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Terrorist Offences under Polish Law

Abstract: The material scope of the research problem encompasses issues concerned with the essence and sense of the legal definition of a terrorist offence in the Polish criminal law. The Polish legislator implemented the definition of a terrorist offence under Art. 115 § 20 of the Criminal Code in 2014, which was caused by the necessity to align the Polish law with the EU regulations. Metaphorically, it needs to be recognised that the definition in a way modifies the prohibited act and the scope of criminal liability. The structure of the legal definition of a terrorist offence comprises two elements, which serve as conditions to be fulfilled by the perpetrator. The first condition is formal and concerned with the severity of the sanction apportioned to the perpetrator's main act, while the second condition is motivational and concerned with a special goal actuating the perpetrator. Undoubtedly, the institution of the terrorist offence in the Polish criminal law serves a dissuasive and repressive purpose in relation to perpetrators of such offences. In order to elaborate the objective scope of the analysis, the following research questions are presented in the paper: (1) To what degree is the legal definition of a terrorist offence effective in the criminal policy regarding prevention and combating terrorism? (2) To what degree may the content of the legal definition of a terrorist offence infringe the principle of *nullum crimen sine lege certa*? The analysis is an overview, and has been performed considering an institutional and legal approach. In this approach, textual, doctrinal, and functional interpretations have been applied to the content of the legal definition of a terrorist offence. Given the discrepancies arising from the ambiguity of the terms used in the definition, relatively great emphasis has been laid on linguistic interpretation.

Key words: counter terrorism security, terrorism, terrorist offence, combating terrorism, penal policy

Introduction

The material scope of the analysis in the text encompasses problematics concerned with the legal definition of a terrorist offence which the Polish legislator introduced in the Criminal Code in 2004 on account of the necessity to align the law with the EU regulations (Act of 6 June

1997). Among the documents of great significance for the alignment of penalization of acts of terrorism in the EU territory one should reckon the Council Framework Decision of 2002 on combating terrorism (2002/475/JHA) and the Directive of the European Parliament and of the Council replacing the Council Decision (EU/2017/541). The very concept of a terrorist offence is essential in that it extends the possibility of criminal liability for acts that might not necessarily be recognized as traditional acts of terrorism. The construction of the concept of a terrorist offence is based on two elements. The first one is a formal condition, i.e. the scope of criminal liability of a prohibited act the indicia of which have been indicated in the criminal law. The other element concerns motivational conditions, i.e. the purpose behind the action taken by the perpetrator of a terrorist act. At the same time, attention should be drawn to the function performed in the penal policy by the legal definition of a terrorist offence. Next to the above-mentioned need to align penalization of acts of terrorism in the EU territory, it is also necessary to indicate the functions of general and special prevention (Pohl, 2019, pp. 412–417; Bojarski, 2020, pp. 347–351). Hence, the institution of a terrorist offence performs a deterrent as well as repressive and retaliatory function in the system of criminal law, or – more broadly – in the penal policy.

The main purpose of the analysis undertaken in the text is to present both positive and negative aspects of the legal definition of a terrorist offence. Therefore, particular attention is paid to the usefulness of this solution with regard to combating the threats related to the phenomenon of terrorism, as well as to the limits or even ambiguities resulting from its implementation into the Polish system of criminal law. In order to elaborate the objective scope of the research problem, the following research questions have been presented in the text: (1) *To what degree is the legal definition of a terrorist offence effective in the criminal policy with regard to prevention and combating of the phenomenon of terrorism?*, (2) *To what degree may the content of the legal definition of a terrorist offence infringe the principle of nullum crimen sine lege certa?*

Textual, doctrinal and functional interpretations have been applied in the analysis of the content of the legal definition of a terrorist offence. On account of the problematic aspects of the equivocal categories used in the content of the definition, emphasis has been laid on linguistic interpretation in both the strict sense (as interpretation, deducing the meaning) and the broader sense (as reading-into, introducing one's own interpretation) (cf. Wronkowska, Ziemiński, 1997, pp. 147–179; Zieliński, 1998,

pp. 1–20; Wronkowska, 2005, pp. 76–91; Wiatrowski, 2013, pp. 1–34; Nowacki, Tabor, 2016, pp. 293–312).

1. Functionality of the definition of a terrorist offence

Emphasizing fear and terror in the analysis of the concept of terrorism has relevance for the legal definition of “terrorist offences” which was introduced by the Polish legislator in Art. 115 § 20 of the Criminal Code. A terrorist offence is a prohibited act committed with the aim of: 1) serious terrorising many 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) causing a serious disturbance in the system or the economy of the Republic of Poland, or another state or international organisation – or a threat to commit such an act. Another condition for recognizing a terrorist offence is that it carries an appropriate penalty, i.e. the maximum penalty of imprisonment is to be at least 5 years (Art. 115 § 20 of the Criminal Code). The result of such defining of the offence, i.e. the realization of the subjective side and consideration of the guidelines with regard to the sanctions, is that behaviour typifying any offence under the Polish substantive criminal regulations can be terrorist in character (Zgorzały, 2007, pp. 58–79). Thus, these will be offences with different sets of protected interests, where offences against state security and public safety will be of significance equal to the significance of offences against sexual liberty and decency. As a consequence, the offence of rape will be classed – provided the state authorities are “blackmailed” as follows: “if you don’t change your mind, I will rape this person”) – among terrorist offences.

The provision concerned with the legal definition of terrorist offences was introduced on account of the necessity to align the presuppositions behind the Council Framework Decision of 2002 on combating terrorism (2002/475/JHA; Directive /EU/ 2017/541; Gołda-Sobczak, Sobczak, 2018, pp. 92–119). The point of the decision was to align the penalization of acts of terrorism in the EU member states. The decision was based on: (1) an objective element (with regard to indicating a specific prohibited act) and a subjective element (with regard to indicating the subjective side, i.e. the goals actuating the perpetrator of the prohibited act).

In relation to the EU regulation, the purpose of the Polish legislator was a proper criminal policy with regard to combating terrorism in con-

nection with the increased threat of terrorist attacks (cf. Ostant, 2016; Wojechowski, Osiewicz, 2017; Gasztold, Gasztold, 2022, pp. 1259–1276). Besides, on account of the special kind of assessment of the acts, the legislator found that terrorist offences should be subject to higher criminal sanctions (just like in the case of serial reoffenders). Attention should also be paid to the function of the new regulations, i.e. the willingness to consolidate the problematics concerned with the phenomenon of terrorism within the framework of the criminal-law provisions system. Hence, one might say that the introduction of such a legal definition with which to create legal classifications in conjunction with other acts serves to prove some legislative effectiveness of the Polish legislator.

2. Formal conditions

The formal condition for the recognition of an offence as a terrorist offence is predicated on a penalty of an appropriately high level. The legislator indicated that the level shall be the upper limit of a custodial sentence of at least five years. Therefore, from the viewpoint of penal policy the determinant affecting the recognition of an offence as a terrorist offence was found to be a severe penalty, without indicating an offence or crime. Noteworthy is the legislative solution consisting in indicating the upper limit of the penalty, and not the lower limit of a custodial sentence, which is the usual case.

Adopting a formal condition thus defined results in behaviour assigned to various types of offences in the penal law deciding whether or not we are dealing with a terrorist offence. Adopting a specified level of liability results in a wide range of types of offences under Polish law, which will constitute a terrorist offence on the premise that other conditions are fulfilled. Hence, the group will include a selection of: (1) offences against peace, and humanity, and war crimes (Chapter XVI of C.C.), (2) offences against the Republic of Poland (Chapter XVII of C.C.), (3) offences against defence capabilities (Chapter XVIII of C.C.), (4) offences against life and health (Chapter XIX of C.C.), (5) offences against public safety (Chapter XX of C.C.), (6) offences against safety in traffic (Chapter XXI of C.C.), (7) offences against the environment (Chapter XXII of C.C.), (8) offences against freedom (Chapter XXIII of C.C.), (9) offences against sexual liberty and decency (Chapter XXV of C.C.), (10) offences against the family and guardianship (Chapter XXVI of C.C.), (11) of-

fences against state and local government institutions (Chapter XXIX of C.C.), (12) offences against the administration of justice (Chapter XXX of C.C.), (13) offences against public order (Chapter XXXII of C.C.), (14) offences against the protection of information (Chapter XXXIII of C.C.), (15) offences against the credibility of documents (Chapter XXXIV of C.C.), (16) property offences (Chapter XXXV of C.C.), (17) offences against economic circulation (Chapter XXXVI of C.C.), (18) offences against trading in currencies and securities (Chapter XXXVII of C.C.), (19) offences addressed in the military part of the Criminal Code (Chapters XXXVIII–XXXLIV of C.C.), (20) non-codified offences (cf. Act of 6 June, 1997, no. 88, item 553, as amended; Gabriel-Węglowski, 2018, pp. 53–59; Giezek, 2021).

It is also noteworthy that the criminal code penalizes acts one of the indicia of which is the category of terrorist offences. These offences include: (1) financing terrorist activity (Art. 165a of C.C.), (2) punishable non-reporting of an offence (Art. 240 of C.C.), (3) distribution of content facilitating a terrorist offence (Art. 255A of C.C.), (4) participation in an organised criminal group or association (Art. 258 of C.C.), (5) crossing the border of the Republic of Poland with the intent to commit a terrorist offence (Art. 259a) (See more in: Act of 6 June 1997, no. 88, item 553, as amended).

The manner in which to realize the penal policy with regard to increasing criminal liability for terrorist offences is the content of Art. 65 of C.C., which indicates that the rules governing the extraordinary aggravation of penalty, penal measures and probation measures as to the second degree recidivism (i.e. special multiple recidivism) are applied to the perpetrator of terrorist offences (Królikowski, Zawłocki, 2015, pp. 407–409). Therefore, it is to be noted that the legislator's purpose is to specifically stigmatize terrorist offences, which is accomplished by means of increasing criminal liability resting with perpetrators of such offences.

3. The conditions of the subjective side and the perpetrator's motives

Apart from the formal condition, the legislator indicates the conditions related to the subjective side, among which one should reckon one of the intents actuating the perpetrator's action. The fact that the legislator uses the phrasing of an act "committed with an intent" indicates that we are dealing

with a directional intention (Latin: *dolus directus coloratus*). Therefore, the perpetrator's action must be intentional and expressed in a special manner, i.e. by intent characterized by a goal, a motive or a reason (cf. Gardocki, 2002, pp. 74–83; Lachowski, Marek, 2016, pp. 89–96; Mozgawa, 2020, pp. 235–245). The legislator did not indicate whether that would be the only or main goal, so one needs to assume that it is enough for one of the conditions of the subjective side set out in Art. 150 § 20 to appear in the group of many conditions, for the indicia of terrorist offences to be fulfilled. And so it is to be assumed that the occurrence of at least one of the three conditions indicated by the legislator, even if it is a marginal one, results in the fulfilment of the indicia of a terrorist offence.

The legislator names three motivational conditions related to the subjective side of terrorist offences: (1) serious terrorising many 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) causing a serious disturbance in the system or the economy of the Republic of Poland, or another state or international organisation. As we invoke individual motivational conditions, it is worthwhile depoliticizing the concept of a terrorist offence, because none of the above-mentioned conditions is connected with the necessity to prove political, ideological or religious motivation (Konarska-Wrzošek, 2016, pp. 602–604; Grześkowiak, Wiak, 2019, pp. 792–797).

In the characterization of the first condition the legislator uses two categories open to interpretative doubt. The first one is the category of “serious terrorising.” The adjectival feature of “serious” is used by the legislator in: (1) Art. 60 of C.C. – extraordinary mitigation of penalty (“serious damage”), (2) Art. 118a of C.C. – participating in a mass attack (“serious breaches of international law”), (3) Art. 118a of C.C. (“serious persecution of a group of people”), (4) Art. 187 of C.C. – destroying or damaging protected areas or objects (“serious damage”), (5) Art. 343 of C.C. – refusal to carry out an order (“serious damage”). Besides, this adjectival feature is in the content of the third motivational condition in Art. 115 § 20. Therefore, in the context of the verbal feature of “terrorising” the adjective “serious” does not occur in other cases in the criminal code. And so there may be a problem concerned with classification of the perpetrator's specific actions the intent of which is “serious terrorising” (see more in: Act of 6 June, 1997, no. 88, item 553, as amended).

According to doctrinal interpretations, activity aimed at serious terrorising is understood to be activity arousing fear, anxiety, panic or terror.

Noteworthy, one needs to emphasize the degree of emotional arousal, as the emotional state must be of considerable intensity (Mozgawa, 2017, pp. 388–389). O. Górniok indicates that the assessment of the degree of intensity should include the quantitative scope of people and space, as well as probability of occurrences that arouse fear and anxiety (Górniok, 2004, pp. 3–11). Undoubtedly, although the commentators attempt to point to the dimensions of potential effects, the phrase “serious terrorising” remains indeterminate and open to discretion, and by extension dubious because of the necessity to assign guilt and to individualize liability.

The criminal code once uses the expression “as a result of fear,” which features in the provision regulating the institution of necessary self-defence, i.e. in Art. 25 of C.C. – next to fear, it also mentions the phrase “as a result of agitation.” The term “fear” is not used to describe the indicia of prohibited acts in other provisions in the criminal code (Mozgawa, 2017, pp. 92–100; Mozgawa, 2020, pp. 268–283). Hence, as an aid one can use the conception of ‘fear’ in the institution of necessary self-defence to describe the meaning of the term ‘terrorising’ [in Polish the said terms are ‘strach’ and ‘zastraszenie’ respectively, and thus are etymologically of the same origin, which is evidenced by their root in the nominal form of ‘strach’ and the verbal form of ‘straszyć’ (to cause fear or terrorize) prefixed with the amplifying morpheme ‘za-’]. From the viewpoint of textual interpretation, one can indicate that fear is about emotion reflecting a sense of danger expressed in the body’s physiological and psychosomatic changes. A feeling of fear is about a sense of anxiety, terror, concern and panic. The Polish legislator does not equate fear with a state of agitation, because in Art. 25 of C.C. they are mentioned one after another. The term ‘agitation’ is to be understood as a state of inner turmoil, commotion and nervousness. Becoming agitated can also be understood as becoming upset or losing one’s temper. So one can be agitated, but not necessarily feel fear (cf. Dunaj, 1996, pp. 1066 and 1296). While under the circumstances of self-defence, fear or agitation determine the situation in which the perpetrator is not in a position to act in accordance with an established norm, and so guilt cannot be apportioned to him, in the first motivational condition of a terrorist offence, terrorising (causing fear) constitutes the statutory indicium determining apportioning guilt in general (cf. Gardocki, 2002, pp. 108–114; Lachowski, Marek, 2016, pp. 105–109; Zakrzewski, 2016, pp. 461–474).

The word “fear” has its derivatives – “straszenie” (causing fear) and “zastraszenie (terrorising).” As regards the latter one, which constitutes

the indicium of the motivational condition, one needs to adopt the textual interpretation whereby it means as much as arousing fear, terror and anxiety in third parties by means of threats (cf. Dunaj, 1996, p. 1337). There would be nothing problematic about this, if next to the formal condition and the motivational conditions, the legislator did not extend the definition at the end by introducing the typographical symbol of dash. For some interpreters the use of this punctuation mark caused problems concerned with the interpretation of the provision, because they treated it as an editing unit of a legal text called 'hyphen' (a short horizontal stroke and the smallest editing unit of a legal text).¹ The difference in understanding would mean that the above-mentioned extension of the legal definition of a terrorist offence would not concern the definition as a whole, but only the last condition contained in the third item, i.e. the third motivational condition. Others pointed out that in the legislation in force before 2011, the dash should only be related to the third item, i.e. only one motivational condition, as technically it was necessary to attach it at the end of the enumerated indicia in the third item, in a run-on line, thereby constituting its continuation and integral part. Such an interpretation would bring about the same effect as in the case of the hyphen.² As there was no unambiguous interpretation, the legislator decided to remove the defective provision and by means of the Announcement by the Speaker of the Sejm of the Republic of Poland of 31 January 2011 on correcting the mistake, changed the content of Art. 115 § 20 of C.C. The change was about separating the dash with the content of the last sentence "or a threat to commit such an act" from the third item (Act of 16 April 2004, no. 93, item 889; Announcement by the Speaker...; Grześkowiak, Wiak, 2019, pp. 793–794). That is why it is worth emphasizing that the sentence "or a threat to commit such an act" concerns the formal condition and each one of the three motivational conditions. If so, then the indicium in the first condition, i.e. terrorising, understood in the textual interpretation as

¹ It is noteworthy that in the legal language 'hyphen' has a different semantic scope than in the general Polish (see Witorska, 2014, pp. 303–313).

² The discrepancies in the interpretation may also have resulted from the differences in the print typography, because the layout of this article provision was different in commercially available printed criminal codes than in the Act of 16 April 2004 *amending the Act – Criminal Code and certain other acts* (Act of 16 April 2004, no. 93, item 889). Such conclusions can be drawn from the analysis of the content of the publication before 2011 with the content of the change introduced in 2004 (See *The Criminal Code*, 2010, p. 54, art. 115 § 20 of C.C.).

“arousing fear, terror and anxiety in third parties by means of threats,” and the last sentence in the provision, which reads “or a threat to commit such an act,” constitute a peculiar tautology.

At this point it is worth asking the question whether the Polish legislator properly implemented the presuppositions behind the Council Framework Decision of 2002 on combating terrorism, as well as the Directive replacing the Decision (2002/475/JHA; Directive /EU/ 2017/541). This remark concerns the connection of the aim of terrorising people with another act which is penalized in the criminal provisions - the offence doctrinally referred to as the offence of distribution of content that could facilitate the commission of a terrorist offence (see Art. 255a of C.C.). Among other things, Directive /EU/ 2017/541 points to the necessity to penalize acts connected with propagation, on the Internet and elsewhere, of messages or images, including images of terrorism victims, for the purpose of winning support for terrorist ideas or intimidating a population. Hence, under the Polish criminal law excluded from penalization is distribution of content concerning terrorism victims, also when this is done for the purpose of serious intimidation of a population.

The other category open to interpretative doubt is the category of “many people.” The fact that is open to doubt is the number of different doctrinal positions, as well as manifold jurisprudence with regard to the understanding of the phrase “many.” The term “many people” as the indicium of prohibited acts is used by the legislator in: Art. 140 of C.C. “serious detriment to the health of many people” (an assault on a unit of the military forces of the Republic of Poland), Art. 163 of C.C. – “endangers the life or health of many people” and “grievous bodily harm to many people” (causing a life-threatening event), Art. 165 of C.C. – “endangers the life or health of many people” and “grievous bodily harm to many people” (causing states generally hazardous to life or health), Art. 166 of C.C. – “danger to the life or health of many people” and “grievous bodily harm to many people” (taking control of a ship or an aircraft), Art. 169 of C.C. – “an impending danger to the life and health of many people” (active repentance), Art. 171 “widespread danger to the life or health of many people” (manufacturing or trading dangerous materials), Art. 172 of C.C. – “widespread danger to the life or health of many people” (hindering assistance), Art. 173 of C.C. – “endangers the life or health of many people” and “grievous bodily harm to many people” (causing a disaster on land or water, or to air traffic), Art. 176 of C.C. – “danger to life or health of many people” (active repentance while causing a disaster), Art. 185 of C.C. – “serious bodily harm

to many people” (aggravated types of offences against the environment), Art. 224A “threatens the life or health of many people” (false alarm). Besides, in one case the criminal code individualizes the creditor, employing the expression “caused damage to many creditors” (Art. 300 – frustration or limiting the satisfaction of a creditor).

A list of individual provisions of the criminal code in which the legislator uses the phrase “many people” serves as the answer to the question about the origin of the discrepancy in understanding, apart from linguistic interpretation. There are three positions adopted in jurisprudence with regard to the indicium of “many people.” The first position consists in adopting the interpretation whereby “many people” means at least six persons. The second position consists in accepting that “many people” means at least ten persons. The third position is about flexible interpretation of the indicium of “many people.” It is also worth pointing to attempts at linguistic interpretation in which ‘many’ is opposed to ‘a few,’ and so if ‘many’ is not ‘a few,’ then the lower limit of this indeterminate numeral can be established with the limit of another indeterminate numeral, i.e. several. This results from the fact that ‘a few’ is a numerical determiner equalling at least two and no more than ten (according to others, the range of this determiner is between three and nine).³ As a result of this assumption ‘many’ denotes at least ten (Judgement of the Appeals Court in Lublin of 18.07.2013, II AKa 117/13). If we adopt the flexible interpretation, then the lower limit ranges between six and ten, but this is also dependent upon the circumstances of a given case (Judgement of the Appeals Court in Lublin of 16.03.2004, II AKa 407/03).

However, as we undertake a functional and systemic interpretation, it is necessary to refer to the content of the Council Framework Decision 2002/475/JHA and the Directive EU/2017/541, which do not use the cat-

³ For instance, the indeterminate numerical “a few” is defined as ranging between two and ten in the online version of *Słownik języka polskiego PWN* [Dictionary of the Polish Language by the PWN – Polish Scientific Publishers] (<https://sjp.pwn.pl>). However, other dictionaries mention different ranges. *Słownik współczesnego języka polskiego* [The Dictionary of Contemporary Polish] names the range between 3 and 9, i.e. a number greater than two and smaller than ten (Dunaj, 1996). The same range is indicated in the dictionary edited by P. Żmigrodzki (<https://www.wsjp.pl>), and the dictionary edited by S. Dubisz, where the reader can find information that ‘a few’ is an indeterminate numeral approximately denoting a number between three and nine (see <http://usjp.pwn.pl/>). It is also noteworthy that ‘a few’ is in Polish used as an insufficiently specified phrase meaning as much as ‘few’ (see *Słownik języka polskiego* [Dictionary of the Polish Language], ed. W. Doroszewski, see <http://doroszewski.pwn.pl>).

egory of “many people.” That which has been adopted as the first motivational condition is defined in the Council Framework Decision 2002/475/JHA as a serious intimidation of a population, and so there is no mention of any numeral, or indeterminate numeral for that matter (and this also applies to the Directive EU/2017/541). Hence, one may assume that “many people” needs to be interpreted as more of an insufficiently specified phrase than a specific number of people. The very term of a “population” implies an anonymous community with no indication as to any specifics related to formal or informal affiliation, or territorial belonging. Nevertheless, the very textual interpretation of the indicium of a “population” is that it is a body of people living in a given area, or a part of the body distinguished by some common characteristic (cf. Dunaj, 1996, p. 472; Konarska-Wrzosek, 2016, pp. 602–604).

The second motivational condition is based on the actions by a perpetrator whose aim is to force 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. Thus, in order to take into account the second condition as the indicium of a terrorist offence, first and foremost the semantics of the word “to force” need to be explained. The linguistic sense of the word “to force” is to urge someone to do something against their will or to exert influence on them (cf. Dunaj, 1996, p. 1368). The indicium of forcing in itself does not indicate measures, manners or methods employed by the perpetrator with the aim of forcing. And accordingly it is not important whether the perpetrator will resort to violence or threats (e.g. an illegal threat). Therefore, taking a hostage with the intention to force a state or local government authority to act in a specified manner, while partially fulfilling the indicia of the offence of taking a hostage (Art. 252 of C.C.), will at the same time be a terrorist offence on account of the matching aim of the action as the indicia of these offences (cf. Judgement of Administrative Court I SA/Kr 198/18; Mozgawa, 2017, pp. 770–773; Konarska-Wrzosek, 2020, pp. 1206–1208; Romańczuk-Grącka, 2020, pp. 353–379).

State authorities are any authorities that act on behalf of the state, and hence government administration authorities as well as local government administration authorities. Noteworthily, the Polish legislator also includes in this catalogue public authorities of other states, which may give rise to interpretative problems as to what rule to adopt while verifying the classification of a given authority of another state as a public authority. The Polish legislator also goes beyond the authorities of the subjects of international law, i.e. states, because in the second condition he includes influence ex-

erted upon authorities of international organisations. However, he does not specify what kind of international organisations is meant – governmental or non-governmental ones. Hence, the international status can be considered with regard to quasi-subjectivity in the context of public international law, but also with regard to the substantive and spatial scope of activity engaged in by organisations which by virtue of this fact are referred to as international (cf. Klafkowski, 1979, pp. 345–377; Góralczyk, Sawicki, 2017, pp. 323–376; Mozgawa, 2017, pp. 388–389; Barcik, Srogosz, 2019, pp. 162–207; Konarska-Wrzošek, 2020, pp. 669–670).

And so to conclude, one needs to assume that the forcing concerns public authorities or international organisation authorities, which can take the form of exerting influence on a number of their activities, e.g. issuing specific decisions, or on the contrary – withholding issuance of a decision or ceasing to proceed on it. As an indicium, forcing needs to take place in connection with a committed terrorist act or a threat to commit one.

The third motivational condition – and so the aim of the perpetrator's action – is causing serious disturbances in the system or the economy of the state or international organisation. Here, the main indicium is causing disturbances. The indicium is not causing any disturbance in the economy of the state or international organisation, but only the kind which is characterised by specific significance. The indicium of “causing” is not a frequent one in the criminal code; it only appears a few times in, *inter alia*, the provisions concerning slander and insult. As regards the word “serious” – the adjectival indicium of the prohibited act – it can be found in a variety of acts addressed in the criminal code, as demonstrated before. In the context of this motivational condition, it is worth referring by analogy to the indicia of another offence, i.e. failure to carry out an order, where the legislator includes the following indicia: “significant material damage or other serious injury.” If then the state of a serious disturbance were to be reduced to, say, a specific state of economy, it would be a state of significant material damage. In turn, according to the legislator, as a category, significant material damage is damage to the amount exceeding PLN 200,000. Of course, from the viewpoint of the third motivational condition, as well as the analogy between the indicium of “a serious disturbance” and the indicium of “serious injury” and “significant material damage,” this interpretation may raise doubts as to the value of the damage (cf. 115 § 5 and § 7 of C.C.; Grześkowiak, Wiak, 2019, p. 795).

Next to serious disturbances in the economy, the legislator points to a serious disturbance in the system of states. Besides, the legislator con-

nects the category of a disturbance in the system with an international organisation, which appears to be at least a non-standard solution or a logical fallacy in the structuring of the content of the third motivational condition. Interpretation predicated on the presumption that the legislator is rational gives rise to the assumption that the legislator finds such a device significant, but a phrase like ‘a system of an organisation’ cannot be found in common linguistic practice. Alternatively, one might assume that the legislator wants to understand the term ‘system’ as an organisational structure or just the functionality of an organisation – that would be a linguistic interpretation with regard to various senses of the word ‘system’ in Polish, but by no means a first-order interpretation (Dunaj, 1996, p. 1191; Grześkowiak, Wiak, 2019, p. 795). In the functional interpretation with regard to the content of Directive /EU/ 2017/541, account needs to be taken of the fact that the content of the third motivational condition encompasses serious destabilization or destruction of basic political, constitutional, economic or social structures of a given state or international organisation. Hence, one might assume that the indicium of the disturbance of the system of an international organisation is simply about a disturbance of the workings of the structure of an international organisation.

As mentioned before, next to the formal condition and the motivational conditions, which characterize a terrorist offence, the Polish legislator also includes a threat to commit such an act. This results in an autonomous prohibited act which in itself constitutes a terrorist offence. According to the comment by A. Grześkowiak and K. Wiak, this means that it is not necessary for a perpetrator to commit an act like this, but it is enough for it to become a part of a threat. At the same time, the legislator abandons the use of the categories of an “illegal threat” (Art. 115 § 12 of C.C.) and a “punishable threat” (Art. 190 of C.C.), which already feature in the criminal law provisions. And so the problem that remains to be solved is whether the already-mentioned types of threats should be treated as interpretations of the understanding of the threat in Art. 115 § 12 of C.C., or as the actual state of threat of such an act (Gabriel-Węglowski, 2018, pp. 53–59; Grześkowiak, Wiak, 2019, pp. 792–797).

4. Liability for terrorist offences committed abroad

The problematics concerned with liability for offences committed abroad can be divided with regard to the subjects committing them.

Hence, we can speak about Polish citizens and foreigners committing offences abroad. In the former case, the Polish legislator has chosen to apply the principle of the so-called active personality principle that addresses a Polish citizen's liability for offences committed abroad. This principle comes to be expressed in Art. 109 of C.C., but it cannot be considered without conjunction with Art. 111 of C.C., which indicates the conditions of this liability. The limitation of liability resting with a Polish citizen is the so-called double criminality principle. It states that liability for acts committed by a Polish citizen abroad is enforceable if they are also seen as offences in the area of their commission. It is noteworthy that a specific case must be connected with a prohibition of specific acts as well as there must be no circumstances precluding wrongfulness, fault or procedural aspects. The provision in Art. 111 of C.C. contains double criminality exemptions. These exemptions apply to a public official who, while performing his duties abroad, has committed an offence there in connection with the performance of his function, and to a person who has committed an offence in a place subject to no jurisdiction (e.g. in outer space or high seas) (Nawrocki, 2016; Zając, 2017; Bojarski, 2020, pp. 81–83).

Article 110 § 1 of C.C. specifies an institution of the so-called ordinary protection (relative protection), which states that the Polish criminal law applies to a foreigner who has committed a prohibited act abroad that is against the interest of the Republic of Poland, a Polish citizen, a Polish legal entity or a Polish organisational unit without the status of a legal entity, as well as to a foreigner who has committed a terrorist offence abroad. It is noteworthy that the provision is applicable in a situation when, *inter alia*, a Polish citizen or a Polish legal entity is a target of a committed terrorist offence. Besides, the provision also applies to a situation when a terrorist offence is committed by a foreigner abroad, but it is not targeted at, say, a Polish citizen. This type of liability was placed in Art. 110 § 1 of C.C. only in 2004, and raises doubts among many commentators, because it is more connected with the so-called absolute liability principle, i.e. the principle of protection in the augmented form, than with the principle of ordinary protection. This results from the fact that the principle of absolute liability does not require the existence of double criminality (Art. 112 of C.C.) It needs to be recognised that including a terrorist offence in the catalogue in 110 § 1 of C.C. impinges on its coherence, because this type of offences is not related to the others listed there, as they essentially concern the infringement of the interests of the Republic of Poland. This

provision might potentially be included in the article regulating liability on the grounds of the so-called universal jurisdiction, i.e. liability resulting from international agreements (Art. 113 of C.C.) (Mozgawa, 2017, pp. 344–345; Warylewski, 2017, pp. 193–209; Grześkowiak, Wiak, 2019, pp. 724–733; Pohl, 2019, pp. 93–103).

It is worth stressing the principle of absolute liability, the content of which is to be found in Art. 112 of C.C. This provision states that in specific situations, regardless of whether we are dealing with double criminality, the Polish criminal law is applied to a Polish citizen or a foreigner. The group of these offences includes, *inter alia*, offences against internal or external security, offences against Polish public officials, offences against essential Polish economic interests, as well as offences that have produced – even if indirectly – a financial gain in the Polish territory. Theoretically, one might ponder whether a terrorist offence *sensu largo* might be reckoned among offences infringing upon internal security. If not, then specific offences can potentially be classed with terrorist offences, with the proviso that the formal and motivational conditions are fulfilled. For instance, these might include an attempted murder of a public official with a view to seriously terrorising a large number of people, or with the aim of forcing a public authority agency to take or not to take a certain course of action. Another example is the offence of financing terrorist activity, which can be linked with the requirement of making material gains in the Polish territory, even if in an indirect manner (see more: Zajac, 2017, pp. 471–519).

As mentioned before, one of legislative solutions should be to include the terrorist offence not in the catalogue in Art. 110 § 1 of C.C., but in the catalogue in Art. 113 of C.C. Subjecting terrorist offences to universal jurisdiction would serve to express the conviction shared by the entire international community as to the serious danger of this type of acts, and at the same time it would function as the equivalent of the past repression of piracy by the international community. However, the problem is that anyway Poland has international commitments concerned with prosecution of offences that can be reckoned among terrorist offences, e.g. taking control of a ship or an aircraft. With regard to these remarks, it is clearly evident that the Polish legislator has not adequately resolved the relationship between the provision in Art. 110 § 1 of C.C. and Poland's commitments in the context of Art. 113 of C.C. concerned with acts deemed terrorist (cf. Grześkowiak, Wiak, 2019, p. 725).

Conclusion

The main purpose of the analysis undertaken in the text is to present both positive and negative aspects of the legal definition of a terrorist offence. Main emphasis is laid on the presentation of the structure and essence of the concept of a terrorist offence, as a result of implementing into the Polish system of criminal law the solutions developed in the European Union documentation. With regard to the ambiguous sense of the terms used to define the motivational conditions, i.e. the aims of the perpetrators' actions, the analysis uses a textual, doctrinal and functional interpretation. Undoubtedly, clarity or a lack thereof (precision or a lack thereof) determines effectiveness of individual legal solutions used to prevent and combat the phenomenon of terrorism. From the viewpoint of legal protection of citizens it is essential that the legislator fulfils the requirement of sufficient specificity of a prohibited act. This is vital to an individual's legal safety, as well as the effectiveness of the criminal policy itself, because the legislator should formulate criminal law provisions in a manner enabling those they are directed at to understand and obey them.

Given the need to elaborate the objective scope of analysis, the text features two research questions related to the following conclusions:

(1) To what degree is the legal definition of a terrorist offence effective in the criminal policy with regard to prevention and combating of the phenomenon of terrorism?

Undoubtedly, the structure of the legal definition, which is predicated on the perpetrator's formal condition and three motivational conditions, facilitates the legal classification based on selected acts penalized in criminal law provisions. The applied solution is certainly characterized by legislative pragmatism, which is expressed in the simplicity of the solution, and so in peculiar legislative economism. However, this simplicity of solutions may raise doubts with regard to ambiguous phrases used in the indicia in the motivational conditions. In addition, the formal condition may be subject to manipulation in the event of interference in the scope of the code catalogue of penalties, and especially in the event of the instability of the legal system and a lack of real control over the application of the law by the supreme agency of judicial power or a constitutional court.

While assessing the institution of a terrorist offence, it must be concluded that it performs the functions of general and special prevention

in the penal policy fairly well. The element that serves as a deterrent to potential perpetrators is the fact that the legal classification of the prohibited act of a terrorist offence is connected with a higher sanction, because the perpetrator is treated like a serial reoffender. Therefore, with respect to such persons the court imposes a punishment above the lower limit of the statutory penalty. At the same time, the legislator indicates that with regard to perpetrators of this type of offences, the court can increase the upper limit of the statutory penalty by half.

Proper formulation of the penal policy, and in the broader context of the criminal policy, will thus be confronted by the obstacle to the effectiveness of prevention in the form of understanding of the content of the provision concerning the terrorist offence by the model citizen. The average citizen appears not to realize the effect of including the formal and motivational conditions in the content. It is probable that some perpetrators may not realize that they will fall under the legal classification of the act concerning exactly this offence.

(2) To what degree may the content of the legal definition of a terrorist offence infringe the principle of *nullum crimen sine lege certa*?

The legal principle of *nullum crimen sine lege certa*, i.e. the principle of maximum specificity of the established types of offences, as a derivative of the more general principle of *nullum crimen sine lege*, is classed as belonging to the canon of principles of essential significance for the whole legal system. As regards the penal law, *nullum crimen sine lege certa* concerns the requirement of the sufficiently precise establishment of the normative scope of the provision defining a punishable prohibited act, i.e. a proper selection of the indicia of a prohibited act. Thus, it corresponds to the requirements of a state ruled by law and a democratic state ruled by law – in this context, it corresponds to the rules of decent legislation. For the functions of general and special prevention in the penal policy to be fulfilled, the contents of legal provisions need to be laid down clearly and unambiguously. In addition, proper defining of indicia enables appropriate apportioning of guilt to the perpetrator of the act, which is the basic requirement with regard to criminal liability.

The above requirements concerned with the principle of sufficient specificity of a prohibited act can hardly be fulfilled in a situation when in the content of the legal provisions penalizing specific acts, the legislator uses discretionary indicia, vague and ambiguous phrases, or struc-

tures the language in a manner precluding reconstruction of the legal norm.

As demonstrated in the analysis, in the legal definition of a terrorist offence, the Polish legislator uses linguistically ambiguous terms, and terms that are semantically ambiguous in the doctrine. Potential infringement of the principle of *nullum crimen sine lege certa* may be related to such indicia as “serious terrorising,” “many people,” “a serious disturbance in the system” and “a serious disturbance in the economy.” Besides, there may be a problem concerned with reconstruction of the legal norm in the relationship between the first motivational condition (“serious terrorising of many people”) and the threat to commit such an act.

From the viewpoint of potential abuse of the formal condition, it is noteworthy that the requirement of the upper limit of at least five years’ custodial sentence results in the inclusion in the group of terrorist offences of acts that have little in common with the traditional understanding of the phenomenon of terrorism. Besides, the scope of these acts may change because of potential changes in the scope of the sanctions in individual penal provisions or in the system of penalties.

The analysis of the content and indicia included by the Polish legislator in the legal definition of a terrorist offence constitutes a peculiar introduction to the understanding of the penal policy with regard to combating terrorism. The definitional scope of this offence, on account of the manner, results in it having broad application in potential classification along with other acts penalized under Polish criminal law. As a result of the vagueness of some of the indicia, the scope of penalization potentially may not fulfil the conditions related to one of the principles of the penal law, i.e. the principle of *nullum crimen sine lege certa*. Undoubtedly, the inclusion of a terrorist offence in such a form in the penal law is characterized by legislative pragmatism. One should also consider a broader context of this penalization – the creation of a coherent penal policy on combating terrorism in the EU member states.

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Przestępstwa o charakterze terrorystycznym w polskim prawie

Streszczenie

Zakres przedmiotowy problemu badawczego prezentowanego w tekście obejmuje kwestie związane z istotą i sensem definicji legalnej przestępstwa o charakterze terrorystycznym w polskim prawie karnym. Polski ustawodawca zaimplementował definicję przestępstwa o charakterze terrorystycznym w ramach art. 115 § 20 Kodeksu karnego w 2014 roku, co wynikało z konieczności dostosowania polskiego prawa do regulacji Unii Europejskiej. Stosując metaforę uznać należy, że definicja ta stanowi swoisty rodzaj modyfikatora czynu zabronionego i zakresu odpowiedzialności karnej. Struktura definicji legalnej przestępstwa o charakterze terrorystycznym składa się z dwóch elementów, będących zarazem przesłankami, które wypełnić ma sprawca. Pierwsza przesłanka ma charakter formalny, i dotyczy wysokości sankcji przypisanej głównemu czynowi sprawcy, z kolei druga przesłanka ma charakter motywacyjny, i dotyczy szczególnego rodzaju celu, jaki przyświeca w działaniu sprawcy. Niewątpliwie instytucja przestępstwa o charakterze terrorystycznym w polskim prawie karnym pełni funkcje odstrasżającą i represyjną w stosunku do sprawców tego typu przestępstw. W celu uszczegółowienia zakresu przedmiotowego podjętej analizy w tekście przedstawiono następujące pytania badawcze: (1) W jakim stopniu definicja legalna przestępstwa o charakterze terrorystycznym jest efektywna w polityce karnej w zakresie przeciwdziałania i zwalczania zjawiska terroryzmu?, (2) W jakim stopniu treść definicji legalnej przestępstwa o charakterze terrorystycznym może naruszać zasadę *nullum crimen sine lege certa*? Analiza zawarta w tekście ma głównie charakter poglądowy, w ramach, którego wykorzystano ujęcie instytucjonalno-prawne. W ramach tego ujęcia treść definicji legalnej przestępstwa o charakterze terrorystycznym poddano interpretacji tekstualnej, doktrynalnej i funkcjonalnej. W związku z rozbieżnościami wynikającymi z niejednoznaczności terminów użytych w tej definicji stosunkowo duży nacisk położono na interpretację językową.

Słowa kluczowe: bezpieczeństwo antyterrorystyczne, terroryzm, przestępstwo o charakterze terrorystycznym, zwalczanie terroryzmu, polityka karna

