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Permissibility of Shooting Down a Civilian Aircraft Used as a Weapon to Perform a Terrorist Aerial Attack within the Jurisprudence of the Polish Constitutional Tribunal

ABSTRACT:

Following an increasing global terrorist threat in the beginning of 2000s, in 2004 a provision was added to the Polish law which allowed to shoot down a civilian aircraft with passengers and crew on board if being used for illegal activities, namely for carrying out a terrorist attack from the air (an aircraft of a RENEGADE status). In 2007 the Constitutional Tribunal was requested to rule the provision unconstitutional for being inconsistent among others with the principles of correct (decent) legislation, legal protection of human life and protection of human dignity. In its judgment dated September 30, 2008, the Constitutional Tribunal declared that the provision authorizing shooting down a civilian airliner was inconsistent with the Constitution. Thus, it annulled the binding force of the provision. The Tribunal recognized human life and dignity as the values constituting the foundation of European civilization and determining the semantic content of the central concept of humanism in our culture (law being no exclusion).

Keywords: Terrorism, shooting down an aircraft, human life protection, protection of human dignity, Constitutional Tribunal.

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I. Introductory remarks

In the Polish legislation, following the international law norms, the concept of an "act of unlawful interference with civil aviation" is present which is understood, *inter alia*, as hijacking an aircraft with or without crew and passengers on board, also for the purpose of using the aircraft as tool of a terrorist attack launched from the air. In fact, such an act usually represents one of terrorist natures, as it involves unreasonable or unlawful use of force or violence against persons or property, aimed at intimidating the government or population of the country or exerting pressure on them. Terror attacks are usually undertaken to promote specific goals. They are directed, as a rule, against the people having no direct influence on achievement of the goals assumed by the attackers, while the effectiveness of the attacks lies in stirring up a significant psychological reaction (intimidation) amidst the public, also due to potentially strong media resonance gained. Consequently, terror attacks are aimed at producing specific effects, namely, death or destruction and are thus expected to cause panic and fear in society to exert pressure on the rulers and make them swing into the political action the terrorists are keen about[1].

According to the international terminology, an aircraft that violates the airspace of a given state and against which aircraft measures are being taken to intercept, is referred to as a RENEGADE plane. In democratic countries, the basic problem to be resolved is to find an adequate response to terrorist attacks, especially those related to hijacking an aircraft. Since World War I, the principal importance has been ascribed to the national sovereignty idea, according to which every single state should enjoy a full and exclusive rule over the airspace above its territory.[2] This principle has been confirmed in many international conventions. Examples include: The Convention on International Civil Aviation, signed in Chicago on December 7, 1944, with its Annex 17 "Protection of International Civil Aviation against Acts of Unlawful Interference," the Tokyo Convention dated September 14, 1963 on offenses and certain acts committed on board and the Hague Convention of 16 December 1970 for the suppression of unlawful seizure of aircraft. The reaction of individual states has never been relevant to the actual level of the threat. Sometimes it resulted from a wrong assessment of the situation. Following the examples, the following cases can be mentioned: shooting

[1] Glen A., Terroryzm lotniczy. Istota zjawiska, organizacja przeciwdziałania, Warszawa, 2013, 11.

[2] Milik P., Legalność zestrzelenia porwanego samolotu cywilnego z pasażerami na pokładzie, Państwo i Prawo, No. 5, 2015, 84.

down a civilian plane of the Israeli El-Al airline in Bulgaria, on July 27, 1955; fetching down a Libyan airliner over the Sinai Peninsula, Israel, 1973; the USSR bringing down a Korean Airplane over Sakhalin in September 1984 or the downing of an Iran Airplane by the American cruiser "Vincennes" over the Persian Gulf on July 3, 1988. The Sakhalin incident, in particular, resulted in a change of approach to the issue. In 1984, the Montreal Protocol to amend the Chicago Convention was adopted. It limited the permissibility of shooting down a civil aircraft in flight.[3] Prohibition of resorting to the use of arms against civilian vessels was regarded as a rule of customary international law.[4] However, with the advent of the intensified air terrorism in late half of the 20th century, a qualitative change occurred in the approach to such events. It resulted in radicalization of air defense measures adopted in several countries.

The September 11 attacks in the US (in 2001) led to a new era of the global terrorist threat (the Terrorism Era).[5] It was confirmed after the attacks in Madrid, on March 1, 2003 and in London on July 7, 2005.

The attack on the World Trade Center and Pentagon became a turning point in the fight against terrorism. Being aware of new hazards, individual countries began large-scale defensive and preventive projects. After September 11, 2001, strict protective measures were introduced in civil aviation, security procedures were tightened and appropriate changes were made to the law, including the possibility of the air defense forces to react fast to threats of terror attacks on civil aircraft. Appropriate regulations were also adopted in the EU. One of the most important ones was the Regulation (EC) No 2320/2002 of the European Parliament and the Council, dated December 16, 2002. It established common rules in civil aviation security. However, this Regulation does not ensure admissibility of the use of armed forces by Member States against a passenger aircraft where unlawful interference took place, but offers measures to prevent such situations. The essential ones are: establishment of common basic standards of aviation security measures; obligation of each Member State to adopt a national civil aviation safety program for national airports and carriers, with a duty to designate an authority responsible for coordinating and monitoring

[3] Ibid., 86.

[4] Barcik J., Czech P., Czy można zestrzelić samolot cywilny? (kontrowersje na tle polskiego prawa lotniczego), "Przegląd Komunikacyjny" of 27 March, 2008, 29.

[5] Lepsius O., The Relationship between Security and Civil Liberties in the Federal Republic of Germany after September 11, A Publications of the American Institute for Contemporary German Studies, The Johns Hopkins University, Washington D. C., 2002, 2 et seq.

implementation of the national civil aviation safety program, national civil aviation security quality control program and regular audits in all the airports.

Prior to analysing the Polish legislation on permissibility of shooting down a civil aircraft, we should note a German example, where similar legal regulations regarding the article subject were previously reviewed by the German constitutional court. Following the experience of September 11, 2001, Germany passed the Act dated January 11, 2005 on the Safety of Air Navigation (*Luftsicherheitsgesetz*). Its aim was to increase the security of air transport and introduce defense measures against new terrorist threats. One of the provisions of the Act declared that: 1. For avoiding a particularly severe catastrophe, armed forces may intercept an aircraft violating airspace, force it to land, threaten to open fire or use warning shots. 2. Out of the available measures possibly least onerous should be selected. A specific measure may be used only over the time to achieve the purpose. 3. A direct use of weapon is only allowed when the surrounding circumstances are considered. It should be recognised if the aircraft is used against human life and solely when such use is the only means of defense against an imminent (present) danger. 4. The application of the measures mentioned in paragraph 3 can only be ordered by the Federal Minister of Defense or other member of the government authorised to represent the Minister. Authorised by the Minister of Defense to apply the measures mentioned in paragraph 1 may be the Commander-in-Chief of the Air Force. The regulation was appealed against to the Federal Constitutional Court. In its judgment dated 15 February 2006, the latter found the provision was inconsistent with the Constitution of the Federal Republic of Germany. The Tribunal's decision relied on three reasons: violation of the federalism principle and the constitutionally defined scope of competence of Germany's *Länder* (the states the German Federal Republic is composed of), scope of operation of the German Armed Forces, violation of the right to live and the requirement to protect human dignity of innocent people on the aircraft (passengers and staff). The Federal Constitutional Court ruled that shooting down a civilian aircraft could be constitutionally legitimate only in case of it being manned solely by terrorists.

In Poland, by the initiative of the Ministry of National Defense, Art. 122a was added to the Aviation Law. That provision came into effect in August, 2004. It reads: "If the reasons of state security require that way and the air defense command authority, taking into account, *inter alia*, information provided by air traffic service agencies, finds that a civil aircraft is used for unlawful actions, like an aerial terrorist attack, the aircraft can be destroyed under the rules defined in the Act of 12 October

1990 on Protection of the State Border." According to the government's explanatory memorandum, the purpose of the amendment was to adopt legal regulations enabling responding to a potential threat of terrorist attacks from the air and, as part of the NATO military airspace surveillance mission, allow the allied aircraft to perform tasks to operate in the Polish airspace.

II. Application Prepared by the First President of the Supreme Court for Declaring the Provision Allowing to Shoot Down an Unconstitutional Civilian Aircraft

The Constitutional Tribunal is Poland's only body competent to rule on the constitutional nature of state laws. It always acts at request of an authorised entity. The review of the constitutionality of legal provisions may be carried out in a particular (specific) or abstract mode. A specific review is initiated upon a constitutional complaint filed with the Tribunal or a legal question posed by the court concerning individual proceedings during which the challenged provision of law was applied. An abstract review, on the other hand, is initiated upon an application made by an authorised entity, unrelated to a specific case pending before the court. The group of entities authorised to initiate an abstract review is obviously limited. According to Art. 181 of the Constitution, the application may be made by: the President of the Republic of Poland, Marshal of the Sejm, Marshal of the Senate, Prime Minister, 50 deputies, 30 senators, President of the Supreme Administrative Court, Prosecutor General, President of the Supreme Audit Office, Ombudsman and First President of the Supreme Court.[6] Notably, it was the latter entity in September 2007 asking the Constitutional Tribunal to rule Art. 122a of the Aviation Law unconstitutional, seeking for the Tribunal's recognition of the provision as inconsistent with Art. 38 (principle of legal protection of life), Art. 31 paragraph 3 (proportionality principle), Art. 2 (principle of the democratic state ruled by law), Art. 26 (principle of providing state security by the armed forces) and Art. 30 (principle of protection of human dignity) of the Polish Constitution.

[6] In addition, the National Council of the Judiciary of Poland, decision-making bodies of local government units, national trade union bodies and national authorities of employers' organizations and professional organisations, as well as churches and other religious associations may submit applications to the Constitutional Tribunal, but only in matters related to the field of the activities of the entities in question.

The applicant raised a number of doubts which, in his opinion, were caused by Art. 122a of the Aviation Law. These are divided into four key issues: 1) lack of sufficient precision of the challenged provision (especially in terms of the scope of the rule application), combined with doubts on the normative scheme's compliance with constitutional guarantees, 2) human life protection, 3) ensuring human dignity and 4) objectives and tasks of the Polish Armed Forces, as defined by the Constitution. The entities participating in the proceedings before the Constitutional Tribunal also included: the Minister of National Defense (questioning the application legitimacy), President of the Civil Aviation Office (who mostly shared the applicant's objections), Prosecutor General (partially sharing the objections of the applicant), Minister of the Interior and Administration (sharing the bulk of the applicant's objections) and Marshal of the Sejm of the Republic of Poland (who, in turn, questioned the legitimacy of the application).

III. Constitutional Tribunal's Judgment on Assessment of Art. 122a of the Aviation Law

By a judgment of September 30, 2008 (K 44/07) the Constitutional Tribunal found Art. 122a of the Aviation Law inconsistent with Art. 2, Art. 30 and Art. 38 in conjunction with Art. 31 paragraph of the Constitution of the Republic of Poland. Thus, acting as the so-called negative legislator, Constitutional Tribunal repealed the legal provision in question.

For the reason of its stance, the Constitutional Tribunal asserted that the First President of the Supreme Court raised two types of allegations as to the constitutionality of the challenged provision. The first group concerned violation of the principle of good (decent) legislation, i.e. the way the provision was phrased, deviating from the standard required by the Constitution (regarding precision and clarity). The other group was related to the legal permissibility of the enactment of a regulation allowing to shoot down an aircraft (as a matter touching the very substance of law and one of fundamental systemic and axiological importance). The constitutional doubts focused on the situation where people other than attackers, i.e. the crew and passengers, are on board and the aircraft is used as a means of terrorist attack from the air. In this context, it is required to answer the question whether a regulation empowering a state authority to make a decision taking the life of innocent people to prevent potential further harm, in a democratic state ruled by law it is mandatory to protect life and

inviolable human dignity – admissible at all, regardless of how the procedural issues were ensured in detail.

As for the first group of allegations, the starting point for the Constitutional Tribunal was to refer to the standards developed in the Tribunal's previous jurisprudence on the required precision of law (the standards resulting from the principles of decent legislation). In turn, those were decoded from the principle of the democratic state ruled by law (Art. 2 of the Constitution). Out of the requirement of definiteness of legal provisions, or – from a broader sense – the principle of decent legislation, it follows that exceeding a certain level of vagueness of legal provisions may constitute, in itself, an autonomous prerequisite for declaring their non-compliance with the rule of law assumption expressed in the Constitution. The requirement of precision of legal provisions becomes particularly important where the value to be violated by actions of the state authorities taken under the challenged legal provision is human life. Meanwhile, to describe the reasons to stand behind the decision on destroying a civil aircraft with passengers on board, such unspecified phrases as "reasons of national security" or the need to recognise that the civil aircraft is being used for "unlawful activities" are used. The fragment of the provision where the term "terrorist attack" has been employed is not free from interpretation doubts, either. The term applies to situations differing in terms of the goals pursued by the attackers and objectively possible aftermath of the attack. This opinion is well confirmed by difficulties to precisely define the very concept of terrorism, which – despite many attempts to provide its definition, made in the world literature and official documents – remains far from being unambiguous. Thus, in the judgment of the Constitutional Tribunal, within the legal system it is unacceptable to leave a provision allowing to shoot down an airplane with innocent persons on board, the above-mentioned vague and imprecise criteria applied in it.

Regarding an assessment of legal substance of the prerequisites for a regulation letting shooting down an aircraft – made from the point of view of constitutional standards – compliance of the prerequisites with the principle of legal life protection comes to the fore.

According to Art. 38 of the Constitution, "The Republic of Poland provides every human being with the legal protection of life". It confirms that in our civilisation and legal culture human life is the highest-rank value and a legal benefit which does not lend itself to differentiation under the Constitution. Similarly, human life is protected under the European Convention on Human Rights. The Art. 2 of the convention states that "Everyone's right to life will be protected by law. No one will be deprived

of his life intentionally, except the execution of a sentence of a court following his conviction when the penalty is provided by law." Simultaneously, the Convention allows deprivation of human life in three cases, when such deprivation results from the use of force which is absolutely necessary: (a) in defense of any person from unlawful violence, (b) to implement a lawful arrest or prevent the escape of a person detained lawfully, (c) in action lawfully taken for the purpose of quelling a riot or insurrection. Similarly, pursuant to Art. 6, paragraph 1 of the Covenant on Civil and Political Rights, "every human being has an inherent right to life. This right is protected by law. No one will be arbitrarily deprived of life."

The Constitutional Tribunal stressed that the most valuable asset of a human being is his or her life. Besides, the right to live is the basic right of an individual, a precondition for holding and exercising all the other rights and freedoms. Taking life, therefore, annihilates man as a subject of rights and duties. The legal protection of life, as guaranteed by Art. 38 of the Constitution, should be primarily viewed as a ban on destruction of human life. In this "defensive" context, the legal protection of life is a consequence of the "right to life" of every human being. Irrespective of that, the right to life also implies the obligation of public authorities to take positive actions aiming life protection. The latter must not be understood merely as protection of the minimum biological functions required for human existence, but the guarantee for people's proper development, ensuring that normal psycho-physical condition, appropriate for a given developmental age (life stage) would be obtained and further maintained by them. In the context of possible terrorist or military threats or social unrest of a different background, an element of the right to legal protection of life is also an obligation to ensure the citizens' safety.

As noted by the Tribunal, the right to legal protection of life is not absolute. In certain cases, especially in consideration of a specific situational context concerning an unresolvable conflict of the right to life of two people, the law may decriminalize acts on taking human life (e.g. in case of self-defense). The statement given above does not equal to the axiological relativism support of any kind. The legislator is empowered to determine possible exceptions, when – due to the collision of goods being constitutional values, rights or freedoms – it is required to sacrifice one of those if they compete with one another. Therefore, limiting legal protection is permitted in case of a need to protect or exercise other constitutional values, rights or freedoms. Based on this assumption, the Tribunal also indicates the general criteria that may justify a legal deprivation of life. All this includes the necessity to examine the following: a) whether

the interest, violation of which is legalised by the legislator, represents a constitutional value itself, b) whether the legalisation of violations of the interest is justified by constitutional values, c) whether the legislator is in compliance with the constitutional criteria for this conflict resolution (including the requirement for proportionality).

For example, criminal law contains commonly accepted regulations regarding the allowed actions that may result in taking human life, not only to directly save one's own or someone else's, but also in other situations, e.g. that of a state of emergency or when police officers use weapons. However, norms authorising the state (*expressis verbis*) to deliberately deprive a person of life must be assessed separately, especially when the deprivation is not required for the protection of other rights and freedoms, or as regards a person who did not trigger such a reaction by his or her behaviour.

The Polish Constitution (Art. 31(3)) lays down restrictions on exercising constitutional rights and freedoms. These restrictions are numerous, including a requirement for a statutory nature of the restriction, a need to impose restrictions in a democratic state, functional relationship of the restriction and values expressly enumerated in the Constitution (namely: national security, public order, environment protection, public health and morals, freedoms and rights of others) and prohibition to violate given right or freedom. The declaration that restrictions may be established only if required in a democratic state ruled by law requires considering whether the established regulation can produce intended effects, whether such regulation is required to protect a related public interest and whether the introduced regulation effects are commensurate with its burdens imposed on the citizens.

With regard to solutions limiting the legal protection of life, indicated premises must be interpreted in a particularly restrictive manner, in the direction convergent with the criterion of "absolute necessity," as developed in the ECtHR jurisprudence under Art. 2 of the Convention for the Protection of Human Rights. When it comes to general standards, any limitation of legal protection of human life must be treated as an *ultima ratio* measure. In addition, due to the fundamental nature of the right to life and its position within constitutional axiology, the right limitation must not serve protection of lower-rank goods in the constitutional hierarchy, like ownership and other property rights, public morality, environmental protection or even people's health. Therefore, a precondition for limiting the right to legal protection of life is a situation when the right cannot be reconciled with similar rights of other people. That premise can be generally defined as the requirement of symmetry of values: sacrificed and saved ones.

In conclusion, the Tribunal stated that the provision challenged by the First President of the Supreme Court violates Art. 38 of the Constitution guaranteeing the right to life and its legal protection. No different conclusion may be justified, whether by the "complex weapon" concept (hijacked plane passengers are part of it), or by the "tacit consent" to the above-described actions of the state authorities in case of a terrorist attack, or – finally – by a statement that the obligation to protect people's lives at the foreseeable point of attack "abolishes" similar obligation to protect passengers' lives and the crew of a RENEGADE aircraft. Finally, under the Polish political-legal system it is not quite reasonable to develop specific theoretical, philosophical and legal concepts of "suspension" or "modification" of the guarantees of civil rights, allegedly required during the "war waged on terrorism." The obligation to ensure security, a component of the right to legal protection of life in its positive aspect, is incumbent on the state both as regards people on the ground and those on board. The state's failure to effectively fulfil this obligation does not exempt it from a need to respect the negative aspect of the right to legal protection of life, i.e. the prohibition taking the life of innocent people intentionally.

Similar conclusions were brought at by the Tribunal analysing statements of the European Court of Human Rights against the background of Art. 2 of the Convention for the Protection of Human Rights.

In the application of the First President of the Supreme Court there was raised the allegation of non-compliance of Art. 122a of the Aviation Law with art. 30 of the Constitution stating that "the inherent and inalienable dignity of man is a source of freedom and human and civil rights. It is inviolable and respecting and the duty of public authorities includes its protection." When analysing that Constitutional provision, the Constitutional Tribunal asserted that the concept of human dignity should be attributed the nature of a constitutional value of key importance for building the axiology of current constitutional solutions. A democratic state ruled by law is a state based on respect for human beings, in particular, protection of life and human dignity. These two values are directly interlinked. Article 30 of the Constitution represents a leading provision for interpreting and applying all other provisions on the rights, freedoms and obligations of the individual.

From the point of view of Art. 30 of the Constitution, in the opinion of the Tribunal the challenged provision of the Aviation Law does not raise that heavy constitutional doubts if it allowed shooting down an airplane with only bombers on board. It is the people that caused the situation in question. The perpetrators chose to die

by their free will, simultaneously risking the lives of innocent people. If such people are shot down, they die in a fight provoked by them. Therefore, they cannot be said to be treated as objects. Meanwhile, to the extent that such a final legal remedy can be directed against non-aggressors on board, i.e. other passengers and staff, it would undoubtedly offend their personal dignity. In this case the Constitutional Tribunal shared the position of the German Constitutional Court. In its above-mentioned judgment of February 15, 2006, the latter expressed a viewpoint that the application of the provision allowing for shooting an airplane with passengers would result in "de-personification" of persons on board merely becoming the object(s) of a rescue operation aimed at preventing hypothetical, further and probably greater losses that could be caused by a targeted terrorist attack. An argument that the passengers and crew of the hijacked plane found themselves in this situation as a result of the unlawful actions of the bombers is fundamentally false. The situation indirectly manifests the state's failure to meet its positive protective obligations.

IV. Conclusions

In conclusion, the Constitutional Tribunal assumed that while assessing compliance of elements of the legal system regarding an issue as sensitive as proper balancing of public security considerations against the right to legal protection of individuals' lives, including those on board the hijacked (RENEGADE) plane, priority should be unequivocally given to human life and dignity. These values represent the foundation of European civilization giving due meaning to the central concept of humanism in our culture (also when its legal components are at stake). They are inalienable for they cannot be "suspended" or "abolished" in a specific situational context. Humanism is not an attitude cultivated as a kind of a *decorum* only during peace and prosperity, but a value that tested in crisis, which is sometimes extremely difficult. The Tribunal also emphasizes that the fight or even regular war against organised crime can be waged without resorting to general negation or "suspension" of basic civil rights and freedoms. Therefore, consequently terrorism can be fought without that far-reaching interference with the right to life of by-standers and notwithstanding the unequivocal condemnation of terrorism, fighting against its manifestations must be carried out taking into account the basic standards of a free, democratic state.

Finally, the Constitutional Tribunal observed that eliminating the challenged legal provision from Poland's legal system does not mean no availability of legal mea-

sures allowing to respond to acts of aerial terrorism. In one hand, all this includes legal construction of the state of necessity and when only assassins that are on board, provisions on necessary defense. To apply them it is imperative an authorised state agency to make a specific decision, taking into account all circumstances of the situation and be ready for taking responsibility in the aftermath. In exceptional situations, the law may de-penalise the effects of this action, recognising a lack of guilt on the entity's side. It may not legalise (excluding illegality) an action consisting in deliberate taking life of innocent people by determining legal conditions of its correctness. The decision to destroy a civil aircraft resulting in death of innocent people on board may not thus constitute a standard legal measure applied by the authorities to defend the life of other people, much less to protect other goods than human life.

As a matter of principle, the judgment of the Constitutional Tribunal dated September 30, 2008 met with a rather favourable public reception. Doubts can only arise and it is actually better – a lack of regulations on shooting down an aircraft, decision being thus subject to general legal principles, namely, a state of emergency, or conditions for making such a decision is regulated in detail. However, this doubt does not essentially undermine the correctness of the Tribunal's deliberations on protecting human life and dignity. Since the repeal of the binding force of Art. 122a of the Aviation Law, attempts were made to adopt a new regulation on neutralization possibilities, including shooting down a RENEGADE aircraft with full respect of the constitutional standard resulting from the judgment dated September 30, 2008 (K 44/07). As it is not acceptable to adopt a law that allows an aircraft to be shot down with passengers and crew on board. These attempts remain limited to situations when the aircraft is manned by only in case of terrorists. Despite numerous efforts, a satisfactory compromise has not been reached yet.[7] Fortunately, so far there is no need to face a terrorist attack from the air, but if this happens, general legal rules will apply. It is of primordial meaning in that respect to release those making the decision to shoot down the plane by the conditions of the state of emergency.[8]

[7] Kraśnicka I., Dopuszczalność zestrzelenia samolotu pasażerskiego nielegalnie przekraczającego powietrzną granice terytorium państwa -nowe propozycje w prawie polskim na tle rozwiązań innych porządków prawnych, in: Państwo i terytorium w prawie międzynarodowym, edited by J. Menkes and E. Cała-Wacinkiewicz, CH Beck, Warszawa 2015, 3 et seq.

[8] Milik P., Stachurski R., Zestrzelenie cywilnego statku powietrznego – aspekty prawne i operacyjne in: Państwo i terytorium w prawie międzynarodowym, edited by J. Menkes and E. Cała-Wacinkiewicz, C. H. Beck, Warszawa, 2015, 11.

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