (visited July 10, 2016).

tions of criminal procedure[7] reveals a whole range of considerable discrepancies between one another. Apart from the fundamental division into *common law* and continental regimes, already at the level of preliminary proceedings we can notice how different approaches there can be in particular legal systems to the problem of maintaining the balance between providing procedural guarantees for individuals and the need to ensure the realization of investigative and control powers by state organs. In recent years, convergence of national systems of criminal procedure has been a subject of vigorous research which generally shows that no member state of the European Union has preserved any of the traditional models of criminal procedure (inquisitorial or accusatorial) in its pure form. Rather, there are all kinds of mixed, or hybrid, systems[8]. However, as far as predictions about the future development of the process of convergence between different legal systems are concerned, opinions vary. As has been aptly pointed out in the literature on the subject, apart from the voices expressing belief in unlimited levelling of systemic differences, there are also opinions that the convergence between different models of criminal procedure will reach some kind of saturation point, which no system will go beyond for fear of losing its fundamental features[9]. Not only would it be very difficult to reach agreement on such a text of common codification which would be adjusted to social and cultural needs of a community rich in its multiple legal traditions and aware of them, but even more discussion and practical problems, apparently, would be caused by, for example, the question of choosing an appropriate model for such codification. The legal act adopted would necessarily have to be either some kind of a midway compromise between the solutions functioning in all countries becoming party to the agreement, or it would have to be similar to one of the already functioning systems of criminal procedure. In the first case, all countries would carry a similar burden of adjusting their national legal system to new solutions. What is more, adopting a "midway" model would carry the risk of the unknown, self-evident in a situation where a system brought to life is a conglomeration of various legal procedure regulations which have never before functioned together. In the latter case, where one of the already existing codifications is adopted as a model for a new common codification, a disproportionately huge burden of adjusting their legal systems to the new regulations would be placed on those countries for which such a legal exercise would be foreign to their legal tradition. Bearing in mind these circumstances, it stands to reason that any hypothetical common model

[7] As for further characteristics of those traditions compare: E. Cape, J. Hodgson, T. Prakken, T. Spronken, *Suspects in Europe. Procedural Rights at the Investigate Stage of the Criminal Process in the European Union*, Antwerpen, Oxford 2007, pp. 5–8.

[8] *Cf.* M. Rogacka-Rzewnicka, *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego*, Warszawa 2007, p. 15.

[9] *Cf.* H. Kuczyńska, *Wspólny obszar postępowania karnego w prawie Unii Europejskiej*, Warszawa 2008, p. 21.

of criminal procedure could be successful only if it were different from a traditionally known code, understood as a comprehensive set of binding detailed provisions applying to all aspects of criminal procedure. In order to gain general acceptance, both in a legal and in cultural and political sense, a hypothetical model would rather have to be limited to basic rules, constituting a set of common minimal standards which no particular national regulations could stand in contradiction to. Naturally, both the extent of such codification and how detailed it would be remains open for debate. Apparently, the solutions adopted should fall somewhere between the two extremes: on the one hand, the model adopted should be free from excessive, purely formal richness of detail, not touching the nature of main institutions of criminal procedure. On the other hand, the solutions adopted within the common code should not be so general that they would constitute merely a set of recommendations for the conduct of criminal procedure, a kind of a very general framework that could be filled with almost any content. The experience of the difficulties encountered during the work on the proposal for the establishment of the European Public Prosecutor's Office shows also that even on the level of integration between member states of the European Union, not to mention the broader international context, a hypothetical common model would have to focus on promoting common normative solutions within the existing, already functioning, systems of criminal justice, rather than promote the ideas of establishing some supranational institutions, possessing wide procedural competences, replacing the position of national police and prosecutorial agencies, not to mention the judiciary, which would be much more difficult to implement. The reason is that taking the latter path would be tantamount to adopting solutions of a strictly federal character, which would in turn mean that the states willing to be part of the agreement would have to be ready to completely transform the political relations among them.

In these circumstances we can see that the bigger, geographically, the intended range of a common model of criminal procedure would be, the more limited and basic its content would have to be. Thus, a lot of money and organizational effort would be invested into calling into existence a legal act of extremely great generality, which by default would have to be implemented by the legal institutions of individual countries, which in turn would allow for dramatically different judicial interpretations. It seems then that in the sphere of international cooperation in the area of criminal procedure, rather than promoting such deep, sweeping reforms, a much more feasible idea, capable of producing tangible results, is to advocate focusing on selected problems or problem areas. The process is currently taking place on many levels, from traditional instruments of international cooperation, created on the inter-state level, to more and more developed mechanisms of direct judicial cooperation in criminal matters, observed in the European Union in the area of the former "third pillar". The scope of the present paper does not allow for any, even cursory, review of the legal regulations adopted under the heading of this

kind of cooperation, for example within the European Union itself. However, it can be assumed as a general and fundamental postulate that the development of this kind of sectoral cooperation should first and foremost focus on adopting, improving and promoting a common minimum catalogue of procedural guarantees for the accused, protecting the individual against adverse effects of the differences between the systems of criminal procedure in different countries. In particular, rather than putting a lot of effort into developing and establishing a complex model of a common criminal procedure, it seems a much more necessary goal, from the point of view of everyday legal certainty of citizens, to develop and promote common rules of admissibility of evidence. It should not happen that in the cases of criminal procedure concerning trans-border criminal activity, the differences between the levels of procedural guarantees in the legal systems of different countries are used against the suspect. As an example, one could point to the sphere of mutual admissibility of evidence, which raises the question of the possibility of the development of the practice of so-called *process laundering*[10]. This could happen, for example, in a situation where a certain way of obtaining evidence is accepted by the law of the country where it has been collected, but is against the law in the country where the proceedings are taking place. In such cases, a court's agreement to admit evidence on the basis of regulations of another country is tantamount to tolerating a violation of local regulations concerning the rules of evidence, which usually adversely affects the legal situation of the suspect[11].

The need to focus on strengthening the position of individuals within the process of growing international cooperation in the area of criminal prosecution becomes even more obvious when we consider most common potential motivation behind the efforts to harmonize different legal systems. Globalization of criminal procedure is a self-evident, ongoing process. Nevertheless, one should beware of the direction of such integration which generally tends to realize the interests of the state, not the suspect. The synergy of criminal procedure institutions among such closely cooperating countries as the European Union member states is inevitable. But one should remember that such changes generally tend to better the position of the states themselves, not the suspects. At the same time, if countries do not agree to some proposals for the unification and strengthening of investigative measures in a criminal procedure on supranational level, it does not have to mean that such refusal is inspired by the needs of individuals involved in criminal proceedings. Such disagreements often stem from a need to protect particular, public, interests of the countries, not the rights of their citizens. An example of such a situation

[10] *Cf.* C. Gane, M. Mackarel, *Admissibility of Evidence Obtained From Abroad Into Criminal Proceedings: The Interpretation of Mutual Legal Assistance Treaties and Use of Evidence Irregularly Obtained*, "European Journal of Crime, Criminal Law and Criminal Justice" 1996, Vol. 4, issue 2, pp. 112–115.

[11] *Cf.* P. Kruszyński, S. Pawelec, *European Code of Criminal Procedure*, "Przegląd Sądowy" 2009, Vol. 1, pp. 95–108 and the literature referred therein.

may be observed in the debate about the European Public Prosecutor's Office. General refusal of some European Union member states to take part in its creation and intense discussion among some other are based on various grounds, including also such basic legal problems as the lack of adoption of the directive on fraud to the Union's financial interests, which still remains a proposal[12]. Nevertheless, one of the most significant junctures of disagreement, which calls into question the establishment of the European Public Prosecutor's Office even through the enhanced cooperation procedure, is the presumed reluctance of at least some member states to give up some of their powers in the matters concerning the prosecution of offences aimed at public money and involving the activity of state organs[13].

The last and most general problem connected with the unification of criminal procedure and its possible negative consequences concerns the issue of its flexibility, its ability to evolve and susceptibility for improvement. In the first place, adopting certain solutions in criminal procedure at a high supranational level may have the effect of petrification thereof. This in turn may mean that when it becomes necessary to introduce corrections to the solutions adopted, due to the discovery of some flaws, for example insufficient protection of the suspect from the point of view of legal security of an individual, the path to amending it may be much more lengthy and arduous than in the case of a solution adopted at a local level. Taking again as an example the comparison between the European Union legal system and the legal systems of individual states, it is not difficult to imagine how much more time it would take to adopt amendments to a European regulation referring to a particular solution in the sphere of criminal procedure, than to introduce a change solely on a national level. Therefore, organizing details of criminal procedure on a supranational, European (or even broader) level, reveals a general difficulty of losing the flexibility of legislation and the ability to adopt changes which could allow for a quick improvement of demonstrably, or even obviously, imperfect solutions.

By way of a brief summary of the general considerations outlined above we should note that integration in the sphere of criminal procedure is an ongoing, constantly developing and – from what we can predict – inevitable process. Depending on the area and character of the already existing mechanisms of cooperation between particular countries it can assume a more (as is the case with

[12] The proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final, July 11, 2012.

[13] Compare *inter alia*: *Transparency International Press Release: EU Still Deadlocked on New European Anti-Corruption Legislation*, posted by the Transparency International EU Office on October 21, 2015, at http://www.transparencyinternational.eu/2015/10/press-release-eu-still-deadlocked-on-new-european-anti-corruption-legislation/ (visited November 27, 2016). As for more detailed analysis on adoption of the European Public Prosecutor's Office through the enhanced cooperation mechanism compare: S. Pawelec, *Implications of Enhanced Cooperation...*, pp. 209–227.

the member states of the European Union) or less intense course. However, if we accept that individual states will want to maintain their sense of identity, manifested also in their separate legal systems, and that no supranational structures of a federal character are likely to emerge in the foreseeable future, we should be sceptical about the chances of establishing a common model of criminal procedure, binding on many countries, which in its comprehensiveness and attention to detail would be comparable to the codifications of the countries of continental Europe. At the same time, in view of growing international cooperation in the area of criminal prosecution, we should remember about the need to respect not only the needs of the state, but also those of the individual. As a general concern we should remember that any international unification in the sphere of criminal procedure tends in the first place to better the position of the state, not the suspect or the accused. Therefore, the main effort should go not into developing and promoting the adoption of a time-consuming and unrealistic on a global scale model of uniform criminal procedure, but into developing a mechanism of ensuring minimum standards of procedural safeguards for individuals, with particular attention paid to promoting common rules of admissibility of evidence. And as a general concern connected with the proposals for establishing institutions of criminal procedure on a supranational level, we should point out the risk of adopting solutions which would be characterized by inherent systemic inertia and resistance to even obviously desirable legislative corrections of the established regulations. Thus, standardization of systems of criminal procedure on an international scale may, arguably, increase legal security of the individual resulting from greater similarity between particular legal systems and reduction of the risk of using the differences between them against the suspect, but such global solutions may be affected by insufficient flexibility and not be amenable to corrections necessary for meeting the needs for protection of the rights of individuals.

Summary

This paper canvasses some of the limitations and possible negative consequences of globalization of criminal procedure. The references to specific examples in this paper assume generally the framework of the legal systems of the European Union and its member states. This, however, is done with the idea in mind that at least some of the remarks made here could be also relevant in a wider international context, when other legal systems are taken into consideration. In the paper, particular attention is paid to possible negative consequences of globalization tendencies. Assuming this perspective was intentional, in order to draw the reader's attention, references are made to those issues which are especially important from the point of view of legal certainty of an individual but seem to attract less attention in the literature on the subject than general analyses of the phenomenon of synergy of legal systems and the benefits stemming therefrom.

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SŁOWA KLUCZOWE

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PLACING "LONE-ACTOR TERRORISM" IN CONTEXT. WHO ARE WE DEALING WITH AND WHAT THREAT DO THEY POSE? PRELIMINARY RESULTS OF THE FP7 PRIME PROJECT

The following article[1] presents partial preliminary findings of the EC-funded FP7 project PRIME. Due to the sensitive nature of the problems in question and the confidential status of the PRIME Report that this publication is based on, only non-sensitive material is provided henceforth.

PRIME (Preventing, Interdicting and Mitigating Extremist Events) is the European Commission's Seventh Framework Programme (FP7) research project pursued by the consortium of six Universities (University College London, King's College London, University of Warsaw[2], University of Leiden, Aarhus University and Hebrew University of Jerusalem) collaborating closely with practitioners and subject matter experts representing governmental institutions, law-enforcement agencies and non-governmental organizations from Europe, North America and Australasia. It is an on-going task (set to run between May 2014 and April 2017), aiming to progress and improve the current system of physical and social countermeasures and communication measures established against the threat of lone-actor terrorism and violent extremism.

One of the initial stages of the PRIME concept was to provide a contextual analysis of the "lone wolf" threat. We sought to identify a range of contextual elements that may affect the relevance and exploitation of the research, such as differences in legislation, technology, cultures, values and law-enforcement or security practices across Europe, above and beyond the countries represented within the PRIME Consortium. Our goal was also to refine the list of contextual factors, which would frame the formulation of counter-, and communication measures requirements, and to anticipate (with the assistance of a method known as crime

[1] The Author would like to acknowledge the support from EC Grant Agreement n. 608354 (PRIME) FP7-SEC-2013-1.

[2] University of Warsaw PRIME team consists of Dr Kacper Gradoń, Dr Agnieszka Gutkowska and Mr Piotr Karasek representing the Faculty of Law and Administration.

scripting[3]) the impact of these factors on the implementation of counter-measures against the lone extremist threat.

At the very beginning of the research devoted to the phenomenon of lone actor extremism and terrorism, we had to face a key problem present in any scientific deliberations i.e. the need to define the phenomenon. While the PRIME Project has adopted its own operational terminology for the purpose of data collection, there is no widely accepted definition of terms such as "lone actor", "terrorism" or "radicalization" in the academic or operational field.

In the literature, the term "lone wolf" most often refers to a person detached from the influence of any organization or other persons, who radicalizes him or herself and – as a result – decides to carry out a terrorist attack[4]. It needs to be stressed that true "lone actors" in a pure sense of the word do not really exist. Only a handful of individuals may be accurately referred to by such a term, with the most prominent example being Theodore Kaczynski – the so-called "Unabomber". Even Anders Breivik (frequently referred to in various media outlets as a "lone wolf") was not a solo-perpetrator operating "in a vacuum" – he used online sources both for gathering know-how and distributing propaganda[5]. We decided the main focus should be put on the wider scope of the existing problems, even if they are not fully consistent with strict definitions of a "lone wolf". We recognized one such problem to be the phenomenon of solo terrorists, namely people who act out of the control of an organization (which does not imply that they have never had relations with one). Another critical problem that we noticed were the so-called sleeping terrorists ("sleepers") who can start operating years after the date when their organization deployed them – i.e. sent them on a "mission".

Ambiguity of the notion of a lone actor is indicated by the fact that in the literature and public discourse, this term can encompass various categories of people:

− persons completely detached from any external structures and organizations, radicalizing themselves on their own, building their beliefs and views without any clear input from people from the outside (namely not subject to indoctrination; not being under the influence of persuasion or suggestions from outside);

− persons detached from external structures (and not seeking to contact them) but who are under the influence of a radical ideology whose recommendations or instructions they can access e.g. via the Internet (readers of extremist websites,

[3] See e.g.: H. Borrion, *Quality assurance in crime scripting*, "Crime Science – An Interdisciplinary Journal" 2013, Vol. 2, pp. 1–12; R. V. Clarke, J. E. Eck, *Crime Analysis For Problem Solvers In 60 Small Steps*, U.S. Department of Justice, Office of Community Oriented Policing Services. Washington D.C., 2005, p. 35.

[4] See e.g. Center for Terror Analysis, *The threat from solo terrorism and lone wolf terrorism*, April 5, 2011; E. Bakker, B. de Graaf, *Preventing Lone Wolf Terrorism: some CT Approaches Addressed*, "Perspective on Terrorism" 2011, Vol. 5, issues 5–6.

[5] A. Seierstad, *One of Us. The Story of Anders Breivik and the Massacre in Norway*, New York 2013.

discussion forums, community websites; audience members of online preaching, identifying with an ideology or a programme of an organization or terrorist group);

− "solo terrorists" (persons looking for contact with terrorist organizations, which often give them training support, on their own initiative, who at the same time are not members, but only supporters);

− perpetrators-emissaries, associated with a terrorist organization and "delegated" to conduct a lone attack;

− returning fighters (persons returning from war zones e.g. from Syria or Iraq), who after contact with real frontline situations return to their home countries and undertake independent attempts to extend the conflict zone;

− "sleeper" terrorists (persons connected with terrorist organizations, deployed to a target country and living within the local society, awaiting the right moment to attack);

− perpetrators who are defined in criminological and criminal literature as "mass murderers" – e.g. perpetrators of school shootings or persons deciding to commit a so-called "extended suicide"; they may connect their behaviour with some ideology, beliefs or a specific philosophy, however it is difficult to find more features in their motivation which would be typical of the above categories of terrorists and extremists. It needs to be stressed, however, that some of the prominent examples of these perpetrators who (at the time of their crime) were labelled "mass murderers" would most probably be named "lone actor terrorists" nowadays, due to the fact that their ideology and target selection would immediately draw attention not to the sheer fact of the crime, but to the motivation and ideology behind it (a perfect example being James Oliver Huberty[6], the perpetrator of the 1984 San Ysidro shooting (with death toll of 21), whose neo-Nazi statements and targeting of Mexican victims would most likely results in naming him a "lone wolf extremist" if his heinous crime were to happen today). The opposite situation is equally likely, as run-over attacks (frequent problem in Israel, according to our interlocutors from Israel Defence Forces) that are clearly terrorist in nature (such as the July 14, 2016 attack in Nice, France) were labelled as "mass murders" up to late 1990s.

It is worth noting that perpetrators located in the above categories do in fact have some (larger or smaller) connections to terrorist organizations. It is a kind of a paradox, since, as indicated above, the essence of this phenomenon lies in the absence of such connections. Yet it appears from the literature and our discussions with practitioners that the most significant problem is not the lone actors in the strict sense of that word, but persons acting "like lone actors".

The acts of terrorism of lone actors have to be examined also as a strategy knowingly used by leading terrorist organizations. Using such "strategy" is

[6] K. Gradoń, *Zabójstwo wielokrotne. Profilowanie kryminalne*, Warszawa 2010, p. 27.

openly advocated and encouraged by both Al-Qaeda – in this context the widely propagated "haemorrhage operation"[7] is worth mentioning – and ISIS[8]. Declarations of the so-called "Islamic State" leaders point, for example, to plans to send terrorists to Europe among groups of immigrants and refugees crossing the Mediterranean Sea; the *modus operandi* of such terrorists in Europe assumes using the tactics of individually operating agents. This strategy would seem to capitalise on the fact that, though they are sent by an organization, their relation with the organization ends in the country that they leave; in Europe, they start functioning as persons without any connections and then they attack at an appropriate moment.

Some specialists share the view that a lone actor terrorist in the strict sense of the word does not exist, because in almost all cases there is some organization operating in the background of their actions. In Jean-Pierre Filiu's opinion, the goal of jihadists is to convince the community, which is the target of potential attacks, that lone actors threaten them, since this arouses greater fear, and in turn this fear causes more emotional and, as a consequence, less professional actions aimed at preventing and countering this phenomenon[9].

Therefore, considering the above reservations, we decided that the phenomenon of terrorism of lone actors shall be examined both in the context of lone actors in the strict sense and lone actors in the wider sense (and as such also solo terrorists, terrorists-emissaries, returning fighters and "sleepers"). We have left out the phenomenon of mass homicides from our considerations, as we aimed to focus on the problems that are univocally considered "terrorist" in nature both by the academic and law-enforcement communities. The literature devoted to the issue of lone actor extremists draws attention to potential obstacles to the implementation of prevention and countermeasures against this kind of terrorism. For instance, they include the attackers' ease of mobility afforded by modern transport, communications, security, democratic legal systems, access to arms and vulnerability of targets[10]. Some of these appeared also in the comments of the interlocutors (practitioners) that we interviewed; they also mentioned other aspects hitherto omitted in the literature or mentioned in a slightly different context, as for example so-called weaknesses of the democratic system permitting the perpetrators to promote their ideas widely during court pro-

[7] Broadly propagated for instance in the "Inspire" magazine published by Al-Qaeda on the Arabian Peninsula.

[8] See http://www.ibtimes.co.uk/isis-calls-lone-wolf-attacks-uk-iraq-intervention-1469694 (visited June 6, 2015).

[9] J. Kapiszewski, *Europę czeka zamach. A dżihadyści chcą, abyśmy uwierzyli w "samotne wilki"*, at http://wiadomosci.dziennik.pl/opinie/artykuly/489664,arabista-jean-pierre-filiu-o-grozbie-zamachow-w-europie-islamie-dzihadzie-i-wojnie-w-syrii.html) (visited June 6, 2015).

[10] J.-L. Striegher, *Early detection of the lone wolf: advancement of counter-terrorism investigations with an absence or abundance of information and intelligence*, "Journal of Policing, Intelligence and Counter Terrorism" 2013, Vol. 8, issue 1, pp. 5–35.

ceedings. Our interlocutors mentioned this in relation to what they perceive as "excessive antidiscrimination policies".

Bearing in mind the need to define the object of our studies, it is also important to point out that the context analysis and the constraints inventoried relate to the terrorism of lone actors, regardless of whether they represent views that are extremely left- or right-wing or promote the idea of "jihad". However, bearing in mind that many of our interlocutors indicated the threat of "jihad"-inspired lone actors as the most urgent problem, in our reports we have paid most attention to "jihad"-inspired lone actors. In the face of increasing activity of the self-styled "Islamic State", the view that "Islamic terrorism considered as a major political threat [with] far-reaching consequences"[11] is likely to remain prominent.

The methodology of our lone-actor context analysis consisted of literature review, open source data collection, legal queries, consultations and interviews with practitioners and subject matter experts, as well as the use of surveys (questionnaires) concerning the subject of the PRIME Project. As indicated in the first paragraph of this article, the full Reports of the PRIME Project are classified (due to confidentiality clauses and the delicate nature of the topic of research), and for the purpose of this publication it is only possible to present selected outcomes of our study. Hereinafter, the original results of the pilot part of the context analysis are presented – namely the outcomes of the surveys/questionnaires.

While selecting the study population, we focused on practitioners (representatives of law-enforcement agencies and security services). The first survey included a group of fifty persons and was conducted in Warsaw. The second survey for the purpose of comparison of opinions on threats connected with the phenomena of lone actor extremism, radicalization and attacks, was conducted in India, where questionnaires were handed over to eighty top-ranking officers with at least 20 years of professional experience, representing all 29 states of India (response rate was 54 persons). We also sent the same questions to 25 police and intelligence officers in Europe and North America, but received a very low response rate; therefore, we decided to exclude them from further analysis. We decided to use only (in the form of quotes) several qualitative remarks included in them, of particular relevance from the point of view of the PRIME Project. Due to the specificity of the target groups, every set of studies had been consulted earlier with representatives of the tested environments and the questionnaires were adjusted for a given group. The questionnaire conducted in India was shortened because we were informed that the tested persons were not able to devote sufficient time to completing the questionnaires.

Due to the specific nature of the audience that we approached, it was not possible to prepare neither a quantitative nor qualitative study in accordance with

[11] R. Haverkamp, *The prognosis of terrorist attacks – limits of scientific findings,* "Crime Law Soc Change" 2014, Vol. 62, pp. 257–268.

the rules governing sociological research. Since we could not get permission from the authorities governing the law-enforcement agencies and security services to perform personal interviews with their officers (only 2 agencies out of 8 agreed to that), we understood that proper qualitative research was not possible to achieve. Similarly, we were not able to draw a representative sample, because it was not possible to enforce the completion of the questionnaire by the drawn respondents, due to the lack of explicit permission of the agencies to question the specific individuals. Taking into account the specific audience, we were only able to choose between an estimated study (that is: the general questionnaire) or terminating the empirical part of our contextual analysis.

The Warsaw survey (performed in January and February 2015) involved 50 participants. All tested persons represented the broad sector of the law-enforcement, security and criminal justice system. Among them, 30 persons were officers of the following services: the Polish National Police, the Internal Security Agency and the Polish Border Guard. The remaining participants were law practitioners (judges, prosecutors and attorneys) as well as scientists specializing in the issues of evidence law and forensic and investigative sciences (i.e. subject matter experts). Due to the nature of the work of the surveyed individuals, who are officers of the law-enforcement and security services, the surveys were developed in such a way as to make it impossible to identify respondents (especially subject matter experts). Therefore, the surveys did not include demographic questions nor questions about the institution in which a given person was employed. Questions included in the survey were prepared during a workshop conducted earlier at the University of Warsaw, in which some of the respondents took part. Our respondents did not answer all the questions included in the questionnaires. Mostly, they avoided answering open-ended questions. Therefore, we analysed only the representative questions i.e. the questions answered by all of the surveyed persons and which were of essential value for the purpose of this context analysis.

The first question was: "How serious in your opinion is the threat from 'lone wolf' terrorists in Europe?". The range of possible answers, including the percentage of respondents who selected the relevant options, was as follows:

1. No danger. 0% (0 persons),
2. Low danger. 4% (2 persons),
3. Average danger. 8% (4 persons),
4. High danger. 88% (44 persons),
5. Extreme danger. 0% (0 persons).

The second question was: "How serious in your opinion is the threat from 'lone wolf' terrorists in Poland?". The range of possible answers, including the percentage of respondents who selected the relevant options, was as follows:

1. No danger. 4% (2 persons),
2. Low danger. 34% (17 persons),
3. Average danger. 40% (20 persons),

4. High danger. 22% (11 persons),

5. Extreme danger. 0% (0 persons).

The third question was: "How serious a danger in your opinion does terrorism of lone actors pose in relation to any other type of terrorist threats?" The range of possible answers, including the percentage of respondents who selected the relevant options, we as follows:

1. Lower danger. 22% (11 persons),

2. Comparable danger. 38% (19 persons),

3. Higher danger. 40% (20 persons).

The fourth question was: "From among the following categories who poses the most serious threat in your opinion at this moment?" During the analysis of the results, we ranked the respondents' answers according to the significance assigned by the participants (together with the percentage of respondents who chose each option):

− Perpetrators acting within terrorist organizations. 32% (16 persons),

− Returning foreign fighters (e.g. persons returning from conflict zones in Syria or Iraq). 20% (10 persons),

− Perpetrators – emissaries "delegated" to singlehandedly perform an attack. 18% (9 persons),

− Perpetrators acting alone, but identifying with an ideology or programme of organizations or terrorist groups. 10% (5 persons),

− "Sleeper" terrorists (those associated with terrorist organizations, embedded in Western society, waiting for the right moment to attack). 8% (4 persons),

− "Solo terrorists" (persons on their own initiative seeking contact with terrorist organizations, which often give them training support, but these persons are not their members but sympathizers only). 8% (4 persons),

− Perpetrators completely detached from any external structures. 4% (2 persons).

The fifth question was: "Please rate the ability to undertake effective counter-terrorism activities at each of the following stages". The table below presents the answers given by respondents:

	Relatively easy	**Difficult**	**Very difficult**	**Impossible**
Radicalization	22% (11 persons)	36% (18 persons)	34% (17 persons)	8% (4 persons)
Attack Preparation	8% (4 persons)	60% (30 persons)	32% (16 persons)	0% (0 persons)
Attack	8% (4 persons)	22% (11 persons)	62% (31 persons)	8% (4 persons)

The sixth question was: "Please compare the ability of undertaking effective counter-terrorism activities at each of the following stages, providing numbers from 1 to 3 (where 1 is the most difficult operation, and 3 is the easiest operation)". The table below presents the answers given by respondents:

	1 (the most difficult)	2	3 (the easiest)
Radicalization	16% (8 persons)	20% (10 persons)	64% (32 persons)
Attack Preparation	16% (8 persons)	68% (34 persons)	16% (8 persons)
Attack	72% (36 persons)	12% (6 persons)	16% (8 persons)

The answers provided in the questionnaires were generally in agreement with the results received during the discussion workshop conducted at the University of Warsaw. In the opinion of Polish respondents, the threat from "lone-actor" perpetrators is above average within the territory of Europe. The risk of occurrence of such events as terrorist attacks by lone actors is rated as low or average for Poland. When comparing the seriousness of the threat of attacks by "lone actors" to other forms of terrorism, a majority of respondents recognized it as comparable or higher.

The opinion of respondents asked to rank the threats from different forms of terrorism according to the criterion of their significance proved especially interesting. Based on the results of the discussion conducted during the workshops (when it was indicated that the term "lone actors" can be understood in various ways) we assumed detailed division of "lone actors" into subgroups, as suggested. While the control category of perpetrators acting within terrorist organizations received the highest individual percentage of votes (32%), all the remaining categories (each of them being a subtype of "lone actors") received a total of 68% of votes. Thus, we can assume that almost 70% of respondents consider one of the forms of "lone-wolf terrorism" as more dangerous than the "traditional" form of group-based terrorism.

With regard to the possibility of undertaking an efficient intervention connected and aimed at prevention and counteraction against escalation of the behaviour of lone actors at one of the stages assumed in the PRIME Project (Radicalization, Attack Preparation, Attack), the vast majority of respondents decided that in relation to extremists radicalizing and moving on to the action phase, actual intervention at any stage is difficult, very difficult or simply impossible. The answers of respondents indicating the probability of undertaking effective intervention at the stage of Radicalization indicate some chances of success – this answer was provided by 22% of respondents.

A similar mechanism can be observed in the answers to the question in which respondents were asked to compare between the probabilities of undertaking efficient intervention. The surveyed persons were in a way "forced" to decide on some hierarchy of values of the chances of efficient intervention and when answering the question formulated in such a manner they decided that intervention seemed the easiest at the stage of Realization (64% of respondents). 68% of the respondents recognized the Attack Preparation phase as a stage of average difficulty with regard to undertaking an intervention. The Attack phase was clearly recognized as the most difficult in terms of prevention (72% of answers).

Taking advantage of the opportunity provided by my participation in a training visit to India (co-leading a course at Sardar Vallabhbhai Patel National Police Academy in Hyderabad, India in May 2015), we conducted a survey concerning the issue of lone-actor terrorism there. The surveys were adjusted to the time possibilities of the group of training participants, all of whom were officers of the Indian Police of the highest rank (from Deputy Inspector General up) representing the 29 States of India. Questions and protocols were developed in such a way as to make it impossible to identify particular respondents. Therefore, the surveys did not include demographic questions nor questions concerning the institution in which the given person was employed. Questionnaires were given to 80 persons and responses were received from 54 persons. Before the start of the survey, the participants were informed about the purposes and tasks of the PRIME Project.

As in the case of the survey conducted in Warsaw, our respondents did not answer all the questions contained in the surveys, avoiding answering the open-ended questions, we analysed the representative questions, i.e. those questions answered by all respondents, which were of essential value for the purposes of this context analysis. The percentage of answers was rounded up to the nearest full value. In the case of answers to open-ended questions the selection of essential citations is given at the end.

The first closed-ended question was: "Does your job involve dealing with lone-actor [LA], extremism or terrorism threats?". Possible answers, including the percentage of respondents who selected the relevant options, were as follows:

1. Yes: 74% (40 persons),
2. No: 16% (14 persons).

The second closed-ended question was: "It's commonplace to rank lone-actor terrorists as one of the main terrorist threats faced by the world today. Do you agree?". The possible answers, including the percentage of respondents who selected the relevant options, were as follows:

1. Yes: 92% (50 persons),
2. No: 8% (4 persons).

The third closed-ended question was: "In your opinion, is the lone-actor threat a serious risk for your country (India)?". Possible answers, including the percentage of respondents who selected the relevant options, were as follows:

1. Yes: 89% (48 persons),
2. No: 11% (6 persons).

The fourth closed-ended question was: "How do you rank the lone-actor threat relative to other kinds of terrorist threats (like group-sponsored terrorism) – in terms of likelihood and potential for damage?". The possible answers, including the percentage of respondents who selected the relevant options, were as follows:

1. Very high: 22% (12 persons),
2. High: 48% (26 persons),

3. Average: 26% (14 persons),
4. Low: 4% (2 persons),
5. Very Low: 0% (0 persons).

The fifth close-ended question was: "The common perception is also that detecting the lone-actor threat early is a 'needle in a haystack' scenario. Either you get lucky or you can do little more than mitigate the damage. Do you agree?". The possible answers, including the percentage of respondents who selected the relevant options, were as follows:

1. Yes: 74% (40 persons),
2. No: 26% (14 persons).

The sixth and last closed-ended question was: "We divide the lone-actor terrorism process into three stages of: Radicalization, Attack Preparation, and Attack. When do you feel the threat stands the best chance of being countered?". The possible answers, including the percentage of respondents who selected the relevant options, were as follows:

1. Radicalization: 44% (24 persons),
2. Attack Preparation: 56% (30 persons),
3. Attack: 0% (0 persons).

From the above answers to closed-ended questions it appears that there is high awareness of threats from lone-actor terrorism among our sample of senior officers of the Indian Police. A majority of the surveyed persons have contact with the problem of the threat connected with extremism and terrorism (including "lone-actor" type) in their work (74% of tested persons).

The Indian Police officers consider lone-wolf terrorism as a very serious danger in the current world (92% of respondents) and in India (89% of persons). Comparing the extremism of lone-actor terrorism to other forms of terrorism, the vast majority of the surveyed persons consider lone actor terrorism to be a more dangerous phenomenon (a total of 70% of indications). The pessimistic conclusion that profiling and detection of lone-actor threats is like "looking for a needle in a haystack", has overall dominance.

With regard to the possibility of undertaking an efficient intervention connected with the prevention and counteraction against the escalation of the behaviour of the "lone-wolf" perpetrators at one of the stages assumed in the PRIME Project (Radicalization, Attack Preparation, Attack), 44% of the surveyed persons decided that effective intervention can be undertaken as early as at the Radicalization stage and as many as 56% of persons recognized that effective intervention actions are possible at the Attack Preparation stage.

Respondents were also asked about the obstacles that they are coming across when commissioning, designing or implementing interventions that address lone-actor terrorist or extremist threats. Unfortunately, not all of the respondents answered; the most common answers typed by almost all of the surveyed persons who decided to complete this part of the surveys were:

− Legal constraints,
− Lack of understanding of the threat,
− Lack of interagency co-operation,
− Lack of co-operation from communities.

Explanation of some of the above conclusions is sometimes detailed in (not many) answers to open-ended questions. Below we quote the answers recognized as essential and interesting from the point of view of the PRIME Project.

One of the open-ended questions was: "In your job, do you deal with the LA/terrorism/extremism threat in general, or do you deal with particular kinds of LAs (e.g. Jihadist terrorists, left/right wing extremists; returning foreign fighters, etc.)?". Answers were very interesting and showed the specificity of threats, which the Indian Police have to deal with. The respondents who decided to answer often underlined that from a wide range of lone-actor perpetrators, those representing leftist extremism (acting under the influence of a form of communist ideology named Naxal Terrorism specific for India) are their most frequent enemies. Responses indicating Islamic terrorism and responses concerning foreign fighters returning from other conflict zones also appeared.

One open-ended question was the question in which respondents were asked to elaborate on their statements concerning the stage at which undertaking effective intervention (Radicalization, Attack Preparation, Attack) would be possible. Unfortunately, not many participants decided to do this.

Respondents who marked the Radicalization stage to be the one at which one can attempt to prevent further action of the perpetrator indicated for example that:

− "It is the time when one can start to maintain vigilance on potential lone actors. Cyber security experts and behavioural psychologists can (assess them) together with other security experts. At this stage, security forces get more time";
− "It is (when it is) easy to legally/technically act and monitor. Chances of wearing away the prospective lone actor are high";
− "Prevention is better than cure. It is possible with community policing";
− "A radicalized lone actor is a potential time bomb and can operate any time. It is better to stop radicalization at its very base, at its initial stage";
− "When source of radicalization is identified, we can introduce the proper intervention. Surveillance would be helpful";
− "That's when it's easy to collect Intelligence";
− "Since Radicalization completely changes the mindset of the individual and engages them to surpass the humanitarian virtues on the wrong pretext of religious 'jihad' which should not find place in a civilized society. After radicalization it is a matter of logic that attack preparation and attack is bound to follow. So, rip the bud so that the crop would not grow";
− "Keeping an eye in religious preachers and the people being indoctrinated is an easy and effective way of preventing it".

In turn, persons who marked the Attack Preparation stage to be the one in which one can attempt to restrain further action of the perpetrator indicated for example that:

− "Not everybody who radicalizes turns into a lone actor terrorist. Focusing too much on radicalization would further alienation and secrecy. It would create more 'us vs. them' situations, causing more problems";

− "Incidences of radicalization are so high that it is near to an impossible task to fix liability. At attack preparation stage, we may look for suspicious behaviour through a vigilant public";

− "Getting signals through neighbourhood watch alerts. Website visit patterns in certain areas";

− "During attack preparation they contact with others who are on suspects lists (friends, contacts, relatives who share the ideology), they get hardware either online or from physical market. They change behaviour during preparation phase which can raise suspicion";

− "During the attack preparation there may be activity beyond personal sphere, which may be picked up";

− "The preparation stage involves physical movements and collection of materials, which may leave some clues";

− "Radicalization may not be illegal everywhere. Stopping the attack is a very difficult action. Our best chance is to catch them in the act of preparation for the attack, based on their behaviour and actions".

Apart from the Polish and Indian questionnaires described above, we sent our surveys to 25 officers of police and intelligence agencies (in Europe and North America); unfortunately, the response rate was exceptionally low (2) and the received results were negligible from the point of view of the statistics. However, below we would like to present the opinions of those two persons, whose biographies include both long-term work in police services and subsequent academic careers (in areas related to crime and criminal justice administration). First of the respondents is a British citizen and the second is a citizen of the United States.

While the British respondent answered both questions: "It's commonplace to rank lone-actor terrorists as one of the main terrorist threats faced by the world today. Do you agree?" and "In your opinion, is the lone-actor threat a serious risk for your country?" saying that he did not agree with such an approach, the American answered quite to the contrary, agreeing that these dangers are more serious both for the world and for the United States.

In the answer to the question: "How do you rank the lone-actor threat relative to other kinds of terrorist threats (like group-sponsored terrorism) – in terms of likelihood and potential for damage?", the British rated the threat as "average", whereas the American as "very high".

As the answer to the question: "We divide lone-actor terrorism process into the three stages of: Radicalization, Attack Preparation, and Attack. When do you feel the threat stands the best chance of being countered?", the British respondent marked the "Attack Preparation", commenting: "There are too many false positives in identifying radicalized individuals (although this must still be attempted. Immediately before there are often a number of clues (in hindsight) that aren't acted upon". In turn, the American selected the answer: "Radicalization", commenting "Once the attack preparations start it is only a matter of luck if we are successful in disrupting them".

Of course, these two sets of opinions cannot lead to any conclusions, however they suggest that it is worth conducting a broad comparative analysis concerning the issue of "lone-actor extremist events" in the United States and in Great Britain and to diagnose the approach of practitioners in both of these countries to these types of threats.

As mentioned earlier, due to confidentiality issues and the classified status of our work, this article cannot provide a full account of our analysis concerning operational constraints affecting prevention, interdiction and mitigation of the lone actor extremism and terrorism. The aforementioned questionnaires are presented as an exception, but in order to provide Readers with more thorough findings of our preliminary research, the final part of the paper summarises the PRIME Context Analysis findings drawn from interviews with practitioners, workshops, surveys and questionnaires. The following conclusions can be considered as a list of the difficulties faced by law enforcement agencies and security services when tackling lone actor terrorism:

1. Absence of a commonly adopted and accepted, uniform definition of lone-actor terrorism;

2. Risk posed by overstating or over-focusing upon any given threat (e.g. Islamic terrorism) at any given time, with regards to neglecting other threats;

3. Nature of lone-actor extremists and terrorists' population, who tend to constitute an offender population which is "off the radar", in comparison to group actors, meaning that many existing tools, procedures, policies and practices already in place to combat terrorism are not adapted to this aspect of the problem;

4. Continuing shortcomings of the existing knowledge base on radicalisation generally and lone actors specifically;

5. Continuing shortcomings of the knowledge base on effective prevention messaging;

6. Data-sharing and broader restrictions to collaboration between security agencies and academia;

7. Increasing complexity introduced by new technologies, with regards to the radicalisation and offence behaviour of lone actors, presenting challenges to law enforcement and other practitioners in terms of keeping up with developments

(in terms of technological proficiency, academic research results, training, resources, and so on);

8. Lack of specialist training calibrated for threats caused by attacks by "lone actors";

9. So-called "legislative chaos", which impacts the operational context, making the standardization of regulations and improvement of procedures governing combating terrorist threats difficult;

10. Barriers to inter-agency cooperation and dominance of law enforcement agencies in the criminal justice system's dealings in the domains of extremism and terrorism control;

11. Lack of legal provisions that would make the long-term (multiannual) and strategic use of operational work tools (such as the operational control) possible. The use of these instruments is, according to security practitioners, hampered by restrictive legal provisions;

12. Possible impact of the influx of refugees and migrants, as well as "foreign fighters", arriving or returning from conflict zones (which ties in to the cultural issues regarding the law-enforcement agencies and security services familiarity and understanding (or lack thereof) of communities from which lone actors might emerge;

13. Absence of what our interlocutors thought of as a sound immigration policy addressing what they perceive as real dangers, notably in the context of an unprecedented influx of refugees to Europe;

14. Under-financing of special services that are necessary to keep up with the increased expenses of operational activity (especially including the operational control) associated with a significant influx of refugees, and the lack of recourses and means for the tasks associated with that phenomenon;

15. Lack of familiarity and trust among certain communities as against refugees and migrants, which law-enforcement agencies and security services worry could become "nurseries" for lone actors;

16. Barriers to communication and cooperation between security agencies and communities more generally;

17. Problems related to so-called "political correctness", which, as perceived by some of our interlocutors, hinders the effective design and implementation of measures to counter terrorist threats;

18. Regulations concerning personal data protections, which are, per the assessment of many of our interlocutors, maladapted to current threats;

19. Insufficiencies of supra-national operational databases used for preventing and combating terrorism and enabling information exchange (including digital and biometric data) between countries;

20. Incompatibility of existing databases;

21. Noticeable problems in the tele-information structure (especially in terms of providing data transmission security) in some European countries;

22. Unrealistically short period, as assessed by participants, of operational data retention, which does not allow for strategic (long-term) planning of law-enforcement actions;

23. Excessive bureaucracy and political interference hindering operational police work;

24. Challenges presented by the availability of unregistered pre-paid SIM--cards and insufficient legal and technical provisions to address this challenge;

25. Insufficient attention paid to the potential of financial analysis in relation to the phenomena of an extremist and terrorist nature, with implications for training and resources available to undertake this kind of work.

Summary

The author presents the de-classified preliminary findings of the European Commission funded FP7 research project PRIME, dealing with extremism, radicalization and lone-actor terrorism (also known as "lone wolf terrorism"). The article provides partial results of the research consisting of a context analysis of the lone actor threat, that is a description of a range of identified contextual elements which may affect the relevance, adoption, implementation or exploitation of the PRIME Project's final deliverables (counter- and communication measures requirements portfolios), including differences in culture and legislation across Europe, as well as operational (law-enforcement-related and stakeholder-identified) constraints. The article presents a host of definitional issues related to "lone wolf terrorism", provides results of the surveys/questionnaires performed in Poland and India and ends with a summary of the problems, constraints and obstacles to the successful and efficient use of operational procedures available for the law-enforcement and security agencies and institutions, based on data gathered through engagement activities with security practitioners.

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KEYWORDS

Extremism, radicalization, terrorism, lone actors, lone wolf terrorism, PRIME, counter-terrorism, Police, Intelligence, special services

SŁOWA KLUCZOWE

Ekstremizm, radykalizacja, terroryzm, samotni sprawcy, terroryzm samotnych wilków, PRIME, zwalczanie terroryzmu, policja, wywiad, służby specjalne

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CRIMINAL LAW AGAINST TERRORISM – LOOKING FOR AN EFFICIENT SOLUTION

Fighting terrorism is undoubtedly a complex undertaking, a challenge that is never fully completed. It includes developing proper criminal law and criminal procedure. As lawyers, we need to answer the question of what solutions represent proper anti-terrorism measures in the field of criminal justice. Many believe that in the current circumstances "proper" equals efficient. This article not only aims to describe different concepts of efficiency in the criminal law, but also it ventures to question the applicability of efficiency as an indicator of the success of anti-terror criminal law. The case of suicide bombers is the main matter under consideration here but a lot of the following remarks apply also to other acts of terrorism. As an extreme example of terrorist activity suicide attacks constitute a hard case for modern criminal justice in a number of aspects.

Even though young men are still the most likely group to take part in such attacks, the strategy of terrorist groups in the field of recruitment is changing. One reason is that, as we do not associate women with the danger of terrorism, we are less alert thereto, which, in turn, makes it easier for women to execute a plan of bombing. Another reason is that using a woman or a child for suicide bombing is better for the organization, as usually it does not cause a loss of a trained fighter. The second statement is especially true in less protected areas like Nigeria that are currently fighting Boko Haram. In such areas, conducting an attack does not require skills and experience of a trained soldier, therefore it makes no sense to risk a life of a person that may be useful for the organization in other fields.

Although it is rooted in many philosophical concepts, economic analysis is not a comprehensive philosophy of law. One may say it is rather a tool a philosopher may use. Nevertheless, this tool became highly influential in the 20th century. It uses economic and econometric methods for the purposes of an analysis of law[1]. Its universal character results in its applicability to many branches of law and, therefore, it penetrates the modern way of thinking about the law, it is often used

[1] R. Stroiński, *Wprowadzenie do ekonomicznej analizy prawa (Law and Economics)*, (in:) M. Bednarski, J. Wilkin (eds.), *Ekonomia dla prawników i nie tylko*, Warszawa 2008, pp. 482–526.

in public debate and has a strong influence on legislatures[2]. This essay discusses the economic approach, therefore the very first thing to elaborate on is the nature of such an approach as against criminal law. An initial presumption of economic analysis is that all actors on the market, including individuals committing crimes, act rationally in order to maximize something (e.g. money, utility, pleasure etc.)[3]. In other words, law and economics are based on the micro-economic theory of rational choices[4]. The idea of rational choices may be seen as highly questionable as applied to suicide bombers, but let's leave that doubt behind for a moment. Another, questionable, presumption is that actors on the market want to maximize something, therefore they are looking for efficient solutions. Note that there is nothing that is desired equally by everybody.

Explaining the concept of efficiency in the context of law is not as simple as it may seem. Initially, it applied to the process of production. To produce something efficiently means either to produce as much as it is possible with given resources, or to produce a given number of goods with as little resources as possible[5]. Unfortunately, this concept may not be easily transposed to the field of criminal law. That is why law and economics has developed more complex concepts of law efficiency. What is worth keeping in mind is that those concepts use different measures to compare given situations. In order to create a comparison of any kind a scale is needed. It could be a number indicating money, time, amount, temperature or anything else we use to describe volume in a certain state. No comparison can be made without a common measurement, for example comparing wind and a mountain seems impossible. So the question arises: how do you measure the law, or, more precisely, its effect? There are as many right answers to that question as measures we can imagine.

One of the commonly used ones is subjective utility which an individual associates with a certain state. Such a subjective indicator is used by the Pareto concept of effectiveness. According thereto, the superior solution is the one that gives a guarantee that it is impossible to make anyone better off without making somebody else worse off[6]. Therefore, a change shall be done (including a change of law) if it would improve the situation of at least one individual without worsening the position of anybody else[7]. This concept not only is highly subjective, but also hard to apply, as there are very few changes in the legal system and in the world in general that can be implemented without making anybody worse off.

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[2] J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007.

[3] R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warsaw 2011, p. 20.

[4] B. Bouckaert, G. De Geest (eds.), *Encyclopedia of Law and Ecconomics*, Cheltenham 2000, p. 384.

[5] R. Cooter, T. Ulen, *Ekonomiczna analiza*..., p. 20.

[6] *Ibidem*.

[7] J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów*..., p. 30.

Another criterion, used even more commonly, is wealth. Even though it is getting nearly impossible to measure it in very complex situations or in a long time perspective, it provides an objective indicator for assessment of nearly every change in a legal system. Kaldor Hicks' concept of efficiency uses wealth to find out in what circumstances gainers gain enough to compensate the losers. This possibility of compensation constitutes a more effective solution and justifies a change (including a change of law that leads to an alternative allocation of goods)[8]. The compensation itself need not be made[9]. Pure existence of the possibility to make one leads us to the "profit and loss" type of analysis.

As private law serves mainly individuals, criterions such as subjective utility or wealth seem to measure properly the success of legal solutions. Criminal law is different on a very basic level. On the one hand, it clearly protects the rights and interests of individuals. On the other, the reason for its existence is much more complex, based on our common sense of justice and human dignity.

Law and economics gives us a heterogeneous, but in its essence rather simple justification for the criminal law and criminal policy. Their aim should be to reduce social costs of criminal activity[10]. Deterrence may be seen as a component of this theory or an independent aim. Some scholars focus more on controlling social phenomena rather than deterring the individual[11]. But at the end of the day, from the economic point of view, there is no doubt that rational crimes exist. A crime is rational if and only if the gain from committing it outweighs expected punishment (punishment for a given crime X the probability of its imposing). In such circumstances, the perpetrator gains more than he loses, therefore a rational individual would commit the crime[12]. Even though the crimes described above are rational, the state still has an obligation to fight them. It is so because the criminal's gain should not constitute a social gain (at least not always). There are two ways to prevent somebody from committing a rational crime. All of them are a matter of criminal policy more than the law itself. A state could invest in education etc. to improve non-economic factors that compel people to obey the law. Secondly, it may try to impose more severe punishments or improve the rate of detectability to outweigh the profits from crime. Such an action is a matter of criminal law.

To fully understand systemic problems in the case of a suicide bombing, it is necessary to elaborate a bit on the nature of and reasons that stand behind the idea of achieving political and social goals via violence and terror. Undoubtedly, suicidal bombing is just one of the strategies used for that purpose, clearly one of the most extreme and quite widespread throughout the world. It is not

[8] J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów*..., p. 36.

[9] R. Cooter, T. Ulen, *Ekonomiczna analiza*..., p. 54.

[10] *Ibidem*, p. 597.

[11] S. Shavell, *Foundations of Economic Analysis of Law,* Cambridge 2004, *chapter 24*, p. 3.

[12] R. Cooter, T. Ulen, *Ekonomiczna analiza*..., p. 600.

a new phenomenon nor is it limited to one culture or an ethnic group, however it is nowadays most commonly associated with and used by Islamic groups like ISIS or Boko Haram. There are just a few things common among groups using such a strategy. All of them constitute some kind of a political minority or at least an organization (including state-type) that is denied expression and exercise of their views[13]. Inability to do so in a political way may be caused by lack of power or international recognition or the unacceptable nature of the presented views. Whether a cause for terrorist activity is just or unjust is subjective and as such it is not going to be a subject of this essay.

Aware of the fundamental reason for the existence of terrorism, one is more likely to understand its nature better. It should be perceived as a way of communication, a violent theatre designed to send a message to the world[14]. In fact, terrorists are not genuinely interested in the number of resultant casualties, but rather in the reaction their attack causes. The goal may be political, like withdrawal of foreign military forces[15], releasing a prisoner or, more generally, spreading fear and uncertainty among the society[16]. What is worth mentioning here is that not only is an "enemy" the one to receive the message. A suicide bombing sends a message also to potential supporters in the country where the attack takes place[17]. It is a declaration of power and determination. An attack like a suicide bombing, reported and commented on via social media, praised in radical mosques etc., may serve as a recruitment tool, especially as terrorist organizations broaden their recruitment to include women and children[18].

The effect described above may be bolstered or weakened by the media, including social media. As terrorists seek to send a message, one of the most effective strategies to reduce the incentive to carry out an attack is to limit media attention devoted thereto. At the same time, probably no modern, democratic society would accept censorship in any form. Therefore, there are proposals to create a Media Ethical Code[19]. A soft law of that kind does not restrict the media, but rather creates a good standard that in the long-time perspective could have an influence on social security. That is why I consider soft media law a rational and possibly effective compromise between safety and freedom of speech.

Taking into consideration all the factors mentioned above, it becomes clear that terrorism, and especially suicide bombers' attacks, are rational crimes in

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[13] K. S. Williams, *Textbook on Criminology*, Oksford, New York 2004, p. 494.

[14] R. Borkowski, *Terroryzm ponowoczesny. Studium z antropologii polityki*, Toruń 2011, p. 260.

[15] The most famous example of a fully successful attack of that type was the Madrid bombing. Afterwards, the Spanish government decided to withdraw its military forces from Iraq.

[16] W. Cooper, *Methods for confronting suicide terror*, (in:) O. Faik, H. Morgenstern (eds.), *Suicide Terror – understanding and confronting the threat*, Hoboken 2009, p. 344.

[17] R. Borkowski, *Terroryzm ponowoczesny...*, p. 263.

[18] W. Cooper, *Methods...*, p. 352.

[19] *Ibidem*, p. 235.

the mind of a terrorist. If he is willing to become a martyr, which means death in highly unpleasant circumstances, as a civilized society we are not able to create a punishment more severe than what he is preparing for himself. The European legal tradition identifies human life as central, one of the most important values, therefore the state should not able to take more from a suicide bomber than what he is about to sacrifice for his beliefs anyway. This conflict arises from the fundamental inconsistency between our common hierarchy of values, punishment based thereon, and the mindset of terrorists. Their view on the hierarchy of values consists of contempt towards life seen as a mean, rather than respect for the individual and their dignity.

Even if an unsuccessful suicide bomber is sentenced to life imprisonment, they achieve their goals at least in some respects. First of all, in line with his initial intentions, albeit in a different manner, they become a kind of a martyr in that they are going to spend the rest of their life in prison, in custody of the group they were fighting against. A failure to kill people does not mean a complete failure, as the captured suicide attacker may become an inspiration for a future generation of terrorists. An example of an imprisoned "brother" may be a useful recruitment tool and, as a result, multiply the final number of casualties in the long run. Moreover, if information about a planned attack becomes public, in a certain way it has a similar effect to an attack itself. A mere attempt rises the level of uncertainty and fear in society, it may cause social pressure on the government to take or withdraw from certain actions. Together with a lack of a clear distinction between domestic and external dangers and the anonymity of terrorists, such a situation significantly rises tensions in society[20]. Finally, depending on how advanced the preparations were, information thereon may lead to doubts about the state's ability to prevent terrorist attacks. These considerations give rise to a very simple conclusion. A modern democratic state is not able to raise the severity of the punishment and the likelihood of detection enough to deter a suicide bomber from carrying out an attack. The motivation of such a terrorist is usually transcendental, in common speak irrational, completely different than that of left-wing European terrorism[21]. As a result, neither the probability of exposure nor the severity of punishment, which are usually used as tools of deterrence, have strong influence on the decision making process of a suicide bomber.

Applicability of law and economics to the criminal law has been widely discussed and even now one can hardly identify any consensus on the matter. The approach that seems to be the most convincing is a moderate theory of limited application[22]. The accuracy of economic analysis is defined by the character of a matter (e.g. punishment) and the type of crime. Not in every case do basic presumptions of economic thinking turn to be true. Therefore, from the economic

[20] R. Borkowski, *Terroryzm ponowoczesny...*, p. 61.
[21] *Ibidem*, p. 60.
[22] See J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów...*, pp. 139–141.

point of view, criminal law has hardly any influence on a suicide bombing, as it is usually an unreasonable act. However, this conclusion does not question the necessity of adjusting criminal law, and the whole criminal policy, to the changing world. What we need to remember is that although the economic point of view is sometimes highly valuable, it is not the only one. Taking into consideration the factors described above, its application to such a problem remains highly questionable, as it does not give any practical answer thereto. In fact, there are many other goals to be realized by criminal law, not only prevention, deterrence and minimization of damage. Some scholars openly question the applicability of effectiveness as a determinant of criminal law[23]. There are many reasons that lead me to join them in those doubts. One of them is the limited applicability of the rational choice doctrine, especially with regard to describing the criminal behaviour of individuals. This is an inconsistency between what we perceive as rational and what a given individual can see as such. What is more, criminal law clearly does not focus only on the individual. In many aspects it is rather community-focused. In fact, I see no possibility to justify the existence of criminal law in a modern country only by reference to one of those approaches. On the one hand, there is a clear and strong need for a law that would protect citizens from wrongdoings of others[24]. On the other, our system of law shall reflect high values like truth, justice, good and beauty, which were enshrined in the Preamble to the Polish Constitution[25]. The Constitution, as the most important and high-ranked act of law, mentions human dignity as a value that cannot be infringed by any legal instrument. In the case of criminal law, requirements of consciousness and guilt must be fulfilled[26]. It expresses a hierarchy of values shared in a country, conduces towards preservation of social peace, as well as protection of dignity, both that of the victim and the perpetrator. Basically, it is a tool that serves a plethora of purposes, not only restoring a profit and loss balance in the society.

I consider those non-efficiency-focused aims of criminal law to have equal importance to effectiveness and other economically focused ones. Moreover, if the economic justification of a criminal norm is weak, these non-economic factors may prove decisive in shaping the law. Therefore, we should be rather focused on values shared among the community rather than the effectiveness of punishments for suicide bombing and other forms of terrorism. Basing criminal policy on fear neither preserves the spirit of liberal democracy, nor does it protect citizens in an effective way. It does not mean that punishments for terrorism should not be severe. Contrary, if there is growing disapproval of violence as a means

[23] B. Brożek, *Ekonomiczna analiza prawa karnego*, (in:) J. Stelmach, M. Soniewicka (eds.), *Analiza ekonomiczna w zastosowaniach prawniczych*, Warszawa 2007, p. 81.

[24] R. Cooter, T. Ulen, *Ekonomiczna analiza*..., p. 589.

[25] More about the meaning of this reference: W. Dziedziak, *O prawie słusznym (perspektywa system prawa stanowionego)*, Lublin 2015, p. 79 *et seqq.*

[26] D. Husak, *Overcriminalization. The limits of the criminal law*, Oxford 2008, p. 96.

of communication in society, criminal law should express it in a balanced, unprejudiced way.

What was said regarding criminal law in its strict sense, does not apply fully to criminal policy as a whole. We need to keep in mind that there are non-economic reasons for people to obey the law. Even though some actions are rational crimes, most of us do not commit crimes because of religious or ethical beliefs, customs or the care for our reputation. The list of reasons is long and diverse, but what can be said is that most of the things that stop people from committing rational crimes have something to do with personal morality, a sense of community and the complex process of upbringing. In case of terrorism, a sense of involvement and empowerment also plays a crucial role.

If we are able to identify the circumstances that, combined, create a good environment for terrorism, we shall move to looking for an effective way to eliminate them. As there is no way to deter a determined terrorist from committing the crime, we need to take one step back and prevent such an individual from radicalizing. It is not the role of criminal law to do so. Appropriate steps should be taken in the fields of policy, education and integration in order to eradicate the factors that may trigger violence. Some scholars believe that such an approach is not appropriate while dealing with religiously motivated terrorism[27]. Taking into consideration that behind religious fundamentalism there are usually the same motives as in the case of political terrorism (exclusion, lack of perspectives and recognition), a change of circumstances could lead to a decrease in popularity of such extreme ideas. This process cannot be quick or simple, as the background of most acts of terror usually includes difficult history, religious, ethnical or cultural incoherence. Nevertheless, a political solution, if prepared with respect for the positions of both sides, has the potential to be long lasting and stable. The conclusion of the British-Irish conflict may serve as one example.

Apart from criminal law and long-term antiterrorist policy, there is another field that needs an efficient solution to preserve public security. That is intelligence, police work, surveillance, criminal procedure and other rules that apply at the stage of identifying a terrorist before an attack. It is crucial for the law to allow for efficient actions of the state in order to prevent a possible attack. The main aim is to correctly identify a suspect, possibly together with other organization members, and arrest them before a bombing or another act of terrorism happens. For the reasons described above, the exact punishment is not of huge importance.

Nowadays, many states have an ability to analyse personal data obtained from computers and smartphones in a way that allows them to spot possibly dangerous people at a relatively early stage of preparation. Not all of those techniques are being (officially) used due to standards of privacy protection. The question of how to find a balance between how far the state is allowed to step into citizens' privacy

[27] R. Borkowski, *Terroryzm ponowoczesny...*, p. 272.

and what should be done to maintain safety is one of the most discussed issues in the modern world. It is an ongoing bargain, unfortunately in some parts of the world governed by fear and emotions. There in no one right answer to the question of how much freedom a modern society is ready give up for its safety. Balancing those two values is partly a matter of personal choice. This paper does not aim to recommend anything, especially as I am convinced that a proper solution depends strongly on the current national and international situation of the country in question as well as the commonly shared hierarchy of values. However, below there are some factors that should be taken into consideration by every responsible and conscious community.

First of all, it is desirable to be possessed of proof for the efficiency of an implemented criminal legal solution. As surveillance alone does not raise the level of security, the state should present at least some proof that data acquired thereby conduces to the effort of preventing terrorist attacks or identifying terrorists. At the same time, the use of data acquired in such an extraordinary way to investigate less severe crimes should be limited. A lack of such proof triggered a serious discussion in the USA a few years ago. Notwithstanding that most citizens agreed that in some cases detention without trial and violent methods of investigation are acceptable, the public opinion was outraged by the fact that such techniques were commonly used even though they did not contribute to any surveillance success. This experience may serve as a warning that extensive attempts to acquire information from an individual are not the most efficient investigation strategy.

The second aspect that is, in my opinion, worth mentioning is that there are some values so crucial to our culture that their core should not be subjected to limitations by the state. According to the Polish Constitution, human dignity in one of them. You can possibly identify two reasons for that. First is the nature of freedoms or values arising from human dignity. Second is the fact that protecting a modern, democratic society cannot be successful if done by destroying its foundation. In other words, we cannot live in a democratic state without at least a basic level of freedom and privacy. Without them a country preserves safety whilst inching towards totalitarianism. Currently, the discussion concerning limits of state power includes not only USA, but also Israel. Due to the extensive and sometimes violent character of the Israeli Army's actions, some of them have been described as "state terrorism"[28]. Even though such a term may seem extreme, it highlights the psychological aspect of the Israeli strategy, which allows them to survive surrounded by hostile neighbours.

Taking into consideration all the factors above, it becomes clear that although efficiency is a very useful category in many aspects of life, it finds limited applicability in the case of suicide bombers. In this regard, I find no possible punish-

[28] K. Liedel, *Terroryzm bliskowchodni*, (in:) K. Liedel, J. Marszałek-Kawa, S. Wudarski (eds.), *Polityczne metody zwalczania terroryzmu*, Toruń 2006, p. 69.

ment that improves the efficiency of criminal law. It is quite a common opinion among experts that in the field of surveillance and investigation techniques, a modern state should do much to improve the efficiency of its actions. A limit to such improvement should be defined by a compromise between freedom and security, designed and agreed to in a democratic way by the society. Unfortunately, we have not been able to reach such a compromise as our views on the importance of freedom and personally felt level of fear differ a lot. What I want to especially stress is that we should not be afraid to look for a just criminal law. Not always is a state going to successfully deter an individual from committing a crime, and for many reasons the popularity of given criminal behaviour rises and decreases in time. What should be constant about our law is that it should give a just response to a wrongdoing.

Summary

This article deals with the problem of modern terrorism, especially suicide bombing, and problems for the criminal law that arise from this phenomenon. It focuses on the limited applicability of the economic analysis of law in the case of religiously motivated terrorism and identifies causes and effects of those limitations. The main aim is to identify problems that may be solved by an effectively designed criminal law and those that need a more complex, possibly value-based approach.

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terrorism, economic analysis of law, punishment, deterrence, fairness

SŁOWA KLUCZOWE

terroryzm, ekonomiczna analiza prawa, kary, odstraszanie, funkcja sprawiedliwościowa

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SPECIAL APPROACHES AGAINST TERRORIST ACTS – THE BANKS' OBLIGATION TO COUNTERACT MONEY LAUNDERING PURSUANT TO THE POLISH BANKING LAW

1. INTRODUCTION

Nowadays, banks are significant institutions for both the proper functioning of states, as well as everyday activity of the population, as they remain institutions of public trust. Considerable changes in the quality of banking took place at the turn of the 19th and 20th centuries, when the banking sector became an essential element of a properly-working national economy[1]. As a consequence, today banks are considered institutions specialized in conducting banking operations of borrowed funds, at the same time taking the risk of their transactions[2]. The important function of the banks was also apparent at the time of the latest economic crisis when central banks played an interventionist role – with the control of financial liquidity and being a lender of the last resort, while commercial banks are said to have been one of the reasons of the crisis. Taking into consideration the significance of the banking sector, the aim of this paper is to present the legal issue of money laundering and terrorism financing by an analysis of the Polish Banking Law and other domestic and international regulations and institutions.

Proper functioning of the banking sector can be ensured by a two-tier bank system, assuming the coexistence of an independent central bank and commercial banks, which is also visible in the Polish economy. The legal position and functions of the central bank, whose main purpose consists of ensuring the stability of the national currency[3], is varied from the commercial ones, however the two-tier model still allows for numerous specific connections between the two

[1] L. Góral, M. Karlikowska, K. Koperkiewicz-Mordel, *Polskie prawo bankowe*, Warszawa 2006, p. 10.

[2] *Ibidem*, p. 11.

[3] W. Baka, (in:) M. Bednarski, J. Wilkin (eds.), *Ekonomia dla prawników i nie tylko*, Warszawa 2005, p. 342.

types[4]. The main regulation governing the workings of the Polish central bank is the National Polish Bank Act (*Narodowy Bank Polski*) enacted in 1997[5].

A bank, within the meaning of the Banking Law, is a legal person incorporated in accordance with the provisions of the law, acting on the basis of authorizations to undertake banking activities that expose to risk the financial resources entrusted to it under any redeemable title. According to this legal definition, it is needed for a bank, as a legal figure, to fulfil three conditions: the personal aspect (being a legal person) and two conditions which are connected with the subject of a bank's activity (banking operations on the basis of authorizations)[6]. Commercial banks can be created in various legal and organizational forms, but with the position of self-contained participants of economic transactions. These banks compete in conducting all banking activities, despite some of the operations being reserved for the central bank only[7]. Commercial banks each time need a special licence, granted by a decision of the Polish Financial Supervision Authority after fulfilling applicable legal conditions, in order to become a bank within the understanding of the Polish Banking Law and perform certain duties connected with banking operations.

According to this special role of banks in everyday life, every person by locating their money in a bank wants to be certain that the funds will be secure. It is also a legislative issue to ensure proper legal protection. One of the instruments to fulfil this aim is a provision in the Polish Banking Law – *Prawo Bankowe*[8] which obliges banks to counteract money laundering and financing of terrorist activity, making it therefore one of their special obligations, next to bank secrecy[9].

Even though banks are not widely recognized as front-line institutions of the antiterrorist defence, in fact they can be significant figures in counteracting money laundering and financing terrorist activity. According to some views, a banker can even be regarded as the most effective weapon against terrorists[10], as under certain circumstances he is able to predict and prevent terroristic activity.

2. COUNTERACTING TERRORISM

To meaningfully talk about terrorism financing and money laundering, it is necessary to try to create a legal definition of terrorism, which is a wide

[4] L. Góral, M. Karlikowska, K. Koperkiewicz-Mordel, *Polskie prawo*..., p. 11.

[5] National Polish Bank Act of August 29, 1997 (Journal of Laws of the Republic of Poland from 1997, No. 140, item 938).

[6] G. Sikorski, *Prawo bankowe. Komentarz*, Warszawa 2015, p. 5.

[7] L. Góral, M. Karlikowska, K. Koperkiewicz-Mordel, *Polskie prawo*..., pp. 11–12.

[8] Banking Law of 29 August 1997 (Journal of Laws from 1997, No. 140, item 939).

[9] Z. Ofiarski, *Prawo bankowe*, Warszawa 2008, pp. 284–287.

[10] J. W. Wójcik, *Przeciwdziałanie finansowaniu terroryzmu*, Warszawa 2007, p. 25.

and complex issue encompassing criminal, international, legal, criminological and forensic aspects. Terrorist activity is itself hard to define, so as a consequence many definitions can be found in various domestic and international laws. Authorities, in pursuit of a proper definition, have identified some of the essential most common elements, such as: violence or threat of its usage, a desire to spread fear, destabilization of state structure, political motivation of the action[11]. Even though terrorism itself is not defined in Polish law, the legislator decided to define a "terrorist offence" in the Polish Criminal Code[12], and also a "terrorist" act is defined in the Act on Anti-Terrorist Activities[13].

What is often stated in the doctrine is the fact that terrorism is made up of two elements: ideology and finance[14]. A lack of proportion between the financial resources of terrorists and those belonging to the state, which tries to counteract rapidly changing terrorism activity (cyber, nuclear etc.[15]), is often observed. It is possible to hamper the activity of terrorist groups by limiting their access to or detaching them altogether from financial resources. To fulfil this goal, cooperation between police, legal bodies and banking authorities is necessary on domestic and international levels[16]. Undeoubtedly, financing of terrorism can be considered as one of the so called (in the doctrine) "crimes without borders"[17], as it is an expanding crime and a growing international problem. Transborder cooperation is needed according to the gravity of the danger, and international solutions shall be sought within supranational partnerships[18]. This is easily visible in international laws and contracts as well as in European Union regulations. One of the most important EU laws on this subject is the Directive of the European

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[11] J. W. Wójcik, *Przeciwdziałanie finansowaniu*..., p. 37.

[12] Article 115 § 20. Terrorist offence

A terrorist offence is a prohibited act with a sentence of imprisonment for at least five years, committed with the aim of:

1) seriously terrorising a large number of people,

2) forcing a public authority of the Republic of Poland, or another state or international organisation, to take or not to take a certain course of action,

3) cause a serious disturbance in the political system or the economy of the Republic of Poland, or another state or international organisation,

– or a threat to commit such an act.

[13] Act on Anti-Terrorist Activities of June 10, 2016 (Journal of Laws from 2016, item 904).

[14] J. W. Wójcik, *Przeciwdziałanie finansowaniu*..., p. 79.

[15] Cyberterrorism is regarded as one of the most significant dangers of the 21st century, which makes it an interesting issue for a plethora of authors; for more, see A. Podraza, P. Potakowski, K. Wiak, *Cyberterroryzm zagrożeniem XXI wieku. Perspektywa politologiczna i prawna*, Warszawa 2013.

[16] B. Hołyst, *Terroryzm. Tom 1*, Warszawa 2009, p. 680.

[17] More can be found in e.g. A. Fichtelberg, *Crime without border: An introduction to International Criminal Justice*; some other crimes considered as "with no borders" are for example cybercrimes such as hacking or pornography.

[18] E. Pływaczewski, *Przeciwdziałanie praniu brudnych pieniędzy z perspektywy międzynarodowej*, "Państwo i Prawo" 2002, Vol. 8.

Parliament and the Council of October 26, 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[19]. The directive emphasizes that: "money laundering and terrorist financing are international problems and the effort to combat them should be global"[20]. Directive 2015/849 of the European Parliament and the Council of May 20, 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing[21], which repealed Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, is a significant document. The legislation forced states to introduce into their national legal systems a prohibition on money laundering, as well as a wide range of obligations for banks and other financial institutions connected with the identification of customers, registering money transfers and informing suitable services.

One of the main strands of international cooperation is related to the global strategy of the United Nations, as fighting terrorism can be considered one of the main UN aims. According to art. 1 of the United Nations Charter: "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"[22]. Over the years, United Nations has been actively acting in favour of counteracting terrorism by preparing many antiterrorism conventions, such as the International Convention for the Suppression of Terrorist Bombing (1997) or the International Convention for the Suppression of the Financing of Terrorism (1999)[23]. Peace and safety were also among the priorities of the Seventeenth Session of the United Nations General Assembly which took place from September 2015 until September 2016[24].

Requisite laws are also a part of the European countries' cooperation, which is evidenced in European Union laws on countering terrorism as well as in the activity of EU bodies, starting from the 2003 European Security Strategy, which

[19] Directive 2005/60/EC of the European Parliament and of the Council of October 26, 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance); at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005L0060 (visited June 30, 2016).

[20] *Ibidem*.

[21] See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L0849 (visited June 30, 2016).

[22] See http://www.un.org/en/sections/un-charter/chapter-i/index.html (visited June 30, 2016).

[23] The original texts of the United Nations Conventions on Terrorism in different languages can be found on the website: https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml (visited June 30, 2016).

[24] See http://www.unic.un.org.pl/70-sesja-zo-(strony)/70-sesja-zgromadzenia-ogolnego-onz-wrzesien-2015-r-%E2%80%93-wrzesien-2016-r)/2897 (visited June 30, 2016).

classified terrorism as one of the biggest threats to European security[25]. The United Kingdom was a founding member of the Financial Action Task Force (FATF), which is a body, made up of 34 member countries, responsible for inter-governmental cooperation and as such is concerned with counteracting money laundering and terrorist financing, made up of 34 member countries[26].

Directive 2005/60/EC provides a definition of terrorist financing in the directive on the money laundering: "For the purposes of this Directive, 'terrorist financing' means the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision"[27].The effectiveness of EU activities is mostly dependent on the policy of member states – what should be mentioned is the fact that cooperation between countries is mainly intergovernmental, perhaps most vividly compared to other issues[28]. As noted above, money laundering, a crime without borders whose effects may spread across vast areas encompassing numerous countries, deserves special treatment in order to facilitate its detection and prevention.

The impact of terrorist financing on the banking sector manifests itself in many various ways. Academics have formulated classifications of the methods used by criminal groups to influence the banking sector. The classification proposed by W. Jasiński divides such actions into 4 groups[29]:

1) first of all, criminal groups consider banks as subjects which manage money – in cash and cashless forms, which may originate from financial institutions;

2) it is possible for the members of the groups to enter into conspiracies together with banking executives in order to internally control their financial sources;

3) usage of financial instruments (created and licensed by banking activity) to support their financial undertakings;

4) making use of the existing financial instruments to do damage to third parties, for example by fraudulent seizure of property.

The areas which are mostly endangered by money laundering-related activity are: cash actions (for example receiving payments), credit operations, bank guar-

[25] See http://www.antyterroryzm.gov.pl/eng/anti-terrorism/foreign-cooperation/the-european-union/677,The-European-Union.html. (visited June 30, 2016).

[26] See https://www.gov.uk/government/publications/preventing-money-laundering/preventing-money-laundering#financial-action-task-force-fatf (visited September 18, 2016).

[27] Directive 2005/60/EC of the European Parliament and of the Council of October 26, 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (Text with EEA relevance); see http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005L0060 (visited June 30, 2016).

[28] B. Hołyst, *Terroryzm*..., p. 687.

[29] W. Jasiński, *Przeciw szarej strefie. Nowe zasady zapobiegania praniu pieniędzy*, Warszawa 2001, pp. 30–31.

antees, non-cash transactions, letters of credit, securities. Very often financing of terrorist activity involves acting according to obligatory legal norms, whilst exploiting loopholes, which, in turn, leads to acting in contravention of the law[30].

In the literature, it is also possible to find three other basic sources of terrorism financing: support provided by some states as well as organizations, legal business activity, as well as activity of organized criminal groups[31]. As underlined by J. W. Wójcik, donors usually do not take part in terrorist offences but in reality they are the propelling force behind the acts[32].

3. POLISH REGULATIONS

Definitely, one of the most important regulations with regard to terrorism financing is art. 106 of the Polish Banking Law[33]. Pursuant to this provision, every bank (within the understanding of the Banking Law) is obliged to fulfil duties imposed by the legislator. The crimes mentioned in the rule are accordingly found in the Polish Criminal Code as financing terrorist activity (art. 165a of the Criminal Code) and money laundering (art. 299). Art. 165a[34] was introduced to the Polish legal system in 2009 as an expression of international obligations stemming from counteracting terrorism. The classification of the offence indicates that public safety is the legal good protected by the regulation[35]. The offence should be regarded as a typical formal crime which exposes, in abstract terms, a legal good to danger which can be brought about by any agent[36].

As noted above, the need for penalization of money laundering[37] is partly grounded in international regulations. Norms enacted to deal with this problem

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[30] J. W. Wójcik, *Przeciwdziałanie finansowaniu*..., pp. 81–82.

[31] *Ibidem*, p. 79f.

[32] *Ibidem*, p. 79.

[33] Article 106 of the Banking Law

1. The Bank is obliged to counteract the use of its banking activity for purposes connected with crimes referred to in Article 165a or 299 of the Criminal Code of June 6, 1997 (Journal of Laws from 1997, No. 88, item 553, as amended), hereinafter the "Criminal Code".

[34] Article 165a. of the Criminal Code Anyone who collects, transfers or offers means of payment, financial instruments, securities, foreign exchange, property rights or other movable or immovable property in order to finance a terrorist offence is liable to imprisonment for between two and 12 years.

[35] D. Gruszecka, (in:) J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 296.

[36] *Ibidem*, pp. 296–299.

[37] Article 299 of the Criminal Code

§ 1. Anyone who receives, transfers or transports abroad, or assists in the transfer of title or possession of legal tender, securities or other foreign currency values, property rights or real

protect a particular legal good which is the preservation of lawful, proper, honest, reliable economical and financial relations[38]. *Mens rea* for both of the abovementioned offences covers both direct intention and recklessness. An offence committed by an employee of a bank or another financial institution requires this person to be aware of and informed about being an object of special duties connected with her function[39]. What is important is the fact that a person may avoid liability if, under art. 299 § 8 of the Criminal Code, she reports information about the perpetrators or the circumstances of the commission of the offence. Such extraordinary mitigation of punishment is also possible if the offender attempts to report the circumstances or information.

In case of a reasonable suspicion of banking activity being used in order to conceal criminal actions or for the purposes connected with tax offences or offences in art. 165a or 299 of the Criminal Code, banks should notify a public prosecutor, the police and a competent authority authorized to conduct preparatory proceedings (article 106a(1) of the Banking Law), as gathering, passing and offering of the monies under art. 165a of the Criminal Code can be conducted manually by a bank or through the usage of the operations thereof[40]. The obligation has a rather legal, not social, character[41], even though no legal sanctions for a failure to comply therewith were envisioned.

It is important that in the event of a justified suspicion that any resources in a bank account originate from or are connected with an offence other than the offence referred to in art. 165a or art. 299 of the Criminal Code, the bank is authorized to block the resources in the bank account (art. 106a(3) of the Banking Law). What is needed to be emphasized is the fact that an employee in breach of their duty by virtue of not reporting the circumstances stated in art. 106 is subject to disciplinary measures, which does not exclude criminal liability. Another regula-

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or movable property obtained from the profits of offences committed by other people, or takes any other action that may prevent or significantly hinder the determination of their criminal origin or place of location, their detection or forfeiture, is liable to imprisonment for between six months and eight years.

§ 2. Anyone who, as an employee of a bank, financial or credit institution, or any other entity legally obliged to register transactions and the people performing them, unlawfully receives a cash amount of money or foreign currency, or who transfers or converts it, or receives it under other circumstances raising a justified suspicion as to its origin from the offences specified in § 1, or who provides services aimed at concealing its criminal origin or in securing it against forfeiture, is liable to the penalty specified in § 1.

[38] J. Giezek, (in:) J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warszawa 2014, p. 1214; quoted after: J. Długosz, *Przestępstwa prania pieniędzy*, (in:) R. Zawłocki (ed.), *System Prawa Karnego. Tom 9. Przestępstwa przeciwko mieniu i gospodarcze*, Warszawa 2011, p. 577.

[39] J. Giezek, (in:) J. Giezek (ed.), Kodeks *karny*..., p. 1233.

[40] G. Sikorski, *Prawo bankowe. Komentarz*, Warsaw 2015, p. 304.

[41] H. Kosiński, (in:) H. Gronkiewicz-Waltz (ed.), *Prawo bankowe. Komentarz*, Warszawa 2013, p. 383.

tion worth mentioning is art. 105 of the Banking Law, which states the cases when banks are obliged to reveal information subject to banking secrecy under certain circumstances. The entities which are entitled to ask for information are divided into groups: firstly – banks, credit institutions, other financial institutions, secondly – entities with the rights of state authorities, thirdly – justice entities and finally – tax authorities[42]. *Inter alia*, the following are mentioned: the Financial Supervision Authority on the basis of the Banking Law and the Act on Supervision over Financial Markets, courts or public prosecutors in connection with pending proceedings concerning particular criminal or fiscal offences, the General Inspector of Financial Information, the Internal Security Agency, the President of the Management Board of the Bank Guarantee Fund, the National Bank of Poland etc. Possible conflicts between these obligations (art. 104, 105 and 106, 106a of the Banking Law) are solved by the act which by its regulations releases banks from liability for the damage which might occur as a consequence of an infringement of bank secrecy, by giving priority to art. 106 and 106a of the Banking Law. This represents one example of a limitation upon the bank secrecy principle[43]. Importantly, banks are not liable for the damage caused if the obligations indicated in art. 106(1) of the Banking Law are performed in good faith. If the circumstances were not connected with an offence or concealing criminal activity, liability for the damage resulting from withholding banking operations is borne by the State Treasury. Article 106b expresses a special regulation (consistent with bank secrecy) that banks, their employees or financial intermediaries may only be demanded to provide information on the basis of a decision of a district court – on a formal motion of a public prosecutor.

4. SPECIAL REGULATIONS

Special, more detailed regulations are found in the Act on Counteracting Money Laundering and Financing Terrorist Activity, enacted in 2000 and later amended to accommodate EU legislation. The regulation created legal frames of a system which coordinates particular actions of institutions, something that guarantees the realization of the act's aims. Under the Act, banks are obliged to, *inter alia*[44]:

– register transactions totalling over 15 000 euros, even if they consist of smaller transactions, as well as register every transaction which is suspected of having originated in an illegal or undisclosed source [suspected transaction];

[42] A. Tupaj-Cholewa, (in:) H. Gronkiewicz-Waltz (ed.), *Prawo bankowe. Komentarz*, Warszawa 2013, pp. 368–370.

[43] E. Fojcik-Mastalska (ed.), *Prawo bankowe*, Wrocław 2009, p. 47.

[44] L. Mazur, *Prawo Bankowe. Komentarz*, Warszawa 2008, pp. 620–622.

− maintain the register of transactions for 5 years from the first day of the year following the year in which a given transaction was made;

− convey information about registered transactions to the General Inspector of Financial Information;

− acknowledge that the judge is entitled to decide whether the reasons outlined in the public prosecutor's formal motion (art. 106 section 1 and 2 of the Banking Law) justify the revealing of information under bank secrecy.

It is also important to mention that the obligations concerning registration of banking transactions are also connected with identifying the people who conduct them[45].

In the 2000 Act, the office of the General Inspector of Financial Information (*Główny Inspektor Informacji Finansowej*) was introduced. The post, functioning under the auspices of the Minister of Finance, is bound to prevent the placing on the market of financial means which come from illegal or non-disclosed sources as well as counteract terrorism financing[46]. The body is also obligated to control the fulfilment of obligations by banks, which are, in the estimation of the Inspector, evidential and informative[47]. Owing to Memoranda of Understanding – bilateral agreements, it is possible for the body to share information and act with its counterparts from other countries. So far, eighty six agreements regarding mutual cooperation have been entered into by the Inspector[48].

Each year, the activity of the Inspector is increasing and getting more significant, which is borne out in the numbers. In accordance with its 2015 general report from March 2016[49], the General Inspector of Financial Information conveyed to public prosecutors' offices 398 notices of an offence of money laundering, which were connected with suspicious transactions totalling 17.1 billion PLN. What is more, just during last year, 339 bank accounts were blocked and 40 transactions were suspended, totalling 165.2 million PLN. The General Inspector fulfilled its statutory duties also by instituting 41 proceedings with regard to transactions which potentially might have been related to terrorism financing. Under art. 33

[45] M. Bączyk, (in:) E. Fojcik-Mastalska (ed.), *Prawo bankowe. Komentarz*, Warszawa 2007.

[46] L. Mazur, *Prawo bankowe*…, pp. 620–622.

[47] E. Fojcik-Mastalska (ed.), *Prawo bankowe*…, p. 47.

[48] See http://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/giif/wspolpraca-miedzynarodowa/-/asset_publisher/3cSg/content/wspolpraca-dwustronna-generalnego-inspektora-informacji-finansowej?redirect=http%3A%2F%2Fwww.mf.gov.pl%2Fministerstwo-finansow%2Fdzialalnosc%2Fgiif%2Fwspolpraca-miedzynarodowa%3Fp_p_id%3D101_INSTANCE_3cSg%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-2%26p_p_col_count%3D1#p_p_id_101_INSTANCE_3cSg__(visited June 30, 2016).

[49] General Inspector of Financial Information Report from 2015, at http://www.mf.gov.pl/c/document_library/get_file?uuid=22ac6a62-b882-438f-bbe9-2eddd0d4ce12&groupId=764034 (visited June 30, 2016).

section 3 of the Act, the information was conveyed 2 587 times to the entitled bodies and units at the Inspector's own initiative.

5. CONCLUSION – EFFECTIVE CRACKDOWN ON TERRORISM

In summary, current Polish activity aimed at counteracting money laundering and terrorism financing rests primarily on legislation – on both domestic and international levels - and an institutional system. Current Polish regulations concerned with money laundering and terrorism financing constitute a part of the international (especially European) system created to prevent countries from dangers in this area. International regulations have created a complex system of prevention and sanctions which can only be effective if countries implement them correctly. Legislation pertaining to money laundering should be helpful, as international cooperation is needed between public institutions, the government, special services and justice organs. In addition, the membership of Poland of international antiterrorism coalitions and organizations is pertinent, as terrorism-related offences can only be effectively fought over borders[50] with the exchange of opinions and experience.

What is more, on the domestic level proper legislation is essential as that could be a weapon to define, examine and prosecute terroristic activity. The whole system – with a wide range of regulations and activities – should be buttressed by correct implementation and internal rules within institutions. Unfortunately, often it is said that institutions do not have the proper procedures to fight that kind of activity or that the ones in place are defective[51]. Complex and extensive regulations are not always adjusted to particular institutions and bodies, especially when it comes to financial and personnel resources. New legal obligations should be preceded by an analysis of the particular environment and its specification.

In my opinion, the creation of bodies responsible for particular actions connected with counteracting money laundering (such as the General Inspector of Financial Information), seems to be a beneficial development, and the number of actions undertaken thereby proves that the work of such novel bodies is effective and can be a successful weapon against terrorism on the financial level. As the problem of terrorism and money laundering grows, the involvement of bodies other than special services should be regarded positively. Again, success in

[50] J. W. Wójcik, *Przeciwdziałanie finansowaniu*…

[51] M. Smolar, *Formy zwalczania procederu prania brudnych pieniędzy*, at https://webcache.googleusercontent.com/search?q=cache:YzRok0X3vn4J:https://www.abw.gov.pl/download/1/1292/Segregator21.pdf+&cd=1&hl=pl&ct=clnk&gl=uk&client=safari (visited September 20, 2016).

this area is dependent upon the existence of cooperation between multiple agencies and their counterparts in different countries.

The arguments given above prove that an effective fight against the expansion of terrorism, when it comes to the banking sector, should be based on a number of premises. First of all, special education of employees (as well as clients) of financial institutions and banks is necessary, as they are responsible for monitoring and discovering activities potentially related to money laundering and terrorism financing. Very often the first barrier for successful terroristic activity can be created by a human act. Legislation and institutional systems in Poland should be supported by the activity of properly prepared professionals, since supervision, control and cooperation with relevant public organs, and between employees and clients, is needed. In the past, various special projects were introduced in order to secure the appropriate functioning of banks. Worth mentioning is *Poznaj swojego klienta* (*Know your customer*) – a promising initiative focused around identifying clients. Special standards were created to prevent money laundering and other crimes. Some of the most common facets of the procedure are:

− identifying the documents of clients with regard to banking regulations;

− executing other verificatory measures, for example: making phone calls or imparting letters with special offers to clients;

− recognizing and understanding the type of business activity and transactions conducted by the client[52].

With the growing problem of terrorism, its development and professionalism, modern long-term actions, methods of identification and initiatives are needed. Especially, research into new technologies and areas which require wide knowledge and instruments as well as specialist experience, is essential. In the modern world, where an increasing amount of business takes place online, with anonymity and secrecy, it is necessary for the legislator and services to be familiar with the innovative methods of offenders. One of the important aspects is also the need to activate the social element – citizens should be educated and encouraged to collaborate with the state to avoid the negative influence being exerted not only on their own interests, but also on the welfare of the country as a whole.

Summary

One of the main issues connected with terrorism – a "crime without borders", a complex phenomenon the definition of which has proven elusive, is terrorism financing and money laundering.

[52] J. W. Wójcik, *Pranie pieniędzy. Studium prawno-kryminologiczne i kryminalistyczne*, Toruń 1997, pp. 359–360.

The Polish legislator – in the Polish Banking Law – imposes on banks (within the scope of their legal definition) a duty of counteracting money laundering and terrorism financing, which corresponds with the significant role of banks and other financial institutions when it comes to the prevention of terrorist crimes.

On the basis of the Act on Counteracting Money Laundering and Terrorism Financing, a special system was created – the aim of the regulations is to facilitate successful performance by banks of their duties. In the Act, the office of the General Inspector of Financial Information was created, with an important task of controlling the realization of banks' duties, as well as cooperation with relevant services and improvement of international antiterrorist activity.

Beyond any doubt, the functioning of the Polish system could be guaranteed by broader legal and institutional frameworks on an international level, the achievement of which is contingent upon the activity of the European Union and the United Nations. A significant element in the fight against terrorism financing crimes is also proper training of the banking sector employees and officers, as well as ensuring proper communication and cooperation between them.

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KEYWORDS

banking law, financing, money laundering, terrorism

SŁOWA KLUCZOWE

prawo bankowe, finansowanie, pranie pieniędzy, terroryzm

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LEGAL APPROACHES AGAINST TERRORIST ATTACKS – FUNDAMENTAL FACETS OF AN EFFECTIVE CRIMINAL JUSTICE RESPONSE

1. INTRODUCTION: 21ST CENTURY – THE ERA OF TERRORISM

Terrorism is a form of a collective system that pretends to attain a particular position in the public sphere by seeking to attack, provoke and challenge state power. As a form of communication, terrorism uses various methods of violence as means of political signalling. More distinctively, terrorists send messages not only to their followers but also to their enemies, by using language of senseless brutality. As a consequence, the seemingly random nature of attacks generates mass fear among people. This exemplifies why terrorist crimes inflict more harm than "common' crimes and why they should be punished more harshly[1].

Evidently, the danger of terrorist organizations lies in their potential to commit an attack against the state, which results in much greater atrocities than it might have caused to individual targets[2]. Therefore, a preventive response and collective security are the key terms in international criminal law policy in today's world. Nevertheless, it should be emphasized that the "legal culture" of criminal policy should be clearly defined and carefully interpreted, as the stability of natural law must be guaranteed[3].

The focus of concern of this work is to introduce up-to-date legislative mechanisms as well as procedures used by governments to combat terrorism and ensure worldwide peace along with international cooperation. Firstly, it outlines the importance of a balance between national security and civil liberties as well as the principle of proportionality of state action while combating terrorism. Sec-

[1] M. C. Meliá, *Terrorism and Criminal law: the dream of prevention, the nightmare of the rule of law,* "New Criminal Law Review" 2011, Vol. 14, No. 1, pp. 117–119.

[2] M. C. Meliá, *The wrongfulness of crimes of unlawful association*, "New Criminal Law Review" 2008, Vol. 11, No. 4, p. 587.

[3] W. Hassemer, J. Y. Choi, *Criminal law facing a new challenge*, "Corea Univesity Law Review" 2007, Vol. 2, p. 16.

ondly, by drawing upon real-life examples of Great Britain, Germany and Poland, this work examines the kinds of counter-terrorism policies that have been introduced by modern democratic states based on the rule of law. By reference to the global strategy implemented by the United Nations, the paper will also analyse how these countries manage to furnish an effective criminal justice response to terrorism. Furthermore, historical background as well as the impediments concerning the practical use of anti-terrorist action will be discussed in order to explain their profound impact on the character of a criminal justice response towards terrorism.

The aim of this work is to analyse the aforementioned governments' policies and spell out their legislative solutions. As a result, this work determines the instruments that would both ensure an effective criminal justice response and preserve the civil rights derived from the principles governing a democratic state ruled by law.

2. HISTORICAL BACKGROUND

Use of terrorism as a political cause has accelerated in recent years. Modern terrorism largely came into being after the Second World War with the rise of nationalist movements in the former European empires. The attacks of September 11, 2001 marked a turning point in world history and the beginning of the "War on Terror". The 9/11 attacks are estimated to have killed 3000 people, making it the deadliest terrorist incident in human history[4]. History shows that before 9/11, terrorism was perceived as a regional issue (the Basque region, Northern Ireland) related to groups of extremists and fundamentalists (RAF, IRA) rather than as an international threat to worldwide security[5]. In today's state of affairs, after experiencing acts of terror from 1990s till the most recent ones committed in France and Belgium (2016), our perception of world security has altered severely.

It can be assumed that the sudden change in our perception of terrorism occurred mainly after the 9/11 attacks. The world was neither safer nor more dangerous on September 12th than it was on September 10th, it was merely our awareness of the danger that was different. It seems that it was not the world, but people themselves who changed their outlook on the ways of ensuring worldwide peace[6]. As argued by Otto Schilly, the change of the world's understanding has been deeply influenced by the chosen point of the attack. New York City

[4] M. Nagdy, M. Roser, *Terrorism*, 2016, at https://ourworldindata.org/terrorism/ (visited July 10, 2016).

[5] O. Lepsius, *Liberty, Security and Terrorism: The Legal Position in Germany*, "German Law Journal" 2004, Vol. 5, No. 5, p. 438.

[6] Note: *Responding to Terrorism: Crime Punishment and War*, "Harvard Law Review" 2002, Vol. 115, No. 4, pp. 1235–1238.

is a desired symbol of freedom, democracy and international cooperation. These occur to be virtues of immense importance to all human beings but also turned out to be major targets of terrorism. As a result, the 9/11 attacks left a permanent scar in the historical consciousness of humanity[7].

What is more, the phenomenon of globalization has brought both merits and perils to the world. Mass mobility of people, goods, services, transport and technology has not only conduced to economic prosperity but also to a great influx of migrants through open borders. Therefore, globalization might have contributed to social anxiety and an increase in crime rates[8]. Due to the continuing refugee crisis and the existence of numerous areas being home to a lot of Muslim migrants (including e.g. Molenbeek in Brussels or the *banlieues* in Paris), some regions of Europe have become permanent places of residence for jihadist fighters who travel to the Middle East to join terrorist organisations and as "trained" terrorists return to Europe. As a consequence of these recent developments, Western countries may have become a breeding ground for terrorism.

According to the Global Terrorism Index, since 2000 there has been an over nine-fold increase in the number of people killed by terrorism. In fact, the largest year-to-year increase in deaths from terrorism was recorded in 2014, when the number raised to 32,685 of total deaths. Additionally, it is noteworthy that a trend shows the spread of terrorism is notably increasing – in 2012 there were 81 countries which experienced terrorist attacks, whereas in 2014 that number increased to 93 countries[9].

Recent measurements concerning terrorism activity also highlight the character of terrorism in Western countries. As it has been shown, lone wolf attackers are the ones who perpetrate most terrorist acts whilst driven by political extremism, nationalism or other forms of supremacy, rather than Islamic fundamentalism[10]. It has also been observed that refugee activity and internal displacement are the key incentives which drive terrorists to action – they are correlated with the spread of political violence, governments' instability, as well as the involvement of states in regional or international conflicts[11].

From the perspective of the 21st century, we can clearly observe a striking change in the character of terrorism: it feeds on the technological and communicational progress achieved in the era of globalization and liberalization, which widens the scope of its actions dramatically. The first legal approach to the idea

[7] O. Lepsius, *Liberty, Security and Terrorism*..., p. 437.

[8] L. Zedner, *Security, the state, and the citizen: the changing architecture of crime control*, "New Criminal Law Review" 2010, Vol. 13, No. 2, pp. 380–381.

[9] Note: *Global Terrorism Index Report 2015*, Institute for Economics & Peace 2015, pp. 9–18. Published at http://economicsandpeace.org. Retrieved from: http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf (visited July 10, 2016).

[10] *Ibidem*, pp. 54–56.

[11] *Ibidem*, p. 5.

of an anti-terrorist "response" was based on a reaction to already existing problems. Nonetheless, subsequent regulations focus on preventing actions rather than reacting to already committed crimes. A modern response to terrorism means overcoming and preventing crises rather than dealing with their consequences. Historically, we can observe a number of responses to terrorism. To mention only the crucial ones, they have included a military response, the use of negotiation[12] and the use of international conventions to create norms that would world-widely oppose terrorism (states' anti-terrorism measures include extended powers of investigation, prolonged detention of suspects and special trial conditions)[13]. This work focuses mainly on representing international agreements as well as domestic policy of the chosen countries, which exemplify various approaches to the anti-terrorism resolution.

3. FUNDAMENTALS: COPING WITH TERRORISM AND SUSTAINING DEMOCRACY

The issue concerning a "good" counter-terrorist war can be traced back to the traditional just war theory. From the dawn of history, with its roots in writings of St. Augustine, philosophers and jurists have strived for consistency in defining the conditions under which war is permissible and properly executed[14]. Although it is still a disputable issue, there are universal rules which must be followed in order for an effort to qualify as a genuinely justified war: it should have just aims and intentions (e.g. self-defence); it should be legally declared and supported by a state's society; it should be conducted with a probable chance of success to minimise human suffering and with respect for the safety of non-combatants. Moreover, it should be undertaken as the last resort, when all peaceful means have been used[15]. As it is explained in the following paragraphs, the ideas of balance and proportionality in combating terrorism clearly fulfil the conditions introduced by the just war doctrine.

A question arises as to whether and to what extent it is indispensable to curtail civic and human rights in order to efficiently combat terrorism. An answer can be given by quoting Australia's Attorney-General Phillip Ruddock, who exemplified

[12] One example of military response is the US action against the Taliban, who harbored the al Qaeda, whereas the use of negotiation may relate to Great Britain's secret talks with the IRA leading to Good Friday Agreements.

[13] C. Warbrick, *The European Response to Terrorism in an Age of Human Rights*, "European Journal of International Law" 2004, Vol. 15, No. 5, pp. 990, 1002, 1017.

[14] R. Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism*, Manchester 2005, p. 124.

[15] *Ibidem*, pp. 124–125.

most common 'targets' of terrorist attacks: "The terrorists are driven by ideological obsession and a desire to destroy Western liberal democratic societies. They want to wage war against all those who do not conform to their perverted and corrupted view of Islam. All countries and people who value peace and freedom are terrorists' targets[16]".

As liberal democratic states have become the main enemy of terrorism, they can act as the only rightful weapon to combat it. It is a balance that countries should strike to guarantee mechanisms which both enable states to respond effectively to the terrorist threat and protect the individual from abuse of power by government. More distinctively, it is the balance of interests between national security and civil liberties. Harsh security laws countering the immediate dangers of terrorism, even if effective, do not outweigh the long-term consequences of curtailment of fundamental rights and liberties[17]. It is assumed that the goal of terrorism is to induce governments to abide by 'rule of law' policies and engage them in a self-destructive practice of adopting extreme measures. That is why states should combat terrorism without introducing draconian criminal restrictions, which would only give terrorist organisations more reasons to fight them back[18].

The control of terrorism, as well as any other crime control which underpins any criminal justice system, must be consistent with the social and political heritage of one's country. As a result, the justice system needs to achieve a harmony between competing values of public order and safety (which are supposed to be ensured by crime control) as well as protection of rights and liberties of an individual. Fundamental freedoms cannot be sacrificed in the name of public order, but, on the other hand, they cannot be sufficiently safeguarded if public order and safety are about to collapse. Therefore, these opposing values render the criminal justice response so complex to carry through[19].

Nevertheless, one can ask if there is any alternative to the "balancing" approach. Until 2001, scholars contributed to the development of three different approaches to measuring proportionality in terms of facing terrorism attacks[20]. The first one, the

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[16] Nevertheless, it is important to point out that Ruddock in the same speech supported the new anti-terrorism laws, which justifies the curtailment of civil rights to combat terrorism by stating: "we must recognize that national security can in fact promote civil liberties by preserving a society, which rights and freedoms can be exercised".

[Speech of:] P. Ruddock, *International and Public Law Challenges for the Attorney-General*, Centre for International and Public Law, Australian National University, Canberra, June 2004. Published at https://law.anu.edu.au. Available at https://law.anu.edu.au/sites/all/files/cipl/04_ruddockspeech_8june.pdf, (visited July 10, 2016).

[17] C. Michaelsen, *Balancing civil liberties against national security? A critique of counter-terrorism rhetoric*, "UNSW Law Journal" 2006, Vol. 29, No. 2, p. 21.

[18] M. C. Meliá, *The wrongfulness of crimes...*, p. 119.

[19] L. F. Travis III, *Introduction to Criminal Justice*, 6th ed., Newark, NJ 2008, pp. 26–27.

[20] M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford 2015, p. 1199.

so called "eye to eye approach", verifies whether a defensive response is necessary to reasonably deter or abate aggressive actions[21]. Another one relates to "cumulative proportionality", which states that in case of a series of attacks, the cumulative effect thereof may justify a single defensive response of a greater impact[22]. The third one, "deterrent proportionality", checks if a defensive response brings a sufficient impact to deter terrorists from planning future attacks[23].

The "proportionality test" is also used by German constitutional jurisprudence[24]. In short, it consists of three requirements: suitability, necessity and appropriateness, which must be fulfilled in order to introduce any adequate curtailment of constitutionally protected civil rights. The first one stands for governmental usage of such legislative measures that are suitable to achieve desired results. The second condition relates to the scope of government intervention – it examines if there was a chance of accomplishing the same aim without unwarranted interference or by implementing a less drastic measure. The last requirement is associated with proportionality of government action to the freedoms that are curtailed; it means that legislative action is unacceptable if the burden ultimately created is disproportionate to the purpose of the measure[25].

It stands beyond question that in a liberal democratic state it is a fundamental duty of the government to protect its citizens and guarantee them not only security but also freedom of licit actions by respecting civil and human rights. As far as personal freedom is concerned, a certain degree of security and personal safety is needed for its realisation. Consequently, liberty can be perceived as one of the preconditions of security[26]. As a matter of fact, a criminal justice response should not be perceived as protection only from physical harm, which ignores other, equally important aspects of human security that prevent the state from undertaking any oppressive action towards the individual. As Miriam Gani has stated, it is improper and misleading to highlight one feature of human security

[21] For a further assessment of the "eye-to-eye approach" see Gregory Intoccia's article on the 1986 American bombings in Libya: G. F. Intoccia, *American Bombing of Libya: An International Legal Analysis,* "Case Western Reserve Journal of International Law" 1987, Vol. 19, pp. 205–206.

[22] Guy Roberts used a "cumulative proportionality" test while assessing peacetime reprisals under the UN Charter. For more, see G. B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, "Case Western Reserve Journal of International Law" 1987, Vol. 19, pp. 284–286.

[23] To examine more applications of "deterrent proportionality" see also: A. Coll, *Military Responses to Terrorism: The Legal and Moral adequacy of Military Responses to Terrorism,* "American Society International Law Proceedings" 1987, Vol. 81, pp. 297–299.

[24] Goerlich, while relating to the "proportionality test", underlines that an individual is a "part of community, not isolated but embedded in a number of structures and interactions which are supported by law". For further reading see H. Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, (in:) U. Karpen (ed.), *The Constitution of the Federal Republic of Germany*, Baden-Baden 1988, pp. 45–66.

[25] C. Michaelsen, *Balancing civil liberties against...*, p. 20.

[26] *Ibidem*, p. 5.

at the expense of others. This line of reasoning resembles the idea that a policy which does not respect human rights in the first place cannot legitimately claim to protect these rights against international security threats[27].

4. UNITED NATIONS' AND SELECTED COUNTRIES' RESPONSES TO TERRORISM

4.1. UNITED NATIONS: GLOBAL COUNTER-TERRORISM STRATEGY

All United Nations activities and programs must be performed in accordance with the rule of law, which basically means fulfilling a list of enumerated obligations. The guiding principles consist of such regulations that obligate UN assistance to e.g. be based on international standards and political country context[28]. It can be stated with certainty that these obligations stand for preserving an accurate balance between helpful assistance and necessity of intervening in the internal affairs of a state. In 2006, the United Nations General Assembly adopted the Global Counter-Terrorism Strategy. The strategy appears to be a crucial global instrument to enhance national, regional and international efforts to counter terrorism. The Global Counter-Terrorism Strategy is in the form of a resolution and an annexed Plan of Action (A/RES/60/288) is composed of 4 pillars addressing, firstly, the conditions conducive to the spread of terrorism; secondly, the measures to prevent and combat terrorism; thirdly, the standards to be ushered in to build states' capacity and strengthen the UN system to ensure the success of the second pillar, and, lastly, to preserve respect for human rights, which occurs to be the fundamental basis for the fight against terrorism[29].

The first pillar underlines the importance of conflict prevention, negotiation, judicial settlement, the rule of law as well as peacekeeping in order to contribute to successful prevention and peaceful resolution of prolonged unresolved conflicts. Moreover, it aims at promoting a culture of peace, justice, mutual respect among civilizations, cultures, peoples and religions. The second pillar addresses mainly the ways to prevent and combat terrorism by denying terrorists access

[27] *Ibidem*, pp. 6–7.

[28] See Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance, April 14, 2008, pp. 1–2. Published at https://www.un.org. Available at https://www.un.org/ruleoflaw/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf (visited July 10, 2016).

[29] UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, Resolution adopted by the General Assembly, A/RES/60/288, September 20. 2006, pp. 1–3. Published at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement (visited July 10, 2016).

to the means which enable them to carry out attacks. It relates to not tolerating any terrorist activities on states' territories (terrorist training camps, preparation or organization of attacks) and the rightful apprehension and prosecution or extradition of perpetrators of terrorist acts. It also aims at strengthening international cooperation in combating terrorist crimes between states. The third pillar is recognized by UN policies as the most crucial one – it depicts the importance of capacity-building of all states as a core element of the global counter-terrorism effort. It consists of global cooperation of states, the United Nations and international organizations (including, *inter alia*, the World Bank, the World Health Organization, the International Maritime Organization, and the International Criminal Police Organization) in countering terrorism. Last but not least, the fourth pillar stands for ensuring respect for human rights by calling them the fundamental basis for the fight against terrorism. The pillar exemplifies the idea that counter-terrorism actions and protection of human rights are not conflicting goals, but the contrary – they mutually reinforce the need to promote and cherish the rights of victims of terrorism. It underlines that state actions taken to combat terrorism are determined by international law, in particular human rights law, refugee law and international humanitarian law[30].

According to the UN criminal strategy, an effective criminal justice response integrates the rule of law and human rights standards in order to convey all moral virtues superior to those of terrorists who attack civilians. Most notably, the United Nations emphasizes the importance of preventive actions and implementation of forward-looking strategies rather than responsive policies, calling it the "proactive law enforcement". Taking it into account, the UN strives to introduce in all member states universal conventions concerning investigation and prosecution of terrorists. Therefore, mandatory criminalization of certain types of behaviour, such as terrorist financing, *association de malfaiteurs*, support for terrorism offences or preparation of terrorist acts, has become the utmost priority in harmonizing criminal law and other international standards[31].

4.2. POLAND

The first steps of Polish counter-terrorism legislation occurred in the socialist era. Since then it has been evolving thanks to the changing states of affairs. The first step, undertaken by the Polish People's Republic, was aimed at unifying

[30] *Ibidem*, pp. 4–9.

[31] UN Office on Drugs and Crime, *Preventing terrorist acts: criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments*, New York 2006, pp. 8–22. Published at https://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf (visited July 10, 2016).

Polish regulations with the universal jurisdiction of multilateral United Nations sector conventions[32]. After 1989, Poland widened its catalogue of antiterrorist UN conventions[33] and as a new member of the Council of Europe (November 1991) adopted the European Convention on the Suppression of Terrorism. Subsequently, after the country's accession to the European Union (May 2004), Poland began the process of implementation[34] of the basic EU regulations[35].

In contrast to German law, Polish legislation provides a definition of a terrorist offence in Article 115 § 20 of the Polish Criminal Code. Polish lawmakers defined a terrorist offence as a prohibited act, which is subject to imprisonment with the upper limit of at least 5 years, committed for one of three purposes. These aforementioned acts consist of serious intimidation of many people; compelling a public authority of the Republic of Poland or another international organization or authority to take or refrain from certain activities; and calling a serious disturbance in the system or the economy of the Polish Republic, another country or an international organization – as well as threats to commit such an act[36].

New Polish anti-terrorism law entered into force on July 2, 2016, only a few months after an initial draft was proposed. The rushing of legislative measures was the result of upcoming international events organised in Poland – the North Atlantic Treaty Organisation (NATO) Summit and the World Youth Day in Cracow in July 2016[37]. These events, which welcomed notable world leaders and millions of international pilgrims, required special preparation with intelligence service coordination for potential security threats.

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[32] These included: *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, September 14, 1963), *Convention for the Suppression of Unlawful Seizure of Aircraft* (Hague, December 16, 1970), *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, September 23, 1971), *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats Agents* (New York, December 14, 1973) and *Convention on the Physical Protection of Nuclear Material* (Vienna, March 3, 1980).

[33] These included: *International Convention against the Taking of Hostages* (New York, December 17, 1979), *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (Rome, March 10, 1988) and *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* (Rome, September 10, 1988). Today, all these UN conventions form a full catalogue of antiterrorist acts. See United Nations Treaty Collection – Text and Status of the United Nations Conventions on terrorism – at http://www.un.org/en/counterterrorism/legal-instruments.shtml (visited July 10, 2016).

[34] For example: *Council Framework Decision of 13 June 2002 on combating terrorism* (2002/475/HA).

[35] P. Daranowski, (in:) K. Roach (ed.), *Comparative Counter-Terrorism Law*, Cambridge 2015, pp. 425– 428.

[36] Polish Criminal Code of June 6, 1997, art. 115 § 20.

[37] Polish Press Agency, *New anti-terrorism laws in force for WYD 2016*, February 2, 2016. Available at http://www.pap.pl/en/news/poland/news,464454,new-anti-terrorism-laws-in-force-for-wyd-2016---ministry.html (visited July 10, 2016).

In a nutshell, the new Act on Anti-Terrorist Activities aims at integrating the Polish protection system by introducing sufficient coordination mechanisms and management of transmission of information among existing agencies. More accurately, it includes the introduction of remand for up to 14 days before judicial review occurs, immediate expulsion from Poland once somebody is thought to be a threat to national security, as well as temporary closure of borders in the event or a risk of terrorism. Moreover, security services are allowed to conduct surveillance of foreign citizens for as long as 3 months without prior court approval. Under this regulation, the Internal Security Agency will have easier access to databases which would include their ability to control foreigners' telephone conversations, emails and to wiretap telecommunication devices. Last but not least, the law enables, under certain circumstances, the police and border guard officers, ISA agents as well as soldiers of the Armed Forces to use a weapon against a person being in the process of committing an act of terrorism, which may cause their death or a direct threat to their life or health[38].

The new surveillance law in Poland raises concerns in terms of undermining the privacy rights of citizens and foreigners by, *inter alia*, increasing government's access to digital data[39]. Worth considering is also the complaint of the Polish Ombudsman against the new anti-terrorist law to the Constitutional Court. Adam Bodnar claims that this document contains some legal defects and infringements of the Constitution as well as the EU's Charter of Fundamental Rights and the European Convention on Human Rights[40]. First of all, he argues that despite the significant aim of the law to strengthen the anti-terrorist protection system as well as ensure public safety, it is imprecise and too general. According to the Ombudsman, the regulations fail to explain exhaustively who and for what reason can be controlled by secret services, nor does it precisely define what an act of terrorism means. Consequently, the law enables special services to gain wide-ranged and uncontrolled competences, which may result in arbitrary or unjustified decisions. The complaint underlines that the flaws of the new law are caused by an unnecessary rush of the government and its ignorance towards remarks made by experts as well as social organisations. The legislative procedure was

[38] Act on Anti-Terrorist Activities of June 10, 2016, Journal of Laws of the Republic of Poland, item 904.

[39] L. Tomkiw, *Poland's New Surveillance Law Is Latest Controversial Legislation Passed By Law And Justice Party*, "International Business Times", May 2, 2016. Available at http://www.ibtimes.com/polands-new-surveillance-law-latest-controversial-legislation-passed-law-justice-2295539 (visited July 10, 2016).

[40] *Rzecznik Praw Obywatelskich skarży ustawę antyterrorystyczną do Trybunału Konstytucyjnego*, official announcement on the Polish Ombudsman's website, July 11, 2016. Available at https://www.rpo.gov.pl/pl/content/rzecznik-praw-obywatelskich-skarży-ustawę-antyterrorystyczną-do-trybunału-konstytucyjnego (visited July 10, 2016).

said to be inadequate to the seriousness of the aim and the matter regulated by the counter-terrorism law[41].

It seems that, in the eyes of non-governmental organisations and the Ombudsman, Polish lawmakers may have fallen short of achieving a healthy balance between national security and civil liberties. The interim merit of preventing terrorist attacks, ensured by harsh and repressive regulations, would be just a short-term solution that cannot guarantee public order and civil safety for a long time without violating the democratic system. What is more, implementing regulations of such importance in a rush and without resorting to expert opinions may have perpetuated distrust among the public opinion towards the legal processes of the government.

4.3. GERMANY

The shock of 9/11 attacks has profoundly influenced the security and control policies in Germany, especially after realizing that this act of terrorism was planned in Hamburg[42]. After 9/11, the German Parliament enacted statues with harsher preventive and repressive measures, which included stronger surveillance, control by the police and introduction of intelligence agencies[43]. Still, it is worth mentioning that there is no legal definition of terrorism in German law – only in several parliamentary documents (Bundestags-Drucksache) it is described as an international threat, supported by a supra-national network of logistical alliances and operative structures[44]. German legislation wanted to strengthen cooperation between the police, prosecution services and intelligence agencies nationally and internationally. Major German intelligence agencies may request data from banks, financial institutions, post offices, telecommunication companies and airlines[45].

In 2002, Security Packages I and II were enacted. These included a wide range of control mechanisms which enabled security agencies to use them while trying to find wanted persons. The activity of extremist organisations was banned. In fact, after the introduction of this new legislation, human rights groups placed Germany in the top five of the list of nations responsible for curtailing civil liberties after 9/11[46]. Moreover, Germans must tolerate the collection and recording of

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[41] Complaint of the Polish Ombudsman to the Constitutional Court, VII.520.6.2016.VV/AG. Available at https://www.rpo.gov.pl/sites/default/files/Wniosek%20do%20TK%20w%20sprawie%20ustawy%20antyterrorystycznej%2011%20lipca%202016.pdf (visited July 10, 2016).

[42] C. J. M. Safferling, *Terror and Law: German Responses to 9/11*, "Journal of International Criminal Justice" 2006, Vol. 4, No. 5, p. 1153.

[43] One of the most important ones was the Suppression of Terrorism Act (*Terrorismusbekämpfungsgesetz*) enacted on January 9, 2001.

[44] *Ibidem*, p. 1156.

[45] *Ibidem*, p. 1159.

[46] L. Jarvis, M. Lister, *Anti-Terrorism, Citizenship and Security*, Manchester 2015, p. 30.

personal data including fingerprints and biometric data on their passports as well as ID-cards[47].

One of the solutions undertaken by the German Parliament was to establish the Aviation Security Act (2005), whose purpose was to ensure security of the airspace against hijacking, sabotage and terrorism. It aimed at implementing harsher security screenings and other military measures to be taken by the federal government concerning aboard terrorism. The Act contained section 14(3), pursuant to which, whilst an aircraft is being hijacked, the defence minister has a power to force it to land, use a threat of launching anti-aircraft weapons and ultimately to shoot down the civilian passenger plane if it can be assumed that it has been transformed into a weapon "against human life"[48]. In fact, the Federal Constitutional Court stated that section 14(13) of the Act violated art. 35 of the Grundsetz (German Federal Constitution) – domestic security is a matter for federal states and not the federal government. Additionally, it impinges upon the right to life according to art. 2(1) and dignity of the person under art. 1(1) of the Grundsezt. In 2005, it was declared to be unconstitutional because of the aforementioned issues together with the fact that, by virtue of art. 87a (1), armed forces can be used only for the sole purpose of defensive operations or in order to avert an imminent danger to the existence of the free democratic order of Germany or one of its states[49]. Additionally, an order carried out on the basis of section 14(3) may turn out to be inadequate to the danger posed by a plane hijacked by terrorists.

Moreover, the Federal Constitutional Court declared another piece of legislation, the Federal Criminal Police Office Act (2009), partially unconstitutional in 2016. In order to omit fragmentation of competences, the act transferred most prerogatives in the realm of combating terrorism to the Federal Criminal Police Office – these included special surveillance based on observation, audio and visual recording of private homes and general monitoring of other confidential situations without judicial approval at all or one month after detection. The Constitutional Court ruled that some provisions concerning investigative powers do not conform to the principle of proportionality, rendering the surveillance system unspecific and too broad. Citizen freedoms prescribed in art. 13 (inviolability of the home) and 10 (secrecy of telecommunications) of the German Grundsetz were deemed to be threatened[50].

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[47] C. J. M. Safferling, *Terror and Law*..., pp. 1158–1159.

[48] Act on the Reorganisation of Aviation Security Tasks (German: *Luftsicherheitsgesetz*) of January 11, 2005, BGBI I, No. 78.

[49] R. Youngs, *Germany: Shooting down aircraft and analyzing computer data*, "International Journal of Constitutional Law" 2008, Vol. 6, No. 2, pp. 332–335.

[50] J. Gesley, *Germany: Federal Constitutional Court Declares Terrorism Legislation Partially Unconstitutional*, "Global Legal Monitor", The Library of Congress, April 20, 2016. Available at http://www.loc.gov/law/foreign-news/article/germany-federal-constitutional-court-declares-terrorism-legislation-partially-unconstitutional/ (visited July 10, 2016).

In June 2015, another German anti-terrorism legislation, which implemented the "Foreign Terrorist Fighters" resolution of the UN, entered into force[51]. The new law focused mostly on penalizing traveling outside of the country with the intent of receiving terrorist training (art. 89a of the German Criminal Code) as well as terrorist financing (art. 89c). The justification for introducing these laws lies in governmental statistics which show that the number of Germans travelling to join the Islamic suddenly rose from 550 in January 2015 to 700 in June 2015[52]. Still, some opponents, like van Lijnden, have accused the Act of being unconstitutional, as it pre-emptively criminalizes behaviour that does not fulfil all elements of an offence[53].

The most recent German package of anti-terrorist laws is called the Act to Improve Information Exchange in the Fight Against International Terrorism, which entered into force on July 30, 2016. It amends several existing acts[54] and gives German domestic intelligence agencies more means of control to effectively oppose international terrorism[55]. The law aims at strengthening the federal government's intelligence services and executes an expansion of the system of international information-sharing between foreign intelligence agencies by authorising the Federal Office for the Protection of the Constitution to create and make use of a common database. Moreover, the regulations introduce tightened means of control of prepaid mobile phones by obliging telecommunications companies to verify the identity of their customers so that authorities will be able to match a phone number to an individual during an investigation[56].

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[51] The document is called the Act on Amending the Crime of Preparation of a Serious Violent Offence Endangering the State.

[52] J. Gesley, *Germany: New Anti-Terrorism Legislation Entered Into Force*, "Global Legal Monitor", The Library of Congress, July 10, 2015. Available at http://www.loc.gov/law/foreign-news/article/germany-new-anti-terrorism-legislation-entered-into-force/ (visited July 10, 2016).

[53] C. B. van Lijnden, *Strafbarkeit im Vorfeld des Vorfeldes?*, "Legal Tribune Online", February 4, 2015. Available at http://www.lto.de/recht/hintergruende/h/neues-anti-terror-gesetz-ausreise-strafbar-vorverlagerung/ (visited July 10, 2016).

[54] These include: amendments to the Act on the Federal Office for the Protection of the Constitution, the Telecommunications Act, and the Federal Police Act.

[55] *Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus of 29 July 2016* [Act to Improve Information Exchange in the Fight Against International Terrorism], BGBl I Nr. 37.

[56] J. Gesley, *Germany: Act to Improve Anti-Terror Information Exchange in Force*, "Global Legal Monitor", The Library of Congress, September 8, 2016. Available at http://www.loc.gov/law/foreign-news/article/germany-act-to-improve-anti-terror-information-exchange-in-force/ (visited August 10, 2016).

4.4. GREAT BRITAIN

The history of British legislation concerning terrorism shows that, at the outset, it acted as a response to the attacks of the Irish Republican Army. The Prevention of Violence Act, enacted in 1939, served as a direct ancestor to the Prevention of Terrorism Acts (established between 1974–1989). In the 21st century, these were replaced by a series of Terrorism Acts confronting the threat posed by radical Islamic organisations within the United Kingdom.

To begin with, a striking difference from German and Polish law is that the British legislation provides a legal definition of terrorism in the Terrorism Act 2000[57]. Moreover, it introduces a broad definition of a terrorist[58] as well as the possibility of seizure of terrorist cash or other "terrorist property". The Act enabled the police to keep a terrorist suspect in detention for up to seven days[59], which was doubled by the Criminal Justice Act 2003[60], as well as to arrest a person, "who is reasonably suspected to be a terrorist" without a warrant (Section 41). In 2006, after the London bombings, the British Parliament enacted another Terrorism Act that condemned encouragement of terrorism or other inducement of members of the public, referring to the commission, preparation or instigation of acts of terrorism[61]. Furthermore, it revised the period of detention of terrorist suspects without charges to 28 days[62]. The Terrorism Prevention and Investigation Measures Act 2011 abolished control orders, a product of the Prevention of Terrorism Act 2005, and authorized "terrorism prevention and investigation measures" to be introduced by the Secretary of State only if enumerated conditions were fulfilled, so that it could be justified as a "relevant decision"[63]. The scope of the Secretary of State's powers has been limited: forced relocation, outright bans on Internet access and phone use as well as some prohibitions on association with others were dropped. Nevertheless, numerous preventive regulations remain in place, such as the overnight residence measure (curfew), travel measure (restrictions on leaving a specified area or travelling outside it), electronic communication device meas-

[57] Terrorism Act 2000, s (1): It states that "terrorism" means the use or threat of action where "the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause".

[58] Terrorism Act 2000, s 40(1) and (2): "terrorist" means "a person who has committed an offence under chosen sections of the Act, or is or has been concerned in the commission, preparation or instigation of acts of terrorism – also to a person who has been, whether before or after the passing of the Act".

[59] Terrorism Act 2000, s 41(5) in accordance with s 29(3).

[60] Criminal Justice Act 2003, s 306(4)"(3A)(b).

[61] Terrorism Act 2006, s 1(1).

[62] Terrorism Act 2006, s 23(7)(3)(b).

[63] Terrorism Prevention and Investigation Measures Act 2011, s 2(1).

ure as well as reporting, association or communication with other persons and constant monitoring measures[64].

A striking example of British anti-terrorism legislation concerns the Data Retention and Investigatory Powers Act 2014. The DRIP aims at broadening the security services' access to "relevant communications data", which can be reduced to phone and Internet records of individuals[65]. Although it ensures the appointment of an independent reviewer of investigatory powers, some scholars claim that the DRIP does not strike an appropriate balance between security and privacy. As a result, it may lead to inappropriate and disproportionate retention of data in a democratic society[66].

In July 2015, the High Court in London ruled that the introduced surveillance powers are unlawful and must be restrained. It underlined the importance of complying with European law, particularly Articles 7 and 8 of the EU Charter of Fundamental Rights[67], which represents a strict view on state access to data[68]. Nevertheless, the UK government appealed the judgment to the Court of Appeal. The Court has asked the Court of Justice of the European Union to rule on whether the previous decision was adequate and if the DRIP expanded the scope of art. 7 and 8 of the EU Charter[69]. It will take a considerable amount of time to answer these questions by the CJEU. In actuality, the case has turned out to be even more sophisticated after the UK's EU referendum and the results of the Brexit poll.

Last but not least, one of the latest laws introduced by the Parliament was the Counter-Terrorism and Security Act 2015. The CTSA introduces further temporary restrictions on travel. It enables the government to seize and retain travel documents while a person is suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity[70]. Besides, the law allows the Secretary of State to impose a "temporary exclusion order", which bars an individual from returning to the UK until they meet certain conditions – these

[64] M. Ryder, *Control orders have been rebranded. Big problems remain,* "The Guardian", January 28, 2011. Available at https://www.theguardian.com/commentisfree/libertycentral/2011/jan/28/control-orders-protection-of-freedoms-bill (visited July 10, 2016).

[65] Data Retention and Investigatory Powers Act 2014, s 1 and s 2.

[66] G. N. La Diega, *Striking a Balance among Security, Privacy and Competition*, "Diritto Mercato Tecnologia", January 1, 2015. Available at http://www.dimt.it/2015/01/21/striking-a-balance-among-security-privacy-and-competition-the-data-retention-and-investigatory-powers-act-2014-drip/ (visited July 10, 2016).

[67] Art. 7, 8 of UE Charter stand for a right of everybody to privacy and protection of personal data.

[68] *R. (on the application of Davis) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin). The judgement is available online at https://www.judiciary.gov.uk/wp-content/uploads/2015/07/davis_judgment.pdf (visited July 10, 2016).

[69] Pinsent Masons, *EU court hears case on UK data retention laws*, "Out-Law.com", June 12, 2016. Available at http://www.out-law.com/en/articles/2016/april/eu-court-hears-case-on-uk-data-retention-laws/ (visited July 10, 2016).

[70] Counter-Terrorism and Security Act 2015, s 1.

address mostly the suspicion that the individual is, or has been, involved in terrorism-related activity[71].

5. DIFFICULTIES CONCERNING INVESTIGATION AND PROSECUTION OF TERRORISTS

Undoubtedly, there is a clear surge among policy makers of early investigative mechanisms. Today's forms of terrorism relate mostly to lone wolf attackers, so called "sleepers" and suicide bombers. It is hard to predict when and how a terrorist attack will be carried out – it can actually be perceived as a fight against unknown. That is why many policies aim at extending the borders of criminalization by covering chains of preparations in order to prevent further terrorist actions, especially violent attacks against the public.

The change of character of so called 'new terrorism' can be easily explained by an example from German law, which aims at blocking the terrorist threat of the German Red Army Fraction. In the 1970s legislators established section 129a in the German Criminal Code, which severely punishes forming a terrorist group. The focus of the provision is to protect the community from terrorist groups by arresting its founders, members or supporters, and to hold them criminally responsible for being part of the organisation[72]. Nevertheless, today's forms of terrorist attacks differ significantly from the ones envisioned by that legislative initiative. Terrorism has evolved from specific perpetrators and organized groups to decentralized, impersonal networks whose actions are motivated by the spread of Islamic fundamentalism[73]. Contemporary terrorism has started to resemble underground resistance organisations, in which arrested members are easy to replace without the threat of their confidential information spreading. Thus, it seems reasonable to assume that criminal law can often be ineffective against modern terrorism without the introduction of punishment for planning and preparing acts of terror by decentralized groups, which still respects the frames of constitutional law[74].

Moreover, we can observe many issues concerning the prosecution of terrorists. To begin with, an alleged act of terrorism is not an isolated incident, but one that originated in a complex organized structure and therefore testimony of group

[71] Counter-Terrorism and Security Act 2015, s 2.

[72] L. Wörner, *Expanding Criminal Laws by Predating Criminal Responsibility – Punishing Planning and Organizing Terrorist attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism*, "German Law Journal" 2012, Vol. 13, No. 9, p. 1042.

[73] O. Lepsius, *Liberty, Security, and Terrorism*..., p. 438.

[74] L. Wörner, *Expanding Criminal Laws by Predating Criminal*..., p. 1043.

members is extremely rare. This can be usually obtained by offering a mitigation of punishment in return for cooperation. Though it must be underlined that internal evidence can be acquired only through informants that usually would risk their lives while giving testimony at trial. The usage of hearsay evidence may introduced, however its importance is said not to be very high. Additionally, external evidence (which means one that is not directly related to the terrorist) has usually weak circumstantial value as well. Last but not least, investigative difficulties are deepened by new evolving forms of terrorist organizations. Investigations and trials are a time-consuming and expensive matter, and problems are exacerbated by the problematic flow of information between intelligence services from different states[75]. The accurate response to these obstacles lies in constructing global mechanisms which would unify the procedural differences as well as simplify international cooperation in investigating terrorist criminals and potential terrorists[76].

6. CONCLUSIONS

In today's world, newly implemented legislative regulations aim at destroying the emergence of terrorism. It is beyond question that the reason behind states' efforts to combat terrorism is its duty of protecting life and other personal and material rights of citizens by resorting to prevention rather than counteraction. Criminal justice responses have changed their direction from sanctioning committed crimes to averting the danger of their occurrence. In other words, instead of responding to illicit behaviour as an *ultima ratio*, the criminal law has employed more prognostic thinking, which strives to prevent "a future wrong".

Nevertheless, legal regulations discussed above prove that in some cases basic rights are sacrificed for the sake of crime control and prevention of terrorism. It was shown that some states wanted to implement harsh anti-terrorist solutions that were precluded by general principles of law, especially of the constitutional rank. Despite the danger of terrorism and the justified idea of preventive war with its consequences, states must adhere to the rule of law if they are to remain fully democratic.

Taking into account evaluated sources, an effective rule of law-based criminal justice response to terrorism involves not only adequate laws and practices, but also specialized training and capacity building connected with international

[75] C. J. M. Safferling, *Terror and Law...*, p. 1162.

[76] One already introduced tool is the European Criminal Record Information System, called ENCRIS – it is a computerised system allowing faster and easier transmission of information on criminal convictions in the European Union.

cooperation to react effectively to the complex nature of terrorism. Additionally, international organisations, like the United Nations, strive to implement universal legislative instruments against terrorism to investigate and prosecute terrorist organisations and their acts of terror.

A fundamental question arises as to what extent a legal system can efficiently avert this peril without causing social turmoil by violating civil liberties. While the introduction of draconian criminal law measures would most effectively defeat terrorism, it would also diminish the values of democracy and individual liberty. National security and privacy do not have to be mutually exclusive goals, once surveillance purports to represent a specific response to perceived threats rather than impose general control of citizens. Last but not least, legislators and practitioners should embrace the idea that regulations must preserve balance and proportionality between national security and civil liberties. The crux of the matter is that counter-terrorism actions and protection of human rights are not conflicting goals, but the contrary – they are the fundamental basis for the fight against terrorism, which ultimately ensures permanent security.

Summary

Terrorism has become one of the major issues of international criminal law policy. A sudden change of public perception of terrorism has occurred since 9/11 attacks – from regional groups of fundamentalists, terrorists have become an international threat to worldwide security. This fact has profoundly influenced anti-terrorist policies – from responsive actions to rather preventive and forward-looking strategies. As the opposing values of national security and civil liberties render the criminal justice response to be so complex to introduce, this work underlines the significance of balance and proportionality in waging a war on terror. Moreover, an evaluation of legislative mechanisms introduced by the United Nations police makers as well as those adopted in Germany, Poland and Great Britain will be made. Lastly, the work outlines the most common impediments that befall the investigation and prosecution of terrorists. By taking the aforementioned aspects into consideration, it will be determined which fundamental features will most effectively ensure an adequate criminal justice response and preserve the civil liberties derived from the principle of a democratic state ruled by law.

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prawo antyterrorystyczne, zasada proporcjonalności, kontrola przestępstw

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COMBATING DANGEROUS PEOPLE UNDER THE ACT ON MENTAL HEALTH PROTECTION AND "THE BEAST ACT"[1]

1. INTRODUCTION

Criminal law is a kind of moral and political philosophy. Its central question relates to justifying the use of coercive state power. The law is regarded as a means to regulate the relationship between the state and the autonomous individual. Commonly, the law is expected to be both, an instrument of modern government and a barrier between the state and a citizen[2]. One of the main goals of the criminal law is protecting the society from offenders committing crimes and, consequently, protecting people from dangerous individuals. To fulfil that special function, the state can react in two ways regulated by the criminal law: adjudicate a penalty or apply preventive measures. The latter is an attempt to countervail foreseen harmful actions which could be undertaken by an individual showing special characteristics of a perpetrator[3].

In order to bear guilt, however, the individual has to conform with all the premises set out by a criminal statute. This criterion is not fulfilled by people who are not mentally sane, in other words those who are insane or suffer from a mental disorder. Yet the fact that they are dangerous for the society imposes the necessity of an adequate state reaction. The World Health Organization has defined mental health as "a state of well-being in which an individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively

[1] The Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom of November 22, 2013 (Journal of Laws of the Republic of Poland from 2014, item 24; Journal of Laws from 2015, item 396).

[2] L. Farmer, *Criminal law, tradition and legal order. Crime and the genius of Scots law, 1747 to the present*, Cambridge 1997, p. 6.

[3] L. K. Paprzycki (ed.), *System Prawa Karnego. Tom 7. Środki zabezpieczające*, Warszawa 2012, pp. 8–12.

and is able to make a contribution to his or her community"[4]. It is deduced that mental health is more than the absence of mental disorders and it is determined by a range of socioeconomic, biological and environmental factors. Nowadays, some common mental disorders (including depression and anxiety disorders) are on the rise. They are affecting nearly 10% of the world's population[5]. The connection between mental disability and the criminal justice system is complex, and it can be treated as a scene upon which the society projects different attitudes, emotions and feelings about responsibility, free will, autonomy, public safety and the meaning and purpose of punishment[6].

Not all mental disorders are potentially dangerous for other people. But there is a border where people affected by mental disorders are considered to be highly likely to commit a forbidden act. The Polish law differentiates two categories: mentally ill people and individuals with mental disorders in the form of mental retardation and personality or sexual preference disorders. As a result of that differentiation the Polish Parliament has implemented two statutes: the the Act on Mental Health Protection of August 19, 1994 and the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom of November 22, 2013.

Combating people posing a threat to others who are not in full senses is a serious problem for the state. It is hard to recognize the border between a real and a fictive hazard as well as between a necessary interference and abuse of power. The aim of this article is to show just a few views about this issue and present how Polish authorities try to keep the balance between needed treatment and purposeful isolation.

2. INTERNATIONAL REGULATIONS

Dignity protection of mentally disordered people has its roots in natural human rights. Mindful of the provisions of the Universal Declaration of Human Rights, it finds confirmation in the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care ("MI Principles") which were adopted by the United Nations General Assembly in 1991. They provide some agreed, albeit not legally-binding, basic standards that mental health systems

[4] *Mental health: strengthening our response*, April 2016, available at http://www.who.int/mediacentre/factsheets/fs220/en/ (visited June 29, 2016).

[5] *Out of the shadows: making mental health a global priority*, April 13, 2016, available at http://www.who.int/dg/speeches/2016/mental-health-spring-meetings/en/ (visited June 29, 2016).

[6] M. L. Perlin, *A Prescription for Dignity. Rethinking Criminal Justice and Mental Disability Law*, New York 2013.

should satisfy and rights that people diagnosed with mental disorder should have. The most important principles concern: fundamental freedoms and basic rights (the right to the best available mental health care, to be treated with humanity and respect for the inherent dignity of the human being), life in the community (to the possible extent), determination of the mental illness (in accordance with internationally accepted medical standards), medical examination, confidentiality, standards of care (protection from harm, including unjustified medication, abuse from other patients, staff or others or other acts causing mental disorder or physical discomfort), treatment (in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others), medication (it shall never be administered as a punishment), consent to treatment, rights and conditions in mental health facilities, admission principles, involuntary admission, review body (a judicial or other independent and impartial body established by domestic law and functioning in accordance with the procedures laid down by the domestic law) and implementation (through appropriate legislative, judicial, administrative, educational and other measures)[7]. Although these principles involve the mentally ill who are not criminals, it should be highlighted that one may derive a principle related to criminal offenders therefrom. It sets out that an assurance of the best available mental health care should be delivered to individuals serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who are believed to have such an illness[8].

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine[9] is a fundamental international instrument aiming at the regulation of the situation of individuals in medical law. Poland, as a member of the Council of Europe, signed it in 1999, but still has not ratified it. There is no doubt that this Convention created rules which have some impact on the Polish law system, even if the Parliament has yet to implement it directly[10]. The Convention sets out rules aiming at respecting the human being both as an individual and as a member of the human species and recognizing the importance of ensuring the dignity of the human being. Article 7 states the principle protecting persons who suffer from a mental disorder of a seri-

[7] *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, United Nations Assembly Resolution 119, 46th Session, December 17, 1991. Meeting: 75. Report: A/46/721.

[8] *Ibidem*, principle 20.

[9] T. Jasudowicz (translator), *Europejskie standardy bioetyczne. Wybór materiałów*, Toruń 1998, pp. 3–16

[10] M. Safjan, *Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny*, Warszawa 1998, p. 33.

ous nature. In that case, treatment without their consent may be carried out only if lack of such treatment may produce serious harm to their health.

On 3 January 2000, the Steering Committee on Bioethics (CDBI) of the Council of Europe published the "White paper – on the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment". The White Paper serves as a basis for pubic consultation purposes with the caveat that its content does not necessarily reflect the final position of the CDBI. The fundamental statements of White Paper point that: not a court should decide about forced commitment, but a relevant independent authority (authorized doctor, social worker or hospital manager – it depends on the domestic regulations); only a psychiatrist should decide whether to treat by force or not and that in emergency cases medically necessary intervention may be carried out immediately[11].

But the first document to make the rights stated in the Universal Declaration of Human Rights binding was the Convention for the Protection of Human Rights and Fundamental Freedoms from 1950. Article 5 states that everyone has the right to freedom and safety and cannot be deprived of that fundamental right except six cases enumerated in the Convention. The list includes *the lawful detention (...) of persons of unsound mind (...)*[12]. Due to this article the issue of deprivation of freedom justified by mental illness should be regulated by statute. Moreover, every person has a right to appeal to a court to contest the legality of the deprivation. There are four minimal standards referring to the procedure connected with the detention of the mentally ill. Due to these rules, educed by the European Court of Human Rights, every person who is subjected to compulsory treatment has the right: 1) to be informed about reasons of the compulsory treatment, 2) to contact with the judge, 3) to stand trial, 4) to a periodic review of validity of staying in the hospital[13]. The interpretations of art. 5 in the context of "persons of unsound mind" derive from the decision of the European Court in the case of *Winterwerp v the Netherlands*[14]. The Court indicated that the following minimum criteria must be satisfied: 1) except in emergency cases, no one can be deprived of liberty unless he or she can be reliably proved to be of unsound mind on the basis of objective medical expertise; 2) the mental disorder must be of a kind or degree warranting compulsory confinement, 3) the validity of continued confinement depends on the persistence of the disorder[15]. Another judgment of the European

[11] White Paper on the protection of the human rights and dignity of people suffering from mental disorder, especially those placed as involuntary patients in a psychiatric establishment, Strasbourg, January 3, 2000, DI R/JUR (2000)2.

[12] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5 point e.

[13] M. Balicki, *Przymus w psychiatrii – regulacje i praktyka*, "Prawo i Medycyna" 1999, Vol. 1, p. 43.

[14] *Winterwerp v Netherlands*, ECHR, Application no 6301/73, October 24, 1979.

[15] See http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1120014/ (visited May 3, 2016).

Court of Human Rights claims that the term of "a person of unsound mind" cannot be defined as psychiatry changes and develops novel evaluations regarding medical advances and social conditions[16]. Moreover, the European Court of Human Rights considered that a patient no longer suffering from mental illness did not require to be immediately and unconditionally discharged for example on account of a possible risk of recurrence of mental illness or because of procedures required by domestic law[17].

3. THE ACT ON MENTAL HEALTH PROTECTION OF AUGUST 19, 1994[18]

The statute stands on a mixed medical law model which balances therapeutic requirements and psychiatrists' discretion against the protection of patients' personal interests[19]. The preamble of the statute recognizes mental health as a fundamental personal interest and includes its protection into the essential duties of the state.

It is worth mentioning that the Polish Act on Mental Health Protection is commonly known for its coherence, sensible solutions and non-complex character. It clarifies rights belonging to the mentally ill, sets boundaries of applying means of coercion and emphasizes the dignity of people of unsound mind[20].

The statute adopted a division of the term "mentally disordered" into three elements – it refers to people with a mental disease, retardation or any other disorder of mental faculties who need special medical treatment and help to live in society. It is coherent with the IX version of the International Classification of Diseases and Related Health Problems and refers to the term of insanity as defined in the Polish Criminal Code[21].

There is no definition of any of the three categories. The legislator claims that the meaning of these terms cannot be defined in positive law as they are a medical matter. Classifying an individual into one category requires a medical diagno-

[16] *Rakevich v Russia* (2003), ECHR, October 28, 2003.

[17] *Johnson v The United Kingdom*, ECHR, October 24, 1997.

[18] Act on Mental Health Protection of August 19, 1994 (Journal of Laws of the Republic of Poland from 1994, No. 111, item 535).

[19] S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego. Komentarz*, Warszawa 1997, pp. 25–26.

[20] J. K. Gierowski, L. K. Paprzycki, *Kontrowersje związane z ustawą z dnia 22 listopada 2013 r. o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób – perspektywa prawna i psychiatryczno-psychologiczna*, "Palestra", No. 9, Warszawa 2014, pp. 144–161.

[21] Polish Criminal Code, art. 31.

sis and consequently should be part of a doctor's examination and be controlled by medical criteria which require expertise[22].

3.1. THE STATUTE'S INSTRUMENTS DEALING WITH AN INDIVIDUAL WHO COULD BE CONSIDERED DANGEROUS FOR OTHER PEOPLE

Coercive means could be used when a patient perpetrates an attempt endangering others' life or health. It refers to acts of direct aggression causing a threat to public safety, for instance when a patient intends to inflict damage or cause harm to another. Applying coercive means is also justified if a patient rapidly destroys objects, when he or she is being transported to hospital without consent or tries to leave a psychiatric unit without doctor's approval. In most cases, the decision to apply coercive means is sudden and is made by a nurse, who should then inform a doctor. Coercive measures are the most far-reaching form of violation of bodily integrity[23]. Applying means of coercion is defined in a Minister of Health's regulation[24] as 1) apprehension with physical force in order to prevent aggressive acting or an unacceptable leave of a unit, 2) compulsory treatment, 3) immobilization (for example tying to a bed) and 4) seclusion (isolating in a closed room). There are not any other acceptable means of coercion[25]. When it comes to evaluating the degree of danger to the life and health of others which an individual creates, one should consider aggressive actions from the past, especially those which have taken place recently and repeatedly. Also, one should take into consideration that young men are more inclined to engage in aggressive behaviour. Other key factors are alcohol or drug addiction and mental disorders.

Compulsory examination – similarly to coercive measures – is not monitored by the court but by the director of a hospital or an authorized psychiatrist. A psychiatrist or another doctor should decide whether to treat a patient without consent or not. In contrast to medical rules governing applying coercive measures and compulsory examination, a person who is mentally ill may be admitted involuntarily to a mental health facility or, having already been admitted voluntarily as a patient, be retained as an involuntary patient, only if a qualified mental health practitioner authorized by law for that purpose (a psychiatrist who should contact a second such mental health practitioner, independent of the first) recognizes a justified reason for such detention. But mental illness cannot be the sole reason for admitting one to a psychiatric unit. Pursuant to the act, hospitalization

[22] S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego*…, pp. 56–57.

[23] L. Ciszewski, *Niebezpieczne dla otoczenia zachowania pacjentów hospitalizowanych na zasadzie środka zabezpieczającego*, "Postępy Psychiatrii i Neurologii" 1996, Vol. 5, issue 4, pp. 421–428.

[24] Regulation of the Minister Health of June 28, 2012 on the methods of application and documentation of the use of means of physical coercion and the assessment of its justifiability.

[25] S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego*…, pp. 111–115.

is admissible only if there is a serious likelihood of immediate or imminent harm to that person or to others. If there is a justified reason to state that an individual is both mentally ill and poses a danger to others' life and health, that person could be located in a psychiatric unit for up to 10 days in order to diagnose their mental disorders[26].

3.2. TREATMENT OF INDIVIDUALS INVOLUNTARILY PLACED IN A PSYCHIATRIC HOSPITAL

The law differentiates three categories of patients who are unable to agree to medical treatment: juveniles, the incapacitated, and people who are not aware of their behaviour.

A patient located in a psychiatric hospital without their consent cannot refuse medical treatment as far as it is necessary to remove the cause of that mandatory location. In case of a direct danger of life and health of others, the bases for compulsory treatment are questionable, because the doctor's decision is motivated not only by the patient's good, but also the interest of others[27]. There is a debate whether compulsory treatment without the patient's consent is necessary and sensible[28].

4. THE ACT ON THE PROCEDURES APPLICABLE TO PEOPLE WITH MENTAL DISORDERS POSING THREAT TO OTHER PEOPLE'S LIFE, HEALTH OR SEXUAL FREEDOM OF NOVEMBER 22, 2013[29]

The second enacted statute points out special measures to deal with people affected by mental disorders who put other people's lives, health or sexual freedom in danger.

The term "dangerous individuals" is peculiarly understood on the grounds of the act as:

1) individuals that are serving a validly adjudged prison sentence or a sentence of 25-year imprisonment in the therapeutic system,

2) individuals that revealed mental disorders in the form of mental retardation, personality or sexual preference disorders,

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[26] *Ibidem*, pp. 122–137.

[27] R. Rutkowski, *Wybrane aspekty przymusu bezpośredniego w szpitalach psychiatrycznych*, "Postępy Psychiatrii i Neurologii" 1996, Vol. 5, No. 4, pp. 407–420.

[28] S. Dąbrowski, J. Pietrzykowski, *Ustawa o ochronie zdrowia psychicznego*…, p. 169.

[29] The Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom of November 22, 2013 (Journal of Laws of the Republic of Poland from 2014, item 24; Journal of Laws from 2015, item 396).

3) individuals that reveal mental disorders with such a character or degree that there is at least a great risk they will commit a forbidden violent act or threat violence against life, health and sexual freedom, punishable by imprisonment, of which the upper limit is at least 10 years.

There is a justification for that specific definition – it was enacted in special circumstances as a response to the forthcoming release of criminals who were guilty of murders and paedophilia and were sentenced to death before 1989 under the regime of the Polish People's Republic. The transformation of the political system brought amnesty which changed their sentence into 25-year-imprisonment as lifelong imprisonment was no longer in the catalogue of possible punishments. In 2013, when these offenders were to be released, the Parliament passed a law describing the procedures to be employed towards people affected by mental disorders who put other people's lives, health or sexual freedom in danger. It is publicly known as "the Beast Act". The problem is crucial as social apprehension and jeopardy of lynch cannot be ignored.

Individuals who are subjected to the law are not diagnosed as mentally ill but they are considered as mentally disordered according to the International Statistical Classification of Diseases and Related Health Problems (ICD-10). It relates to mental disorders as unspecified psychoses that do not appear due to a substance application or a known physiological condition, schizophrenia, schizotypal disorders (personality disorders characterized by eccentric thoughts and appearance, inappropriate affect and behaviour, extreme social anxiety, and limited interpersonal interaction[30]). It also relates to delusional disorders (mental disorders in which a person suffers from extreme fear and distrust of others; a paranoid person may have delusions that people are trying to harm them[31]). These individuals cannot be treated under the Act on Mental Health Protection or, if they were not insane during the action, they could not be subject to isolating preventive measures under the Polish Criminal Code[32].This regulation raised a lively discussion about its consistency with the constitutional requirements because the statute creates a new legal basis for the deprivation of freedom, mindful of medical and criminological criteria. People who fulfil the requirements mentioned above could be subjected to preventive supervision or located in the National Unit for the Prevention of Antisocial Behaviour.

Preventive supervision is conducted by County Police Commanders and is grounded in the Police Commander's duty to report on changes of an individual's place of permanent residence, the place of employment, name or surname.

[30] See http://www.icd10data.com/ICD10CM/Codes/F01-F99/F20-F29/F21-/F21 (visited July 2, 2016).

[31] See http://www.icd10data.com/ICD10CM/Codes/F01-F99/F20-F29/F22-/F22 (visited July 2, 2016).

[32] M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji sprawców niebezpiecznych*, "Forum Prawnicze" 2013, issue 5(19), p. 21.

If a Police Commander requires this, the individual is obliged to provide information about their current and intended place of staying and about dates and places of departure. The Police can carry out a preliminary investigation and verify, collect and process the information given by the person under supervision.

An individual placed in the Unit has to be located under conditions allowing for the provision of adequate therapeutic treatment with a view to improving their health and making their return to society possible (art. 25).

5. TEST OF CONSTITUTIONALITY

Firstly, there is a possibility that this Act can be applied to those who have already served their sentence and this may lead to the violation of the ban on punishing offenders more than once for the same crime[33]. The possibility of postpenal detention creates peculiar preventive measures (regulated outside of the Criminal Code). This contradicts the Criminal Code's rule stating that the offender can be punished or be under a specified preventive measure[34]. Mindful of this line of thought, the abovementioned regulation could be regarded as contrary to the *ne bis in idem* rule. Also, when it comes to the attitude of the European Court of Human Rights, it seems that by reference to the "penal" character of the sanction the Court considers the individual's action, the kind and the seriousness of the penalty and the goal which it should result in. In the view of the ECHR, there is no need to examine the seriousness of the penalty at stake as even a lack thereof cannot deprive an offence of its inherently criminal character (*Kadubec v Slovakia*, September 2, 1998, Application Number 27061/95). This proves that applying a preventive measure after served imprisonment may be regarded as a violation of the *ne bis in idem* rule.

However, the opposite opinion maintains that the legality of these measures is based on that they are not connected with the punitive character of the served imprisonment[35]. It is argued that the statute detaches the justification for isolation from punishment.

One can pose a question whether the statute complies with the constitutional rule of the non-retroactive character of the criminal law. It indicates that "dangerous people" should be placed in the National Unit for the Prevention of Antisocial Behaviour or be subjected to special prevention supervision. We can see that this widens the list of preventive measures compared to the Criminal Code. Never-

[33] Motion of the Ombudsman addressed to the President of Polish Tribunal Court, May 16, 2014.

[34] Statement of the Helsinki Foundation for Human Rights, November 27, 2013.

[35] M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji...*

theless, our legislator framed it into a civil procedure. It seems to be an intentional elision as this rule is not so strictly followed in the civil law[36]. The Polish Constitutional Court maintains that retroactive regulations can exceptionally be recognized as constitutional only if, *inter alia*, they are not criminal regulations (P 66/07 from May 12, 2009).

Although the Polish Constitutional Court has started proceedings against the 2013 Act[37], the German Federal Constitutional Court acknowledged that a similar German act met constitutional standards (2 BvR 2302/11 from July 7, 2013). This is because it did not extend the scope of the elements of the specified offence committed, but constitutes a different response to legally relevant actions taking place before the publication of the act. We should take into consideration that German postpenal detention is adjudicated simultaneously to the sentence. The European Court of Human Rights did not accept the stance, and it declared that such regulations are dissonant with the European Convention on Human Rights[38]. It particularly stressed that the regulations which are in force at the moment of committing the crime decide about applying any preventive measure. Besides, the Court acknowledged the similarity between placing in the Unit and imprisonment, which, as a means of punishment and a part of criminal law, is subject to an absolute ban on retroaction.

To begin with the issue of the vague criteria, limits of state power must be specified, according to the standard of the autonomy of the individual which is derived from the constitutional concept of dignity; then the criminal law, using the same standard, can try to specify the exact conditions under which individuals may be held responsible for their actions by the law. It has come from this that the sphere of responsibility under the criminal law is reasonably well defined. It is to be regarded as a relatively neutral conceptual exercise that must define, in turn, the grounds of an individual's liability, the actions that are prescribed by the law and the socially important values (such as bodily autonomy and property) that must be protected by the law[39]. Moreover, these regulations make it possible to place persons in the Unit only on the basis that a further crime is forecast to occur. The Act requires a high or very high degree of probability that a convicted offender will commit another violation. However, it does not accurately define the criteria to be used for the purposes of evaluation. The Polish Psychological Association shows that the current level of science does not allow one to formulate

[36] The opinion of dr Ryszard Piotrowski on the compatibility of the project of the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom with the Polish Constitution, June 26, 2013.

[37] Add the annotation 37: The Polish Constitutional Court delivered its judgement on November 23, 2016 (K 6/14) and stated that the Act, predominantly, is not inconsistent with the Constitution.

[38] *M. v Germany*, ECHR, Application No. 19359/04, December 17, 2009.

[39] L. Farmer, *Criminal law, tradition and legal order. Crime and the genius of Scots law, 1747 to the present*, Cambridge 1997, p. 6.

objective standards of such evaluation. Consequently, it is the court experts that will bear the most responsibility for the relevant decisions[40] and their reliability may be called into question[41].

Last but not least, psychiatrists disapproved of the solutions applied by the legislator in order to help these dangerous perpetrators. They underlined that enforced therapy is not possible. Treatment of individuals being in full possession of senses, but revealing personality or sexual preference disorders, demands different treatment than treatment of the mentally ill. This is because the latter demand wider drug treatment. Psychotherapy without the patient's consent is ineffectual, which undermines the pledged purpose of the Act. The legislator mandated treating people, who are, on the grounds of psychiatry, healthy. This leads to a dissonance between some medical possibilities and the reality of fulfilling the projected legislative goals[42].

6. CONCLUSION

Taking the dispute between politicians, lawyers and psychiatrists into consideration, we need to remember that psychiatry should treat, support and help shape positive attitudes towards the mentally handicapped amongst society. It should shield from stigmatization and social exclusion but should not substitute judicature in its basic aims such as securing the legal system and isolating dangerous people from society. The main goal of criminal law is to protect the legal system, especially by preventive actions. It is partially fulfilled by preventive measures, which refer to situations when the law is infringed by mentally disordered people. The paramount function of medical-preventive measures is protecting society from dangerous people by isolating and treating them. Under the Act on Mental Health Protection of August 19, 1994, mental health is proclaimed to be a fundamental personal interest and applying involuntary treatment is only an exception from the rule of voluntary treatment[43]. The help declared by the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom of November 22, 2013, seems to be a fiction.

[40] The *amicus curiae* opinion of the Helsinki Foundation for Human Rights addressed to the President of the Constitutional Court on the compatibility of the regulations of the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom with the Polish Constitution, November 4, 2015, p. 41.

[41] Opinion of the National Consultant for Psychiatry, April 24, 2013.

[42] Opinion of the Helsinki Foundation for Human Rights, November 27, 2013.

[43] J. K. Gierowski, L. K. Paprzycki, *Kontrowersje związane z ustawą z dnia 22 listopada 2013 r. o postępowaniu wobec osób z zaburzeniami psychicznymi...*, pp. 144–161.

The procedures are considered as measures subsequent to the penalty, and enable gaining influence over dangerous people by isolating them[44].

Instrumental treatment of psychiatry for the purposes concerning public order protection is a basic objection. Next one is the disproportional restriction of personal freedom that appears to come into play here. The Constitutional Court is going to decide whether the legislator circumvented the criminal law-abiding ban on retroactive actions by using civil procedures. All these circumstances indicate that there is no coherent view on how the state should fulfil the requirements of preventive justice.

Comparing the Act on Mental Health Protection and the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom, the former shows the standard of procedures towards people of *unsound mind*. In contrast, the latter act comes hazardously close to isolation outpacing the treatment. The thesis that, in the context of the second act, treating human rights and resocialization as absolute criteria is misleading and would make us helpless in the face of the real danger of people who are the subjects of the act[45], seems partially true. Certainly, we have to react to the risk such people constitute for the society, but the legislator missed some very important issues pointed to by, *inter alia*, the Helsinki Foundation of Human Rights and the Polish Psychological Association. The law should be precise and equally protect basic rights of every human being. The particular circumstances of enacting this statute (media hype, the brutality of perpetrators who were to be released) made it vulnerable to emotional statements and, unfortunately, haphazardly enacted provisions.

Summary

The aim of the article is presenting two ways of the state's response to the danger caused by individuals with mental disorders pursuant to the Act on Mental Health Protection and the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom. There is a need to provide safety to society which justifies applying measures which often interfere with human freedom. The connection between mental sanity and the criminal justice system is complex, and it can be treated as a scene upon which the society projects different attitudes, emotions and feelings about responsibility, free will, autonomy, public safety and the meaning and purpose of punishment. Not every kind of mental disorder creates a danger for others – yet, the fact that there is a high probability of committing a crime imposes the necessity of an adequate state reaction. Mindful of the level of an individual's

[44] *Ibidem*, p. 155.

[45] M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji...*, p. 34.

sanity, mental and physical health, behaviour and hitherto served punishment, the Polish criminal law distinguishes three legal approaches towards people with certain disorders: preventive measures applied on the ground of the Criminal Code, measures regulated in the Act on Mental Health Protection as well as in the Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom.

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KEYWORDS

mental disease, mental disorder, postpenal detention, mental health, Act on Mental Health Protection, Act on the Procedures Applicable to People with Mental Disorders Posing Threat to Other People's Life, Health or Sexual Freedom

SŁOWA KLUCZOWE

choroba psychiczna, zaburzenie psychiczne, izolacja postpenalna, zdrowie psychiczne, ustawa o ochronie zdrowia psychicznego, ustawa o postępowaniu wobec osób z zaburzeniami psychicznymi stwarzających zagrożenie życia, zdrowia lub wolności seksualnej innych osób