

Remigiusz ROSICKI

Adam Mickiewicz University in Poznań

ORCID ID: 0000-0002-1187-5895

Theoretical and philosophical aspects of special powers of a political community with regard to counter terrorism security

Abstract: The material scope of the analysis undertaken in the text covers the issues concerned with the relationship between two goods. Between the good constituted by community security on the one hand, and the good vested in the power to apply special measures falling within necessary defence and the state of higher necessity. The problem of the relationship between two goods, e.g. a conflict between two goods, can be observed in the competition between the common good and the good of the individual. A similar relation can be noted in the process of derogation from the obligations upon the contemporary political community as regards protection of life and other individual rights and freedoms. Special cases of the conflict between goods include the admissibility of the use of force, violence or restriction of individual freedom. Undoubtedly, situations in which individuals or groups are subjected to torture or have their life taken serve as the most extreme examples of violence use by the political community. All kinds of surveillance measures used by state institutions should be reckoned among the examples concerned with interference in individuals' private lives.

The main purpose of the analysis contained in the text is to present all manner of argumentation concerned with the possibility of applying special measures within or outside the bounds of necessary defence and the state of higher necessity by the political community. In order to elaborate the objective scope of the analysis, the following research questions have been formulated in the text: (1) To what extent is it possible, within the limits of the law and *per analogiam* to the individual's adequate actions, for the political community to apply special measures (necessary defence or the state of higher necessity) with the aim of providing security (and in particular counter terrorism security) for itself?, (2) To what extent is it possible, outside the limits of the law and *per analogiam* to the individual's adequate actions, for the political community to apply special measures (necessary defence or the state of higher necessity) with the aim of providing security (and in particular counter terrorism security) for itself?

The presented analysis is chiefly an overview of a conceptual character with regard to the presentation of the issues concerned with the relationship between such goods as security and special powers of a political community. For the presentation of the legal aspects of this issue textual, functional and systemic interpretations have been applied. Next to the individual kinds of legal interpretation, in the course of argumentation a theoretical reflection on the law is used. The conceptual approach to the title problem makes use of argumentation *per analogiam* to appropriate actions by an individual when faced with a direct threat, and specified in the provisions of the Polish criminal law – necessary defence and the state of higher necessity.

Key words: security, counter terrorism security, terrorism, common good, necessary defence, state of higher necessity

Introduction

The material scope of the research problem addressed in the text encompasses the relationships between the interest vested in the community security and special measures taken as part of necessary defence and the state of higher necessity. Relationships

of this type can be analysed with regard to the conflict of two interests, i.e. the common good and the good of the individual, but also with regard to the scope of derogation from the obligations upon the contemporary political community as regards protection of life and other individual rights and freedoms. Special cases of the relationships between different types of interests concern the admissibility of the use of force, or violence, as well as the admissibility of the restriction of freedom. Undoubtedly, situations in which someone is subjected to torture or has their life taken undoubtedly serve as the most controversial examples of violence use by the political community. As regards interference in rights and freedoms, in the context of security, infringements of the right to privacy by means of surveillance constitute no less controversial examples (cf. Szuniewicz, 2016).

The assumption made in the text is one whereby the category of counter terrorism security is more closely linked with legal policy. Nevertheless, under specific conditions it can be treated as one of the elements in the *definiens* of the object of protection or the protected interest, i.e. security or state security, or one of the elements in the *definiens* of adequate constitutional categories. It is also noteworthy that the Polish legislator uses various terms, and so legal values (constitutional principles), e.g. security, state security or citizen security. The variety of terms gives rise to the problem of interpretation of semantic and essential relationships between them. Undoubtedly, the lack of precise delimitation and demarcation of the content of the general clause, i.e. security, creates a problem of ambiguity, and gives rise to a temptation to treat it as an absorbing set, and from the systemic viewpoint it puts up a facade of legitimization for actions in breach of life protection and other individual rights and freedoms.

The main purpose of the analysis undertaken in the text is to present argumentation concerned with the scope of special measures applied within or outside the bounds of necessary defence and the state of higher necessity by the political community. In order to elaborate the material scope of the research problem, the following research questions have been presented in the text: (1) *To what extent is it possible, within the limits of the law and per analogiam to the individual's adequate actions, for the political community to apply special measures (necessary defence or the state of higher necessity) with the aim of providing security (and in particular counter terrorism security) for itself?*, (2) *To what extent is it possible, outside the limits of the law and per analogiam to the individual's adequate actions, for the political community to apply special measures (necessary defence or the state of higher necessity) with the aim of providing security (and in particular counter terrorism security) for itself?*

As regards the analysis of the legal aspects of application of special measures within or outside the limits of necessary defence and the state of higher necessity by the political community, textual, functional and systematic interpretations have been used (cf. Wronkowska, Ziemiński, 1997, pp. 147–179; Wronkowska, 2005, pp. 76–91; Nowacki, Tabor, 2016, pp. 293–312). As regards the assignment to the political community of actions within or outside the limits of necessary defence and the state of higher necessity, *per analogiam* argumentation proportionate to the individual's actions specified in the provisions of the Polish criminal law has been used (cf. Wronkowska, 2005, p. 86).

The analysis makes use of two legal institutions related to criminal law, i.e. two kinds of exemption from liability, in the form of necessary defence and the state of higher

necessity. The analysis undertaken in the text encompasses assignment to the collective entity, i.e. a political community, of actions within or outside the bounds of necessary defence and the state of higher necessity. Therefore, one might say that the purpose of the analysis of the problem concerned with the counter terrorism security of a political community is served by analogy with an individual's actions within or outside the limits of necessary defence and the state of higher necessity. Next to the above-mentioned institutions of criminal law, the analysis in the text makes use of philosophical and theoretical consideration of the essence of the community and society, as well as the category of state security. Of major relevance in this regard are the following publications *The Concept of the Political* (1927 and 1932) by C. Schmitt, *The Limits of Community* (1924) by H. Plessner, and *Community and Civil Society* (1887) by F. Tönnies.

1. Community and society

Deliberation on the essence and distinctive features of the community, society or any other forms of human associations constitutes the basic problematics concerned with social ontology, and with regard to the political – political ontology. Nevertheless, it is noteworthy that the problem of the two opposing ontological approaches presenting different attitudes towards social reality *sensu largo* can be traced between naturalism and antinaturalism, i.e. between the independent existence of reality and its social construction (cf. Berger, Luckmann, 2010; Furlong, Marsh, 2010, pp. 184–209; Parsons, 2010, pp. 80–97; Grabler, 2019, pp. 145–149). Next to this division, one should point out that in political science there are two clashing positions as to the status of political entities. Namely, on the one hand there is radical individualism, and on the other hand there is radical holism. The former case posits that the only causal agent behind political processes is the individual along with his attributes. The latter case posits that the causal agent behind political processes is the community with its attributes. However, this approach does not exclude the influence of “prominent” individuals, e.g. in emergency situations (Nowak, 1991, pp. 284–289; Pierzchalski, 2009, pp. 161–240). Undoubtedly, one might also point to other approaches indicating the existence of individual or collective political entities, as well as their special attributes, which in turn enable them to influence politics and political processes.

On account of the theoretical assumptions underlying the subjectivity of the political community as an entity evincing attributes identical with individuals, the subjectivity is assigned a special kind of causal agency, but also autonomy in relation to the state itself. C. Schmitt originated the distinction between the political community and the state, while F. Tönnies and H. Plessner – the distinction between the community (in German ‘Gemeinschaft’) and the society or association (in German ‘Gesellschaft’). However, it must be stressed that the text makes a loose and vestigial reference to the works by these authors. Hence, the community is understood to be a coherent group of people connected by natural bonds; in the first place it is inspired by organic will, and in the second place by arbitrary will, which essentially overcomes the bipolar division between the community and the association, as adopted by F. Tönnies. The organic will gives rise to unreflective and instinctive bonds based on shared emotions, while the arbitrary will

gives rise to bonds based on calculation and benefits (Tönnies, 1887, pp. 9–95; Plessner, 2008; Schmitt, 2000, pp. 191–250).

Despite social changes, emotions are undoubtedly reckoned among the most important mechanisms of mobilization and demobilization of the members of political communities. This can be seen particularly in the context of threats to national security in the form of threats to counter terrorism security. State institutions, which create a special kind of legal solutions and which interfere with individual rights and freedoms, at the time when acts of terrorism occur or when they can be anticipated, employ argumentation based on shared emotions. Undoubtedly, the actions taken by members of the community and state institutions feature feedback, or, one might even say, positive feedback, which amplifies the effects in the form of intensification of legal solutions interfering with individual rights and freedoms. Feedback of this type often causes mutual accord on legal and extralegal special measures aimed at ensuring state security, e.g. with regard to counter terrorism security. At the same time, positive feedback precludes citizens' deeper reflection on the use of fear for the purpose of state authorities' intensified interference with their rights and freedoms. The negative effect of the interactions thus fostered between citizens, or – more broadly – between the political community and the state is hybridization of political democratic political systems (cf. Davis, Silver, 2004, pp. 28–46; Mueller, 2006; Wilkinson, 2006; OHCHR, 2008, pp. 1–48; Vultee, 2010, pp. 33–47; Hetherington, Suhay, 2011, pp. 546–560; Bakker, de Graaf, 2014, pp. 1–16; Reddick, Chatfield, Jaramillo, 2015, pp. 129–141; Rosicki, 2015, pp. 88–105; Garcia, Geva, 2016, pp. 30–48; Hunter, 2016, pp. 165–193; Stoycheff, Wibowo, Liu, Xu, 2017, pp. 784–799; Rosicki, 2018, pp. 263–277; Christensen, Aars, 2019, pp. 615–631; Gasztold, Gasztold, 2020).

From the legal perspective, clear rules of criminalisation should be in place to safeguard against opportunistic use of the law, including the use of emotions, fear, anxiety. However, there always remains the problem of understanding the rationality of the law and the rationality of the legislator, because these can invoke, *inter alia*, normative, material and formal-procedural premisses. Still, well-established mechanisms of criminal policy, with special consideration of penal policy in the context of criminalization, constitute a rather effective safeguard against legal populism (cf. Gardocki, 1990; Kulesza, 2014, pp. 87–111; Kulesza, 2017). At the same time, it should be noted that in accordance with the above-mentioned feedback, legal populism concerns the behaviour of both the community members and the state authorities. In the context of the functioning of democratic states ruled by law it is vital to create institutional solutions that limit negative interference with individual rights and freedoms, and with the essence of democracy, and which – following K. Löwenstein – can be termed *militant democracy* (Loewenstein, 1935a, pp. 571–593; Loewenstein, 1935b, pp. 755–784; Loewenstein, 1937a, pp. 417–432; Loewenstein, 1937b, pp. 638–658; Lerner, 1938; Barber, 2003; Jovanović, 2016, pp. 745–762; Malkopoulou, Norman, 2018, pp. 442–458; Bäcker, Rak, 2019, pp. 63–82; Maddox, 2019).

Noteworthy, the presuppositions adopted in the analysis in the text, by means of a thought experiment, do not include a pro-democratic or pro-constitutional perspective. According to these presuppositions, the political and legal entity is a political community *a contrario* state authority, like in C. Schmitt's concept of the political. In line with

J. J. Rousseau's identical deliberations, state authority only performs an executive function whereby realised is the general will, the will of the superior, i.e. the political community (Porębski, 1986, pp. 215–229; Błaszcze, 1987, pp. 41–74; Rousseau, 2002; Pietrzyk-Reeves, 2010, pp. 333–349; Baćłowski, 2012, pp. 183–192; Lis, 2014, pp. 69–83).

The consistent will of the political community members was also invoked by C. Schmitt, who opposed it to the state. On the one hand, the political community is based on instinctive bonds and shared emotions, but on the other hand it is based on shared benefits and interests. In both these cases, that which connects emotions and the calculation of the benefits serves as an indication of factors or entities threatening the existence of the community and – at the lowest level – the existence of the individual, as a consequence of disturbing the community's sense of security (Schmitt, 2000, pp. 191–250; Schmitt, 2014, pp. 21–34). According to F. Tönnies, the shared goods and common friends are an object of benefit and good will, while shared worries and enemies are an object of aversion, hatred, ill will, i.e. a shared will to destroy (Tönnies, 1887, pp. 27–29). Undoubtedly, the very person of a stranger or the other becomes a mechanism facilitating the use of the figure of an enemy, which results from the fact that defining an enemy or a danger is one of the socialization mechanisms, and in the ideational dimension – one of the mechanisms for creating the identity of a group or community (cf. Russell, 1985, pp. 11–22; Jędraszewski, 1994, pp. 15–104; Iskra-Paczkowska, 2007; Waldenfels, 2009).

As regards C. Schmitt's concept, defining a political enemy has an existential meaning, and so it cannot be reduced to a symbolic or metaphorical figure. This means that he who really threatens the existence of the whole community will be recognized as the public enemy (Schmitt, 2000, pp. 191–250). Therefore, of no little importance are F. Tönnies' presuppositions as to the will of the community and society that engenders instinctive, emotional, self-interested (calculating) ties, because they can all be reduced to one will – the willingness to safeguard existence. And so can there be any greater legitimization of the action taken by the community and its individuals than the protection of the good – their life? The issue that remains unresolved is the question whether the category of a protected good, i.e. the life of an individual, can be directly equated with another good, i.e. security (and accordingly, whether the constitutional category of life can be equated with the constitutional category of security).

By loosely drawing on C. Schmitt's concept, one should assume a logical sequence of presuppositions whereby entities performing acts of terrorism can be recognized by the political community as public enemies, but the "war on terrorism" alone does not constitute the political in C. Schmitt's perception (cf. de Benoist, 2007; Górniewicz, 2019, pp. 133–190). This results from the fact that according to C. Schmitt ascribing the public enemy status to someone is not synonymous with declaring war, as the war only unveils the ultimate consequence of the people being politically unified in line with the bipolar division into the enemy and the friend. Therefore, it can be concluded that an exceptional or critical situation gives rise to a political unity, which can be identified with pointing to special measures that the community wants to take to obviate potential danger. Hence, real power is exercised by anyone who in a critical situation has the right to determine who the enemy is, and who disposes of their life and death. Extraordinary measures in the fight against terrorism can then be considered in the context of the suspension of the

legal order found to be lawful. The practical problem that remains unresolved till this day is the question as to what should be regarded as a critical situation that entitles particular entities or the entire political community to specific actions, and to make them legally valid. This context calls for a question if and to what degree these circumstances justify the use by the political community – *per analogiam* to appropriate actions by an individual – of special measures within or outside the limits of necessary defence and the state of higher necessity (Schmitt, 2000, pp. 191–250).

2. A community as a disposer of special measures

Opposing the political community to the state authority also means opposing the power of the community as well as the body of norms that are its emanation (Latin *jus*) to the legislation laid down by the state authority (Latin *leges*). To paraphrase the statements by Ulpian and Celsus, which came to be reflected in the Digest of Justinian, one can say that the law (*ius*) is the art of choosing that which is good and fair (just) (*Digesta Iustiniani: Liber 1*; Litewski, 1995, pp. 25–112; Szolc-Nartowski, 2007; Pichlak, 2017, pp. 49–58). Hence, the art of law consists in distinguishing between the just and the unjust, between the licit and the illicit. Unquestionably, the law is a political mechanism which in aspiration toward the fair uses fear of penalties as well as points to benefits of the observance of the law. In this context, independent powers of the political community constitute a mechanism of its association or consolidation (German *Assoziation*), originated by a sense of existential threat (cf. Schmitt, 2000, p. 198; Szahaj, Jakubowski, 2020, pp. 156–160; Biały, 2018, pp. 56–58). Action under the circumstances of an emergent political situation includes a possibility of applying special measures within the limits of *jus* and *leges* with regard to necessary defence and the state of higher necessity. However, in the case of suspended *leges*, within the framework of the community powers, action is taken with regard to applying special measures outside the limits of necessary defence and the state of higher necessity, while maintaining positive argumentation that is in favour of the measures, and carries the power of lawful institutions. While the former situation does not raise doubts given the current standards of constitutional (liberal) democracy and the democratic state ruled by law, the latter one constitutes a violation of a body of norms concerned with these forms of democracy. However, in C. Schmitt's approach it does not matter for the legitimacy of the political community's actions whether the former or the latter situation is the case. In both the situations the actions of the political community are lawful; however, in the latter situation the actions are carried out in the so-called emergency.

The moment its existence is under threat, the superior authority, i.e. the political community, disposes of powers both within and outside the compass of *jus* and *leges* in connection with the suspension of the law (Latin *justitium*). Therefore, one might say that in the face of existential threat, the sovereign superior authority is not restricted by peremptory norms (Latin *jus cogens*), and in principle both *jus* and *leges* are non-compulsory (Latin *jus dispositivum*). And so it is neither the law nor absolute values that are the guarantor of order, but a political entity – the sovereign. It is the sovereign that decides about the scope of order and the law that is derived from it (Skarżyński, 2004,

p. 101). This assumption goes beyond naturalist justifications of legal legitimacy, as espoused by, inter alia, G. Radbruch. The general rule presented by G. Radbruch states that whenever a moral norm is flagrantly violated (flagrant injustice) by legal norms and provisions, the latter ones are not legally binding. This results from the fact that statutory lawlessness, unlawfulness and injustice (German *gesetzliches Unrecht*) that infringe core principles, e.g. fundamental human and civil rights, must not be legitimized even if they are formally and properly passed (cf. Szyszkowska, 1971, pp. 217–229; Zajadło, 2001; Woleński, 2015, pp. 5–18).

Opposing the general will in the form of the political community to the state provides an opportunity for treating the community as an independent entity with causal attributes. If in a conflict the political community, or another entity acting on its behalf, decides what the public or state interest, security or public order etc. are, then the community can be referred to as the sovereign (cf. Hirst, 2011, pp. 13–26). An emergency situation emphasizes the significance of the sovereign, throwing into relief its authority and precedence as the lawmaker. Therefore, it is only a decision by the sovereign that is the source of order, and its rightness is of greater significance than the provisions in the *leges* passed. The analogy of the distinction between the two types of norms in the Roman law can be found in Schmitt's distinction between constitution (German *Verfassung*) and constitutional laws (German *Verfassungsgesetz*). Despite C. Schmitt's distinction between the political and statehood, it is actually through the act of establishment of a state by the political community that the only political entity recognized by the international community is exactly the state (cf. Schmitt, 2000, pp. 191–250; Skarżyński, 2004, pp. 101–103; Kaleta, Koźmiński, 2013, pp. 154–168).

Hence, it can be assumed that the sovereign has legitimate capacity to suspend *leges*, when acting with the aim of implementing decisions it finds right. And that which is right for the sovereign is its own assessment of its existential situation, or rather existential threat. What is more, the sovereign has a right to suspend not only *leges*, but *jus* as well, thereby becoming a dictator of sorts. Such conclusions are to be drawn at least on the basis of the presuppositions underlying the concept developed by Schmitt, who associated extraordinary measures (action under emergency circumstances) with sovereignty (cf. Schmitt, 2000, pp. 191–250; Schmitt, 2016, pp. 125–186). As Giorgio Agamben points out, there is a kind of paradox of the political community wavering in and out between public law and the political fact or the legal order on the one hand, and life, or the right to decide about someone's life on the other hand. The sovereign positions itself both within the legal order and outside it. According to the Schmittian presupposition, the sovereign situates itself between the current legal order and the decision to suspend it on its own account (Agamben, 2008a; Agamben, 2008b; Sawczyński, 2019, pp. 233–253). Giorgio Agamben himself makes a reference to the Roman institution of *justitium*, i.e. the suspension of jurisdiction, legal order or *jus*. Ulpian's famous legal maxim of the Roman law, i.e. *iustitia est constans et perpetua voluntas ius suum cuique tribuendi* ("justice is the constant and perpetual will to render to every man his due"), which is contained in the Digest of Justinian, becomes somewhat ambiguous in this context (Lewski, 1995, p. 9; Agamben, 2008a; Agamben, 2008b). For there remains the unresolved problem of what rule of justice (Latin *justitia*) and rightness (Latin *aequitas*) to apply while rendering to him that which is his due, if he poses an existential threat to the po-

litical community or is recognized as one. In other words, what yardstick should be used when choosing special measures against the enemy, and in the context of the problem addressed in the text – what yardstick should be used when choosing special measures within or outside the bounds of necessary defence and the state of higher necessity by the political community? This question leads us directly to the issue of distributive and redistributive justice addressed by Aristotle in *Nicomachean Ethics* (Arystoteles, 2008; Galewicz, 2017, pp. 289–307; Wesoly, 2017, pp. 99–125).

3. State security and counter terrorism security

In the context of Art. 5 of the Constitution of the Republic of Poland, which stipulates the obligations of the state, security as a legal interest is not positioned above or below in relation to other interests or values, e.g. human and civic rights and freedoms. Still, in Art. 31 of the Constitution the legislator points out that the constitutional rights and freedoms can be restricted by statute, and only when this is necessary in a democratic state for its security (cf. Jabłoński, 2010). However, it must be borne in mind that while Art. 5 of the Constitution stipulates the state obligations towards the citizens and the community, Art. 31 of the Constitution stipulates grounds for restricting civil liberties and rights for the sake of, *inter alia*, security as well as liberties and rights of other individuals. In the latter case the legislator points to the limit of the restrictions imposed for the sake of security, as they must not infringe the essence of rights and liberties. Hence, one can say that both the afore-mentioned constitutional provisions present a conflict between two values, i.e. the interest of the community and the interest of the individual. If we assume that Art. 5 of the Constitution indicates, *inter alia*, the priority of the security of the citizens and the community, and Art. 31 indicates the priority of individual security as well as rights and freedoms, as a prerequisite for applying necessary restrictions, then the situation in which the existence of the community, citizens and other persons is threatened will constitute sufficient grounds for undertaking action within or outside the limits of necessary defence and the state of higher necessity.

Pointing to the limits of the restrictions, in the form of non-violation of the essence of rights and freedoms, may also apply to the protection of the existence of the community and citizens. There is no way one might presuppose that the protection of entities threatening the existence of the community and citizens could be greater than the protection of the rights vested in the community members themselves. According to the existential approach espoused by Sartre, every man who renounces his freedom for the sake of another man, has himself to hold accountable for objectifying himself, that is for reducing himself to the status of a mere object. Hence, the individual can deny and objectify himself, or annihilate another man. A situation of universal freedom and coexistence, as well as of the absence of conflict is not possible. And so the other/the stranger who stands in the way of an individual's freedom, as a source of anxiety and fear should be rendered harmless (cf. Gromczyński, 1969; Bukowski, 1981a, pp. 227–243; Bukowski, 1981b, pp. 142–151; Kowalska, 1991, pp. 73–92; Ochmann, 2009, pp. 247–264; Błaszczyk, 2019, pp. 39–50).

It has been recognized that counter terrorism security is an element in the content of a broad category of security, both as a protected good and a constitutional value that

corresponds to it. Therefore, when the sense of the category of counter terrorism security is interpreted, it needs to be understood as the absence of a threat, i.e. a form of negative liberty. In the context of the workings of the political community and the state, it needs to be assumed that security is a possibility of satisfying existential needs, as well as of ensuring one's existence, survival and development (see more in: Williams, 2008, pp. 1–12; Zięba, 2008, pp. 15–38; Rosicki, 2010, pp. 24–32; Koziej, 2011, pp. 19–39; Stańczyk, 2017). Hence, security is a state of certitude as to the above-mentioned possibilities. And counter terrorism security means absence of the threat of terrorist acts, or more broadly – the phenomenon of terrorism, or to put it yet differently, it is freedom from terrorism and terrorist threats. Ensuring the existence of the community with regard to the occurrence of various terrorist threats is reckoned among the actions aimed at counter terrorism security.

The text does not set out to analyse the very concept of terrorism or a terrorist act, because they are subjects of research undertaken by representatives of many disciplines with well-established literature (See Lemkin, 1935, pp. 561–564; Schultz, 1978, pp. 7–15; Hanausek, 1980, pp. 30–31; Chalk, 1996; Wilkinson, 2006; Dietl, Hirschmann, Tophoven, 2009; Bolechów, 2010; Wejksznier, 2010; Wojciechowski, 2013; Ostant, 2017; Wojciechowski, Osiewicz, 2017; Chaliand, Blin, 2020; Gasztold, 2020; Schuurman, 2020, pp. 1011–1026 and many other publications). Still, one should certainly point out that the concept of terrorism itself is not identical with the the concept of a terrorist offence under the Polish law, nor is it so in the legal orders of the EU member states, as this is the result of the implementation of the solutions provided for in the Council Framework Decision of 2002 (2002/475/JHA; Zgorzały, 2007, pp. 58–79; Przesławski, 2009, pp. 17–28; Gabriel-Węglowski, 2018, pp. 52–64; Michalska-Warias, 2018, pp. 103–113).

Thus, it is worth considering whether the category of counter terrorism security has any legal grounds, i.e. whether it constitutes a legal category, or is perhaps just contained in the part defining a protected good or a constitutional value, i.e. security or state security. There is no doubt that with regard to the narrower material scope, counter terrorism security is simply an element in the broad set of security. In this sense, security serves as a denotation for counter terrorism security understood as an absence of threat of terrorist acts.

Counter terrorism security, as a legal category, can be reconstructed with the aid of selected contents of the Act of 10 June 2016 *on counter-terrorism activities* (Journal of Laws 2016, item 904, as amended). The said act introduces, *inter alia*, legal definitions of counter terrorist activities and a terrorist incident. Pursuant to the act the legislator finds counter terrorist activities to be “activities undertaken by public administration bodies and aimed at preventing incidents of a terrorist character, preparations to take control over such incidents by means of planned undertakings, reaction whenever such incidents occur and removal of their effects, including the recovery of the resources aimed at reacting to such incidents.” Next to counter terrorist activities, the legislator defines a terrorist incident which is understood as “a situation suspected to have developed as a result of a terrorist offence or a threat of such an offence.”

Therefore, it needs to be posited that in a situation when the category of counter terrorism security is reconstructed as a legal category, it will concern an actual state of

the absence of terrorist offence threats. In this case, creating the category of counter terrorism security is based on the analogy with the construction of the concept of security grounded in “freedom from,” and ultimately in deductive reasoning governed by the rule of substitution. The conclusions to be drawn are that the legal category of counter terrorism security encompasses freedom from terrorist offences and threats of terrorist offences. In the context of the powers vested in the political community, counter terrorism security is associated with the ensuring of the existence of the community with regard to the occurrence of such threats and offences.

4. Special measures in the counter terrorism security of the community

4.1. Necessary defence actions

Under the Polish law the institution of necessary defence is regulated in the criminal code, which provides for its circumstances excluding the unlawfulness of the act; in the doctrine it is reckoned among the so-called counter-types. The idea of necessary defence is connected with everyone’s natural need to protect their own goods, and especially life, as well as with the presupposition that lawfulness should not yield to lawlessness. And so next to the natural premiss of instinctive motives, account should be taken of the entity’s action taken with awareness of the actual unlawfulness of an assault on a specific good protected by the law (cf. Decision of the Supreme Court of 27.04.2017, IV KK 116/17; Pohl, 2019, pp. 288–290; Bojarski, 2020, pp. 172–178).

While drawing an analogy with the institution of necessary defence, connected with a man’s act, it can be indicated that the political community, when acting within the limits of necessary defence, i.e. using special measures to combat terrorism, should meet certain conditions. The first group of these conditions includes ones that authorize necessary defence. The second group includes ones that define a legitimate manner of reacting to the attack. The first group of conditions concerns the attack itself, which should be actual, direct and unlawful. The second group of conditions concerns the very manner or means of implementing necessary defence, which should be appropriate to the kind of attack as well as to its directness (Królikowski, Zawłocki, 2015, pp. 256–259; Pohl, 2019, pp. 292–297).

As regards the actions of the political community, it is to be assumed that acts of terrorism or terrorist offences need to be characterized by directness. However, it is debatable whether in themselves they need to threaten the existence of the community as viewed from the perspective of a political situation as defined by C. Schmitt. Nevertheless, one might assume that it is the community that defines the plausibility, and hence the objectivity of a threat to its existence. However, the conditions of the political situation might determine the community’s actions outside the limits of the existing law in the light of the previously adopted theoretical assumptions. Undoubtedly, the problem of directness is linked with the possibility of timely application of means and measures for implementing necessary defence by the political community.

In the case of actions taken as part of necessary defence, terrorist acts or terrorist offences can be regarded as direct whenever they could be committed immediately,

or in the event of a high probability that the good found by the community to be of considerable significance is in danger of immediate attack. Given such an approach, the community's actions that are preventive and non-contemporaneous, i.e. happening much earlier or later, are deemed excessive in regard to the bounds of necessary defence. All preventive actions aimed at protecting the good, i.e. counter terrorism security, can both *ex ante* and *ex post* be taken only when *jus* and *leges* get suspended. A similar situation will be the case, if the political community resorts to too intensive means and measures of necessary defence. In the event that *jus* and *leges* are suspended, the political community, as it takes preventive actions, tends towards an extensive excess (inappropriate means and measures), and towards an intensive excess (non-contemporaneous actions). Such actions can be exemplified by *jus ad bellum*, as a response to terrorist acts, use of preventive taking of lives of groups or persons, torture, preventive imprisonment and use of uncontrolled means of surveillance (cf. Kowalski, 2013; Szuniewicz, 2016; Kwiecień, 2019).

4.2. Higher state of necessity actions

Under the Polish law the institution of higher necessity is regulated in the criminal code, and like necessary defence it determines the circumstances excluding the unlawfulness of the act. Noteworthy, the Polish criminal code distinguishes two different states of higher necessity. The one is actually associated with circumstances excluding the unlawfulness of the act (the counter-type), while the other one constitutes circumstances precluding apportioning of guilt to the person perpetrating it as a prohibited act. In both the cases we are dealing with a situation in which one good is sacrificed to protect another one, i.e. a person's action with the aim of averting a direct threat to any good protected by the law. However, in the first case the good sacrificed is less valuable than the good saved, while in the second case, the value of the good sacrificed is not obviously higher than the good saved (proportionality). In both the cases, specific goods can be sacrificed, if the danger cannot be avoided in any other way (subsidiarity), and if it is objective (Królikowski, Zawłocki, 2015, pp. 259–265; Warylewski, 2017, pp. 332–336, 422–424; Pohl, 2019, pp. 300–307).

In the two different types of higher necessity, one can clearly see the utilitarian dilemma concerned with sacrificing one good for another. Sometimes the manner of objectively assessing the import or value of goods may be dubious. Undoubtedly, life should be regarded as the superior value, and so sacrificing, say, a thing in order to save life is recognized as an action of the first type of higher necessity, while sacrificing one life for the sake of another, or sacrificing a thing of value inferior to another thing are recognized as actions of the second type of higher necessity (of course with the proviso that at the same time the requirements of realness, directness, subsidiarity and proportionality are met). The greatest controversy can be aroused by saving one life at the expense of another, which can be particularly well seen in the dilemma concerned with sacrificing an individual life in order to save a greater number of human lives. This kind of legal problem is identical with the known ethical and cognitive dilemma referred to as the trolley problem (cf. Thomson, 1985, pp. 1395–1415; Kamm, 1989, pp. 227–256; Vardy, Grosch, 2010,

pp. 68–76; Awad, Dsouza, Kim, 2018, pp. 59–64). Nevertheless, it is assumed that the state of higher necessity may not legitimize the actions undertaken by state authorities in breach of the individual good. Besides, it is assumed that the individual good can be sacrificed for the common good only by way of explicit authorization (cf. Mozgawa, 2017, pp. 100–105).

By drawing an analogy with the state of higher necessity, linked with a man's act, one needs to point out that the political community, when acting within the legal limits of the state of higher necessity, should use special measures in a situation when it is necessary to sacrifice a good of value inferior to the value of the good saved (the counter-type), or when it is necessary to sacrifice a good of value that is not obviously superior to the one of the good saved (exemption from liability). At the same time, despite the differences to necessary defence, the state of higher necessity must be characterized by an objective, actual and direct threat to any protected good. This directly leads to a similar dilemma we dealt with when discussing the problematics of the political community's preventive action taken *ex ante* and *ex post* as part of the institution of necessary defence. In the case of every prevention, i.e. non-contemporaneous actions, the political community acts outside the limits of *jus* and *leges*. However, when acting in the state of higher necessity, in a critical situation or when faced with an existential threat, when viewed through the lens of C. Schmitt's political situation, the community will act in accordance with its powers, i.e. the powers vested in the sovereign.

The state of higher necessity reveals a conflict of various goods – the good of a lower value and the good of a value that is not obviously higher. Irrespective of whether we consider the problem against the first or the second type of the state of higher necessity, the choice between the good of one life and another life, or even a material good will give rise to a number of ethical dilemmas. This issue can be considered by looking at the example of a potential decision to shoot down a plane that might be used for a terrorist attack.

As regards the first type of the state of higher necessity, we can assume that in the event of a direct threat to the lives of community members, if the danger of a terrorist attack cannot be averted otherwise, and the good sacrificed is less valuable than the good saved, then the aircraft will be shot down, and the political community that resorts to this type of special measures does not transgress against *jus* and *leges*. As regards the second type of the state of higher necessity, we can assume that in the event of a direct threat to the lives of community members, if the danger of a terrorist attack cannot be averted otherwise, and the good sacrificed is not of a value obviously higher than the good saved, then the aircraft will be shot down, and the political community that resorts to this type of special measures does not transgress against *jus* and *leges* either. However, if on board a plane there are other people than terrorists, as well as members of the community under threat, the situation gets immensely complicated. With regard to the institution of the state of higher necessity, one good, which is a life, is a good of neither lesser nor greater value. Life is then a good that is not obviously more valuable, if it is necessary to save one life at the cost of another. The situation gets even more complicated from the ethical viewpoint, because in accordance with the scenario of the above-mentioned trolley dilemma, the political community may quantitatively measure the good constituted by life, e.g. questioning whether a sacrifice can be made of some members of the political community aboard the hijacked plane with a view to saving a larger number of the community members.

Conclusion

The material scope of the analysis performed in the text encompasses the theoretical aspects of the relationship between the good constituted by the community security and special measures taken within and outside the bounds of necessary defence and the state of higher necessity. The main purpose of the analysis is to present argumentation concerned with the scope of special measures taken by the political community within or outside the bounds of necessary defence and the state of higher necessity. The theoretical presuppositions underpinning the analysis constitute a thought experiment which *per analogiam* provides the political community with causal agency attributes that individuals are endowed with by the provisions of the Polish criminal code, but also outside these provisions, i.e. actions within and outside the limits of necessary defence and the state of higher necessity. It is noteworthy that the assumptions behind the thought experiment go beyond the assumptions behind the pro-democratic and pro-constitutional interpretation. Given the need to elaborate the objective scope of analysis, the text features two research questions related to the following conclusions:

(1) To what extent is it possible, within the limits of the law and by analogy with the individual's adequate actions, for the political community to apply special measures (necessary defence or the state of higher necessity) with the aim of providing security (and in particular counter terrorist security) for itself?

It is to be posited that for the political community's actions consisting in using special measures falling within necessary defence to be in conformity with *jus* and *leges*, they need to fulfil the following conditions: (1) a terrorist attack or offence must be actual, direct and – obviously – unlawful, (2) a terrorist attack or offence must not be imaginary, (3) necessary defence ought to be directed at the person committing a terrorist attack or offence, and so it should not affect a third party, (4) necessary defence must not be premature (*ex ante*), (5) necessary defence must not be belated (*ex post*), (6) necessary defence ought to be based on a manner or means of defence appropriate to (commensurate with) the danger of the terrorist attack or offence.

As regards the political community's actions consisting in using special measures falling within the compass of the state of higher necessity, it should be posited that if they are to be in conformity with *jus* and *leges*, they should meet the following conditions: (1) a threat to any good of the political community posed by the effects of a terrorist attack or offence ought to be actual and direct, (2) a threat represented on account of a terrorist attack or offence must not be imaginary, (3) the political community, when using special measures, should maintain an appropriate balance between the good saved and the good sacrificed, (4) the political community, when sacrificing some good, should do it only if there is no other solution, i.e. if that is necessary and only manner of defence available.

(2) To what extent is it possible, outside the limits of the law and by analogy with the individual's adequate actions, for the political community to apply special measures (necessary defence or the state of higher necessity) with the aim of providing security (and in particular counter terrorist security) for itself?

It is to be posited that for the political community's actions consisting in using special measures falling within necessary defence to violate the established order of *jus* and *leges*, they need to exceed the principles indicated in the conclusions concerning

the first research question. The community's actions taken under the circumstances of suspended *jus* and *leges* include: (1) the use of special measures, if they are a reaction to actions that are not unlawful, (2) the use of special measures, if they are a reaction to an imaginary threat of acts of terrorism or terrorist offences, (3) the use of special measures, if they are non-contemporaneous with the terrorist attack or offence (both *ex ante* and *ex post*), (4) the use of special measures, if they are incommensurate with the threat, i.e. they are too intense. A separate issue is one concerned with the political community's actions that exceed the limits of necessary defence, but are taken as a result of fear or agitation, which is justified by the circumstances of the terrorist attack or offence, which goes beyond the scope of the imaginarieness of threats affecting the political community.

Typical examples of necessary defence abuse by political communities include *ex ante* and *ex post* actions. The first type of actions can be exemplified by preventive actions of an anticipatory nature, e.g. the case of three IRA members, D. McCann, M. Farrell and S. Savage, killed by SAS in Gibraltar in 1988, or the "preventive" taking out of terrorist organization members by Israel. The second type can be exemplified by US retaliatory measures taken as part of the so-called global war on terrorism, both "within the framework" of *jus ad bellum* and in acts of violation of human rights taking place at the Guantanamo Bay detention camp.

In the case of special measures exceeding *jus* and *leges*, taken as part of the state of higher necessity by the political community, the following situations should be invoked: (1) a threat to any good of the political community posed by the effects of a terrorist attack or offence is neither actual nor direct, (2) a threat connected with a terrorist attack or offence is simply imaginary, (3) the political community, when using special measures, does not maintain the balance between the good saved and the good sacrificed, e.g. the value of the good saved is lower than the value of the good sacrificed, (4) the political community, when using special measures, does not observe the principle of subsidiarity, i.e. saves one good at the expense of another, while it has other measures to choose from.

Typical examples of abuse with regard to the state of higher necessity include attempts at introducing, in the legal orders of individual states, rules that correspond to the trolley problem. In order to illustrate this problem, the text uses an example of regulations providing for the shooting down of an aircraft, if it has become a means of terrorist attack.

The analysis contained in the text is an overview, and as such it is an introduction to the discussion of the proposed thought experiment consisting in assignment to the political community – *per analogiam* to the individual – of causal agency attributes in the form of actions within or outside the limits of necessary defence and the state of higher necessity when counteracting a terrorist threat. The starting point for the thought experiment is a presupposition whereby the political and legal entity is constituted by a political community *a contrario* state authority, as derived from C. Schmitt's concept of the political. More consideration and further research should be dedicated to the issues concerned with mechanisms, means and measures exemplifying the political community's actions within or outside the limits of necessary defence and the state of higher necessity.

Bibliography

- Agamben G. (2008a), *Stan wyjątkowy. Homo sacer II, 1*, Ha!art, Kraków.
- Agamben G. (2008b), *Stan wyjątkowy*, <https://recyklingidei.pl/agamben-stan-wyjatkowy>, 31.01.2021.
- Arystoteles (2008), *Etyka nikomachejska*, PWN, Warszawa.
- Awad E., Dsouza S., Kim R. et al. (2018), *The Moral Machine experiment*, "Nature", vol. 563.
- Bacławski J. (2012), *Wola powszechna i jej stabilność według koncepcji J. J. Rousseau*, "Przegląd Filozoficzny. Nowa Seria", no. 4.
- Bakker E., De Graaf B. (2014), *Towards a Theory of Fear Management in the Counterterrorism Domain: A Stocktaking Approach*, "ICCT Research Paper", January 2014.
- Bäcker R., Rak J. (2019), *Trajektoria trwania opancerzonych demokracji*, "Studia nad Autorytaryzmem i Totalitaryzmem", vol. 41, no. 3.
- Barber B. R. (2003), *Strong Democracy. Participatory Politics for a New Age*, University of California Press, Berkeley–Los Angeles.
- de Benoist A. (2007), *Carl Schmitt actuel: guerre »juste«, terrorisme, état d'urgence, »Nomos de la Terre«*, Éditeur Krisis, Paris.
- Berger P. L., Luckmann T. (2010), *Spoleczne tworzenie rzeczywistości*, PWN, Warszawa.
- Biały F. (2018), *Koncepcje demokracji agonistycznej*, UAM, Poznań.
- Błaszke M. (1987), *Umowa społeczna J. J. Rousseau: polityka i racjonalność*, "Archiwum Historii Filozofii i Myśli Społecznej", t. 32.
- Błaszczyk M. (2019), *Człowiek według Jeana-Paula Sartre'a*, "Przegląd Filozoficzny – Nowa Seria", no. 2.
- Bojarski M. (ed.) (2020), *Prawo karne materialne. Część szczególna i ogólna*, Kluwer, Warszawa.
- Bolechów B. (2010), *Terroryzm: aktorzy, statyści, widownie*, PWN, Warszawa.
- Bukowski J. (1981a), *Konstrukcje czy zalecenia etyczne? (uwagi do filozofii Sartre'a)*, "Archiwum Historii Filozofii i Myśli Społecznej", no. 27.
- Bukowski J. (1981b), *Problem Innego u Sartre'a*, "Teksty: teoria literatury, krytyka, interpretacja", no. 3.
- Chaliand G., Blin A. (2020), *Historia terroryzmu. Od starożytności do Da'isz*, PIW, Warszawa.
- Chalk P. (1996), *West European Terrorism and Counter-Terrorism. The Evolving Dynamic*, Palgrave Macmillan, London.
- Christensen D. A., Aars J. (2019), *Does Democracy Decrease Fear of Terrorism?*, "Terrorism and Political Violence", vol. 31, no. 3.
- Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).
- Davis D. W., Silver B. D. (2004), *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, "The American Journal of Political Science", vol. 48, no. 1.
- Decision of the Supreme Court of 27 April 2017 (IV KK 116/17).
- Dietl W., Hirschmann K., Tophoven R. (2009), *Terroryzm*, PWN, Warszawa.
- Digesta Iustiniani: Liber 1*, <https://droitromain.univ-grenoble-alpes.fr/#1>, 31.01.2021.
- Furlong P., Marsh D. (2010), *A Skin Not a Sweater: Ontology and Epistemology in Political Science*, in: *Theory and methods in political science*, eds. D. Marsh, G. Stoker, Palgrave Macmillan, Basingstoke.
- Gabriel-Węglowski M. (2018), *Działania antyterrorystyczne. Komentarz*, Wolters Kluwer, Warszawa.
- Galewicz W. (2017), *Zakres sprawiedliwości wyrównawczej w etyce Arystotelesa*, „Peitho”, vol. 8, no. 1.
- Garcia B. E., Geva N. (2016), *Security Versus Liberty in the Context of Counterterrorism: An Experimental Approach*, "Terrorism and Political Violence", vol. 28, issue 1.

- Gardocki L. (1990), *Zagadnienia teorii kryminalizacji*, PWN, Warszawa.
- Gasztold A. (2020), *Feminist Perspectives on Terrorism: Critical Approaches to Security Studies*, Springer Nature, Cham.
- Gasztold A., Gasztold P. (2020), *The Polish Counterterrorism System and Hybrid Warfare Threats*, "Terrorism and Political Violence", doi: 10.1080/09546553.2020.1777110.
- Górnisiewicz A. (2019), *Wojna i Nomos: Carl Schmitt o problemie porządku światowego*, Universitas, Kraków.
- Grabler A. (2019), *Epistemologia. Sandwiczowa teoria wiedzy*, Universitas, Kraków.
- Gromczyński W. (1969), *Człowiek, świat rzeczy, Bóg w filozofii Sartre'a*, PWN, Warszawa.
- Hanausek T. (1980), *W sprawie pojęcia współczesnego terroryzmu*, „Problemy Kryminalistyki”, no. 143.
- Hetherington M., Suhay E. (2011), *Authoritarianism, threat, and Americans' support for the war on terror*, „American Journal of Political Science”, vol. 55, no. 3.
- Hirst P. (2011), *Decyzjonizm Carla Schmitta*, in: *Carl Schmitt. Wyzwanie polityczności*, ed. Ch. Mouffe, Wyd. Krytyki Politycznej, Warszawa.
- Hunter L. Y. (2016), *Terrorism, Civil Liberties, and Political Rights: A Cross-National Analysis*, “Studies in Conflict & Terrorism”, vol. 39, issue 2.
- Iskra-Paczkowska A. (2007), *Antynomie Sartre'owskiej koncepcji egzystencji autentycznej* (praca doktorska), UŚ, Katowice.
- Jabłoński M. (ed.) (2010), *Wolności i prawa jednostki w Konstytucji RP*, tom 1: *Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP*, Beck, Warszawa.
- Jędraszewski M. (1994), *W poszukiwaniu nowego humanizmu: J.-P. Sartre–E. Lévinas*, PAT, Kraków.
- Jovanović M. (2016), *How to Justify »Militant Democracy«: Meta-ethics and the Game-like Character of Democracy*, “Philosophy and Social Criticism”, vol. 42, no. 8.
- Kaleta K. J., Koźmiński K. (2013), *Charakter władzy suwerennej w koncepcjach ładu konstytucyjnego Hansa Kelsena i Carla Schmitta*, “Filozofia Publiczna i Edukacja Demokratyczna”, no. 2.
- Kamm F. M. (1989), *Harming Some to Save Others*, “Philosophical Studies”, vol. 57, no. 3.
- Kowalska M. (1991), *Pojęcia bytu i nicości w filozofii J.P. Sartre'a*, “Archiwum Historii Filozofii i Myśli Społecznej”, no. 36.
- Kowalski M. (2013), *Prawo do samoobrony jako środek zwalczania terroryzmu międzynarodowego*, Difin, Warszawa.
- Koziej S. (2011), *Bezpieczeństwo: istota, podstawowe kategorie i historyczna ewolucja*, “Bezpieczeństwo Narodowe”, no. 18.
- Królikowski M., Zawłocki R. (2015), *Prawo karne*, BECK, Warszawa.
- Kulesza J. (2014), *Zarys teorii kryminalizacji*, “Prokuratura i Prawo”, no. 11–12.
- Kulesza J. (2017), *Problemy teorii kryminalizacji. Studium z zakresu prawa karnego i konstytucyjnego*, UŁ, Łódź.
- Kwiecień R. (2019), *Od „wojny sprawiedliwej” do „wojny z terroryzmem”. Siła zbrojna i reglamentacja jej używania (ius contra bellum) w świetle prawa międzynarodowego*, PISM, Warszawa.
- Lemkin R. (1935), *Terroryzm*, „Gazeta Sądowa Warszawska”, no. 41.
- Lerner M. (1938), *It Is Later Than You Think: The Need for a Militant Democracy*, The Viking Press, New York.
- Lis R. (2014), *Jean Bodin, John Locke i Jean Jacques Rousseau. O paradoksie suwerenności i ludowładztwa oraz próbach jego rozwiązania*, “Studia Polityczne”, no. 34.
- Litewski W. (1995), *Rzymskie prawo prywatne*, PWN, Warszawa.
- Loewenstein K. (1935a), *Autocracy versus Democracy in Contemporary Europe, I*, “The American Political Science Review”, vol. 29, no. 4.

- Loewenstein K. (1935b), *Autocracy Versus Democracy in Contemporary Europe, II*, „American Political Science Review”, vol. 29, no. 5.
- Loewenstein K. (1937a), *Militant Democracy and Fundamental Rights, I*, „American Political Science Review”, vol. 31, no. 3.
- Loewenstein K. (1937b), *Militant Democracy and Fundamental Rights, II*, „American Political Science Review”, vol. 31, no. 4.
- Maddox G. (2019), *Karl Loewenstein, Max Lerner, and militant democracy: an appeal to »strong democracy«*, „Australian Journal of Political Science”, doi:10.1080/10361146.2019.1604943.
- Malkopoulou A., Norman L. (2018), *Three Models of Democratic Self-Defence: Militant Democracy and Its Alternatives*, „Political Studies”, vol. 66, no. 2.
- Marsh D., Stoker G. (eds.) (2010), *Theory and methods in political science*, Palgrave Macmillan, Basingstoke.
- Michalska-Warias A. (2018), *New Terrorist Offences in Polish Criminal Law*, „Annales Universitatis Mariae Curie-Skłodowska, sectio G (Ius)”, vol. 65, no. 1.
- Mouffe Ch. (ed.) (2011), *Carl Schmitt. Wyzwanie polityczności*, Wyd. Krytyki Politycznej, Warszawa.
- Mueller J. (2006), *Overblown: How politicians and terrorism industry inflate national security threats and why we believe them*, Free Press, New York.
- Nowacki J., Tabor Z. (2016), *Wstęp do prawoznawstwa*, Kluwer, Warszawa.
- Nowak L. (1991), *U podstaw teorii socjalizmu*, tom III: *Dynamika władzy. O strukturze i konieczności zaniku socjalizmu*, Nakom, Poznań.
- Ostant W. (2017), *Unia Europejska wobec zagrożenia terroryzmem od Maastricht do Lizbony*, Instytut Zachodni, Poznań.
- Ochmann J. (2009), *Nicość realna w interpretacji Heideggera, Sartre'a, Weltego, Nehera i filozofów Bliskiego i Dalekiego Wschodu*, „Poznańskie Studia Teologiczne”, no. 23.
- Parsons C. (2010), *Constructivism and Interpretive Theory*, in: *Theory and methods in political science*, eds. D. Marsh, G. Stoker, Palgrave Macmillan, Basingstoke.
- Pichlak M. (2017), *Rozróżnienie »ius et lex« we współczesnej filozofii prawa*, „Archiwum Filozofii Prawa i Filozofii Społecznej”, no. 2.
- Pierchalski F. (2009), *Podmiotowość polityczna w perspektywie indywidualistycznej i holistycznej*, Akademia Humanistyczna im. Aleksandra Gieysztora, Pułtusk.
- Pietrzyk-Reeves D. (2010), *Podstawy zgody i dyskursu publicznego w koncepcji umowy społecznej Jana Jakuba Rousseau*, „Krakowskie Studia z Historii Państwa i Prawa”, t. 3.
- Pohl Ł. (2019), *Prawo karne. Wykład części ogólnej*, Kluwer, Warszawa.
- Porębski C. (1986), *Umowa społeczna według Jana Jakuba Rousseau*, „Etyka”, no. 22.
- Przesławski T. (2009), *Cel w konstrukcji przestępstwa terrorystycznego*, „Prokuratura i Prawo”, no. 5.
- Reddick Ch. G., Chatfield A. T., Jaramillo P. A. (2015), *Public opinion on National Security Agency surveillance programs: A multi-method approach*, „Government Information Quarterly”, vol. 32, no. 2.
- Rosicki R. (2010), *O pojęciu i istocie bezpieczeństwa*, „Przegląd Politologiczny”, no. 3.
- Rosicki R. (2015), *Information and anti-terrorist security of Poland. A critical analysis exemplified with the tasks and activity of the Internal Security Agency*, „Studia Politologiczne”, vol. 38.
- Rosicki R. (2018), *Counter-Terrorist Security: the Example of the Special Powers of the Polish Special Services in the Field of Surveillance of Foreign Nationals*, „Przegląd Strategiczny”, no. 11.
- Rousseau J. J. (2002), *Umowa społeczna*, Wyd. M. Derewiecki, Kęty.
- Russell B. (1985), *Authority and Individual*, Routledge, London–New York.
- Sawczyński P. (2019), *Dwa oblicza stanu wyjątkowego w filozofii Giorgia Agambena*, „Politeja”, vol. 59, no. 2.

- Schmitt C. (2000), *Teologia polityczna i inne pisma*, Znak, Kraków.
- Schmitt C. (2014), *Teologia polityczna 2*, Aletheia, Warszawa.
- Schmitt C. (2016), *Dyktatura*, Kronos, Warszawa.
- Schultz R. (1978), *Conceptualizing politicalterrorism: A typology*, „Journal of International Affairs”, vol. 32, no. 1.
- Schuurman B. (2020), *Research on Terrorism, 2007–2016: A Review of Data, Methods, and Authorship*, “Terrorism and Political Violence”, vol. 32, no. 5.
- Skarzyński R. (2004), *Decyzjonizm Carla Schmitta (1921–1932)*, “Studia Politologiczne”, vol. 8.
- Stańczyk J. (2017), *Formułowanie kategorii pojęciowej bezpieczeństwa*, FNCE, Poznań.
- Stoycheff E., Wibowo K. A., Liu J., Xu K. (2017), *Online Surveillance’s Effect on Support for Other Extraordinary Measures to Prevent Terrorism*, “Mass Communication and Society”, vol. 20, no. 6.
- Szahaj A., Jakubowski M. N. (2020), *Filozofia polityki*, PWN, Warszawa.
- Szolc-Nartowski B. (transl.) (2007), *Digesta Justyniańskie. Ks. 1*, WSHP, Warszawa.
- Szuniewicz M. (2016), *Ochrona bezpieczeństwa państwa jako przesłanka ograniczenia praw i wolności jednostki w świetle Europejskiej Konwencji Praw Człowieka*, C.H. Beck, Warszawa.
- Szyszkowska M. (1971), *Relatywizm filozoficzno-prawny Radbrucha*, “Studia Philosophiae Christianae”, vol. 7, no. 1.
- Thomson J. J. (1985), *The Trolley Problem*, “The Yale Law Journal”, vol. 94, no. 6.
- Tönnies F. (1887), *Gemeinschaft und Gesellschaft: Abhandlung des Communismus und des Socialismus als empirischer Culturformen*, Fues’s Verlag, Leipzig.
- UN Office of the High Commissioner for Human Rights (OHCHR) (2008), *Human Rights, Terrorism and Counter-terrorism*, “Fact Sheet”, no. 32.
- Vardy P., Grosch P. (2010), *Etyka*, PWN, Poznań.
- Vultee F. (2010), *Securitization: A new approach to the framing of the »war on terror«*, “Journalism Practice”, vol. 4, no. 1.
- Waldenfels B. (2009), *Podstawowe motywy fenomenologii obcego*, Oficyna Naukowa, Warszawa.
- Warylewski J. (2017), *Prawo karne. Część ogólna*, Kluwer, Warszawa.
- Wejksznar A. (2010), *Ewolucja terroryzmu motywowanego ideologią religijną na przykładzie salafickiego ruchu globalnego dżihadu*, UAM, Poznań.
- Wesoły M. A. (2017), *Księga Arystotelesa »O sprawiedliwości« (Eth. Nic. V)*, “Filo-Sofija”, no. 36.
- Williams P. D. (ed.) (2008), *Security Studies: An Introduction*, Routledge, New York.
- Wilkinson P. (2006), *Terrorism versus Democracy: The liberal state response*, Routledge, London–New York.
- Wojciechowski S. (2013), *The Hybridity of Terrorism*, Logos, Berlin.
- Wojciechowski S., Osiewicz P. (2017), *Zrozumieć współczesny terroryzm. Wybrane aspekty fenomenu*, Difin, Warszawa.
- Woleński J. (2015), *O formule Radbrucha*, “Principia”, no. 61–62.
- Wronkowska S. (2005), *Podstawowe pojęcia prawa i prawoznawstwa*, Ars boni et aequi, Poznań.
- Wronkowska S., Ziemiński Z. (1997), *Zarys teorii prawa*, Ars boni et aequi, Poznań.
- Zajadło J. (2001), *Formuła Radbrucha. Filozofia prawa na granicy pozytywizmu prawniczego i prawa natury*, Arche, Gdańsk.
- Zgorzały R. (2007), *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, “Prokuratura i Prawo”, no. 7–8.
- Zięba R. (2008), *Pozimnowojenny paradygmat bezpieczeństwa międzynarodowego*, in: *Bezpieczeństwo międzynarodowe po zimnej wojnie*, ed. R. Zięba, WSiP, Warszawa.

Zięba R. (ed.) (2008), *Bezpieczeństwo międzynarodowe po zimnej wojnie*, WSiP, Warszawa.

Teoretyczne i filozoficzne aspekty szczególnych uprawnień wspólnoty politycznej w zakresie bezpieczeństwa antyterrorystycznego

Streszczenie

Zakres przedmiotowy analizy podjętej w tekście obejmuje problematykę relacji między dwoma dobrami. Z jednej strony między dobrem, którym jest bezpieczeństwo wspólnoty, i z drugiej strony – dobrem wyrażającym się w uprawnieniu do stosowania szczególnych środków wpisujących się w ramy obrony koniecznej i stanu wyższej konieczności. Problem relacji między dwoma dobrami, np. konfliktem między dwoma dobrami, zauważyć można w rywalizacji dobra wspólnego i dobra jednostki. Podobną relację zauważyć można w procesie derogacji zobowiązań współczesnej wspólnoty politycznej w zakresie ochrony życia oraz innych praw i wolności jednostki. Za szczególne przypadki kolizji dóbr należy uznać dopuszczalność użycia siły, przemocy i ograniczenia prywatności jednostki. Do najbardziej skrajnych przykładów użycia siły i przemocy przez wspólnotę polityczną należy zaliczyć pozbawienie jednostek lub grup życia i stosowanie wobec nich tortur. Natomiast do przykładów związanych z ingerencją w sferę życia prywatnego jednostki należy zaliczyć wszelkiego rodzaju środki inwigilacji stosowane przez instytucje państwowe.

Głównym celem analizy zawartej w tekście jest przedstawienie różnego typu argumentów dotyczących możliwości stosowania szczególnych środków w granicach lub poza granicami obrony koniecznej i stanu wyższej konieczności przez wspólnotę polityczną. W celu uszczegółowienia zakresu przedmiotowego analizy w tekście wskazano następujące pytania badawcze: (1) *W jakim zakresie możliwe jest w granicach prawa, per analogiam do adekwatnych działań jednostki, stosowanie szczególnych środków (obrony koniecznej lub stanu wyższej konieczności) przez wspólnotę polityczną w celu zapewnienia jej bezpieczeństwa (w szczególności bezpieczeństwa antyterrorystycznego)?*; (2) *W jakim zakresie możliwe jest w poza granicami prawa, per analogiam do adekwatnych działań jednostki, stosowanie szczególnych środków (obrony koniecznej lub stanu wyższej konieczności) przez wspólnotę polityczną w celu zapewnienia jej bezpieczeństwa (w szczególności bezpieczeństwa antyterrorystycznego)?*

Analiza zawarta w tekście ma głównie charakter poglądowy i koncepcyjny w zakresie prezentacji problematyki relacji dóbr, jakimi są bezpieczeństwo i szczególne uprawnienia wspólnoty politycznej. Do prezentacji prawnych aspektów tego zagadnienia wykorzystano interpretację tekstualną, funkcjonalną i systemową. Obok poszczególnych rodzajów interpretacji prawnych w toku argumentacji wykorzystano teoretyczną refleksję nad prawem. W ujęciu koncepcyjnym tytułowego problemu wykorzystano argumentację *per analogiam* do adekwatnych działań jednostki w chwili bezpośrednio grożącego jej niebezpieczeństwa a określonych w przepisach polskiego prawa karnego – czyli obrony koniecznej i stanu wyższej konieczności.

Słowa kluczowe: bezpieczeństwo, bezpieczeństwo antyterrorystyczne, terroryzm, dobro wspólne, obrona konieczna, stan wyższej konieczności

