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LEGAL APPROACHES AGAINST TERRORIST ATTACKS – FUNDAMENTAL FACETS OF AN EFFECTIVE CRIMINAL JUSTICE RESPONSE

1. INTRODUCTION: 21ST CENTURY – THE ERA OF TERRORISM

Terrorism is a form of a collective system that pretends to attain a particular position in the public sphere by seeking to attack, provoke and challenge state power. As a form of communication, terrorism uses various methods of violence as means of political signalling. More distinctively, terrorists send messages not only to their followers but also to their enemies, by using language of senseless brutality. As a consequence, the seemingly random nature of attacks generates mass fear among people. This exemplifies why terrorist crimes inflict more harm than "common' crimes and why they should be punished more harshly[1].

Evidently, the danger of terrorist organizations lies in their potential to commit an attack against the state, which results in much greater atrocities than it might have caused to individual targets[2]. Therefore, a preventive response and collective security are the key terms in international criminal law policy in today's world. Nevertheless, it should be emphasized that the "legal culture" of criminal policy should be clearly defined and carefully interpreted, as the stability of natural law must be guaranteed[3].

The focus of concern of this work is to introduce up-to-date legislative mechanisms as well as procedures used by governments to combat terrorism and ensure worldwide peace along with international cooperation. Firstly, it outlines the importance of a balance between national security and civil liberties as well as the principle of proportionality of state action while combating terrorism. Sec-

[1] M. C. Meliá, *Terrorism and Criminal law: the dream of prevention, the nightmare of the rule of law,* "New Criminal Law Review" 2011, Vol. 14, No. 1, pp. 117–119.

[2] M. C. Meliá, *The wrongfulness of crimes of unlawful association*, "New Criminal Law Review" 2008, Vol. 11, No. 4, p. 587.

[3] W. Hassemer, J. Y. Choi, *Criminal law facing a new challenge*, "Corea Univesity Law Review" 2007, Vol. 2, p. 16.

ondly, by drawing upon real-life examples of Great Britain, Germany and Poland, this work examines the kinds of counter-terrorism policies that have been introduced by modern democratic states based on the rule of law. By reference to the global strategy implemented by the United Nations, the paper will also analyse how these countries manage to furnish an effective criminal justice response to terrorism. Furthermore, historical background as well as the impediments concerning the practical use of anti-terrorist action will be discussed in order to explain their profound impact on the character of a criminal justice response towards terrorism.

The aim of this work is to analyse the aforementioned governments' policies and spell out their legislative solutions. As a result, this work determines the instruments that would both ensure an effective criminal justice response and preserve the civil rights derived from the principles governing a democratic state ruled by law.

2. HISTORICAL BACKGROUND

Use of terrorism as a political cause has accelerated in recent years. Modern terrorism largely came into being after the Second World War with the rise of nationalist movements in the former European empires. The attacks of September 11, 2001 marked a turning point in world history and the beginning of the "War on Terror". The 9/11 attacks are estimated to have killed 3000 people, making it the deadliest terrorist incident in human history[4]. History shows that before 9/11, terrorism was perceived as a regional issue (the Basque region, Northern Ireland) related to groups of extremists and fundamentalists (RAF, IRA) rather than as an international threat to worldwide security[5]. In today's state of affairs, after experiencing acts of terror from 1990s till the most recent ones committed in France and Belgium (2016), our perception of world security has altered severely.

It can be assumed that the sudden change in our perception of terrorism occurred mainly after the 9/11 attacks. The world was neither safer nor more dangerous on September 12th than it was on September 10th, it was merely our awareness of the danger that was different. It seems that it was not the world, but people themselves who changed their outlook on the ways of ensuring worldwide peace[6]. As argued by Otto Schilly, the change of the world's understanding has been deeply influenced by the chosen point of the attack. New York City

[4] M. Nagdy, M. Roser, *Terrorism*, 2016, at https://ourworldindata.org/terrorism/ (visited July 10, 2016).

[5] O. Lepsius, *Liberty, Security and Terrorism: The Legal Position in Germany*, "German Law Journal" 2004, Vol. 5, No. 5, p. 438.

[6] Note: *Responding to Terrorism: Crime Punishment and War*, "Harvard Law Review" 2002, Vol. 115, No. 4, pp. 1235–1238.

is a desired symbol of freedom, democracy and international cooperation. These occur to be virtues of immense importance to all human beings but also turned out to be major targets of terrorism. As a result, the 9/11 attacks left a permanent scar in the historical consciousness of humanity[7].

What is more, the phenomenon of globalization has brought both merits and perils to the world. Mass mobility of people, goods, services, transport and technology has not only conduced to economic prosperity but also to a great influx of migrants through open borders. Therefore, globalization might have contributed to social anxiety and an increase in crime rates[8]. Due to the continuing refugee crisis and the existence of numerous areas being home to a lot of Muslim migrants (including e.g. Molenbeek in Brussels or the *banlieues* in Paris), some regions of Europe have become permanent places of residence for jihadist fighters who travel to the Middle East to join terrorist organisations and as "trained" terrorists return to Europe. As a consequence of these recent developments, Western countries may have become a breeding ground for terrorism.

According to the Global Terrorism Index, since 2000 there has been an over nine-fold increase in the number of people killed by terrorism. In fact, the largest year-to-year increase in deaths from terrorism was recorded in 2014, when the number raised to 32,685 of total deaths. Additionally, it is noteworthy that a trend shows the spread of terrorism is notably increasing – in 2012 there were 81 countries which experienced terrorist attacks, whereas in 2014 that number increased to 93 countries[9].

Recent measurements concerning terrorism activity also highlight the character of terrorism in Western countries. As it has been shown, lone wolf attackers are the ones who perpetrate most terrorist acts whilst driven by political extremism, nationalism or other forms of supremacy, rather than Islamic fundamentalism[10]. It has also been observed that refugee activity and internal displacement are the key incentives which drive terrorists to action – they are correlated with the spread of political violence, governments' instability, as well as the involvement of states in regional or international conflicts[11].

From the perspective of the 21st century, we can clearly observe a striking change in the character of terrorism: it feeds on the technological and communicational progress achieved in the era of globalization and liberalization, which widens the scope of its actions dramatically. The first legal approach to the idea

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[7] O. Lepsius, *Liberty, Security and Terrorism*..., p. 437.

[8] L. Zedner, *Security, the state, and the citizen: the changing architecture of crime control*, "New Criminal Law Review" 2010, Vol. 13, No. 2, pp. 380–381.

[9] Note: *Global Terrorism Index Report 2015*, Institute for Economics & Peace 2015, pp. 9–18. Published at http://economicsandpeace.org. Retrieved from: http://economicsandpeace.org/wp-content/uploads/2015/11/Global-Terrorism-Index-2015.pdf (visited July 10, 2016).

[10] *Ibidem*, pp. 54–56.

[11] *Ibidem*, p. 5.

of an anti-terrorist "response" was based on a reaction to already existing problems. Nonetheless, subsequent regulations focus on preventing actions rather than reacting to already committed crimes. A modern response to terrorism means overcoming and preventing crises rather than dealing with their consequences. Historically, we can observe a number of responses to terrorism. To mention only the crucial ones, they have included a military response, the use of negotiation[12] and the use of international conventions to create norms that would world-widely oppose terrorism (states' anti-terrorism measures include extended powers of investigation, prolonged detention of suspects and special trial conditions)[13]. This work focuses mainly on representing international agreements as well as domestic policy of the chosen countries, which exemplify various approaches to the anti-terrorism resolution.

3. FUNDAMENTALS: COPING WITH TERRORISM AND SUSTAINING DEMOCRACY

The issue concerning a "good" counter-terrorist war can be traced back to the traditional just war theory. From the dawn of history, with its roots in writings of St. Augustine, philosophers and jurists have strived for consistency in defining the conditions under which war is permissible and properly executed[14]. Although it is still a disputable issue, there are universal rules which must be followed in order for an effort to qualify as a genuinely justified war: it should have just aims and intentions (e.g. self-defence); it should be legally declared and supported by a state's society; it should be conducted with a probable chance of success to minimise human suffering and with respect for the safety of non-combatants. Moreover, it should be undertaken as the last resort, when all peaceful means have been used[15]. As it is explained in the following paragraphs, the ideas of balance and proportionality in combating terrorism clearly fulfil the conditions introduced by the just war doctrine.

A question arises as to whether and to what extent it is indispensable to curtail civic and human rights in order to efficiently combat terrorism. An answer can be given by quoting Australia's Attorney-General Phillip Ruddock, who exemplified

[12] One example of military response is the US action against the Taliban, who harbored the al Qaeda, whereas the use of negotiation may relate to Great Britain's secret talks with the IRA leading to Good Friday Agreements.

[13] C. Warbrick, *The European Response to Terrorism in an Age of Human Rights*, "European Journal of International Law" 2004, Vol. 15, No. 5, pp. 990, 1002, 1017.

[14] R. Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism*, Manchester 2005, p. 124.

[15] *Ibidem*, pp. 124–125.

most common 'targets' of terrorist attacks: "The terrorists are driven by ideological obsession and a desire to destroy Western liberal democratic societies. They want to wage war against all those who do not conform to their perverted and corrupted view of Islam. All countries and people who value peace and freedom are terrorists' targets[16]".

As liberal democratic states have become the main enemy of terrorism, they can act as the only rightful weapon to combat it. It is a balance that countries should strike to guarantee mechanisms which both enable states to respond effectively to the terrorist threat and protect the individual from abuse of power by government. More distinctively, it is the balance of interests between national security and civil liberties. Harsh security laws countering the immediate dangers of terrorism, even if effective, do not outweigh the long-term consequences of curtailment of fundamental rights and liberties[17]. It is assumed that the goal of terrorism is to induce governments to abide by 'rule of law' policies and engage them in a self-destructive practice of adopting extreme measures. That is why states should combat terrorism without introducing draconian criminal restrictions, which would only give terrorist organisations more reasons to fight them back[18].

The control of terrorism, as well as any other crime control which underpins any criminal justice system, must be consistent with the social and political heritage of one's country. As a result, the justice system needs to achieve a harmony between competing values of public order and safety (which are supposed to be ensured by crime control) as well as protection of rights and liberties of an individual. Fundamental freedoms cannot be sacrificed in the name of public order, but, on the other hand, they cannot be sufficiently safeguarded if public order and safety are about to collapse. Therefore, these opposing values render the criminal justice response so complex to carry through[19].

Nevertheless, one can ask if there is any alternative to the "balancing" approach. Until 2001, scholars contributed to the development of three different approaches to measuring proportionality in terms of facing terrorism attacks[20]. The first one, the

[16] Nevertheless, it is important to point out that Ruddock in the same speech supported the new anti-terrorism laws, which justifies the curtailment of civil rights to combat terrorism by stating: "we must recognize that national security can in fact promote civil liberties by preserving a society, which rights and freedoms can be exercised".

[Speech of:] P. Ruddock, *International and Public Law Challenges for the Attorney-General*, Centre for International and Public Law, Australian National University, Canberra, June 2004. Published at https://law.anu.edu.au. Available at https://law.anu.edu.au/sites/all/files/cipl/04_ruddockspeech_8june.pdf, (visited July 10, 2016).

[17] C. Michaelsen, *Balancing civil liberties against national security? A critique of counter-terrorism rhetoric*, "UNSW Law Journal" 2006, Vol. 29, No. 2, p. 21.

[18] M. C. Meliá, *The wrongfulness of crimes...*, p. 119.

[19] L. F. Travis III, *Introduction to Criminal Justice*, 6th ed., Newark, NJ 2008, pp. 26–27.

[20] M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford 2015, p. 1199.

so called “eye to eye approach”, verifies whether a defensive response is necessary to reasonably deter or abate aggressive actions[21]. Another one relates to “cumulative proportionality”, which states that in case of a series of attacks, the cumulative effect thereof may justify a single defensive response of a greater impact[22]. The third one, “deterrent proportionality”, checks if a defensive response brings a sufficient impact to deter terrorists from planning future attacks[23].

The “proportionality test” is also used by German constitutional jurisprudence[24]. In short, it consists of three requirements: suitability, necessity and appropriateness, which must be fulfilled in order to introduce any adequate curtailment of constitutionally protected civil rights. The first one stands for governmental usage of such legislative measures that are suitable to achieve desired results. The second condition relates to the scope of government intervention – it examines if there was a chance of accomplishing the same aim without unwarranted interference or by implementing a less drastic measure. The last requirement is associated with proportionality of government action to the freedoms that are curtailed; it means that legislative action is unacceptable if the burden ultimately created is disproportionate to the purpose of the measure[25].

It stands beyond question that in a liberal democratic state it is a fundamental duty of the government to protect its citizens and guarantee them not only security but also freedom of licit actions by respecting civil and human rights. As far as personal freedom is concerned, a certain degree of security and personal safety is needed for its realisation. Consequently, liberty can be perceived as one of the preconditions of security[26]. As a matter of fact, a criminal justice response should not be perceived as protection only from physical harm, which ignores other, equally important aspects of human security that prevent the state from undertaking any oppressive action towards the individual. As Miriam Gani has stated, it is improper and misleading to highlight one feature of human security

[21] For a further assessment of the “eye-to-eye approach” see Gregory Intoccia’s article on the 1986 American bombings in Libya: G. F. Intoccia, *American Bombing of Libya: An International Legal Analysis,* “Case Western Reserve Journal of International Law” 1987, Vol. 19, pp. 205–206.

[22] Guy Roberts used a “cumulative proportionality” test while assessing peacetime reprisals under the UN Charter. For more, see G. B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self Defense and Peacetime Reprisals*, “Case Western Reserve Journal of International Law” 1987, Vol. 19, pp. 284–286.

[23] To examine more applications of “deterrent proportionality” see also: A. Coll, *Military Responses to Terrorism: The Legal and Moral adequacy of Military Responses to Terrorism,* “American Society International Law Proceedings” 1987, Vol. 81, pp. 297–299.

[24] Goerlich, while relating to the “proportionality test”, underlines that an individual is a “part of community, not isolated but embedded in a number of structures and interactions which are supported by law”. For further reading see H. Goerlich, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, (in:) U. Karpen (ed.), *The Constitution of the Federal Republic of Germany*, Baden-Baden 1988, pp. 45–66.

[25] C. Michaelsen, *Balancing civil liberties against...*, p. 20.

[26] *Ibidem*, p. 5.

at the expense of others. This line of reasoning resembles the idea that a policy which does not respect human rights in the first place cannot legitimately claim to protect these rights against international security threats[27].

4. UNITED NATIONS' AND SELECTED COUNTRIES' RESPONSES TO TERRORISM

4.1. UNITED NATIONS: GLOBAL COUNTER-TERRORISM STRATEGY

All United Nations activities and programs must be performed in accordance with the rule of law, which basically means fulfilling a list of enumerated obligations. The guiding principles consist of such regulations that obligate UN assistance to e.g. be based on international standards and political country context[28]. It can be stated with certainty that these obligations stand for preserving an accurate balance between helpful assistance and necessity of intervening in the internal affairs of a state. In 2006, the United Nations General Assembly adopted the Global Counter-Terrorism Strategy. The strategy appears to be a crucial global instrument to enhance national, regional and international efforts to counter terrorism. The Global Counter-Terrorism Strategy is in the form of a resolution and an annexed Plan of Action (A/RES/60/288) is composed of 4 pillars addressing, firstly, the conditions conducive to the spread of terrorism; secondly, the measures to prevent and combat terrorism; thirdly, the standards to be ushered in to build states' capacity and strengthen the UN system to ensure the success of the second pillar, and, lastly, to preserve respect for human rights, which occurs to be the fundamental basis for the fight against terrorism[29].

The first pillar underlines the importance of conflict prevention, negotiation, judicial settlement, the rule of law as well as peacekeeping in order to contribute to successful prevention and peaceful resolution of prolonged unresolved conflicts. Moreover, it aims at promoting a culture of peace, justice, mutual respect among civilizations, cultures, peoples and religions. The second pillar addresses mainly the ways to prevent and combat terrorism by denying terrorists access

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[27] *Ibidem*, pp. 6–7.

[28] See Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance, April 14, 2008, pp. 1–2. Published at https://www.un.org. Available at https://www.un.org/ruleoflaw/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf (visited July 10, 2016).

[29] UN General Assembly, *The United Nations Global Counter-Terrorism Strategy*, Resolution adopted by the General Assembly, A/RES/60/288, September 20. 2006, pp. 1–3. Published at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/504/88/PDF/N0550488.pdf?OpenElement (visited July 10, 2016).

to the means which enable them to carry out attacks. It relates to not tolerating any terrorist activities on states' territories (terrorist training camps, preparation or organization of attacks) and the rightful apprehension and prosecution or extradition of perpetrators of terrorist acts. It also aims at strengthening international cooperation in combating terrorist crimes between states. The third pillar is recognized by UN policies as the most crucial one – it depicts the importance of capacity-building of all states as a core element of the global counter-terrorism effort. It consists of global cooperation of states, the United Nations and international organizations (including, *inter alia*, the World Bank, the World Health Organization, the International Maritime Organization, and the International Criminal Police Organization) in countering terrorism. Last but not least, the fourth pillar stands for ensuring respect for human rights by calling them the fundamental basis for the fight against terrorism. The pillar exemplifies the idea that counter-terrorism actions and protection of human rights are not conflicting goals, but the contrary – they mutually reinforce the need to promote and cherish the rights of victims of terrorism. It underlines that state actions taken to combat terrorism are determined by international law, in particular human rights law, refugee law and international humanitarian law[30].

According to the UN criminal strategy, an effective criminal justice response integrates the rule of law and human rights standards in order to convey all moral virtues superior to those of terrorists who attack civilians. Most notably, the United Nations emphasizes the importance of preventive actions and implementation of forward-looking strategies rather than responsive policies, calling it the "proactive law enforcement". Taking it into account, the UN strives to introduce in all member states universal conventions concerning investigation and prosecution of terrorists. Therefore, mandatory criminalization of certain types of behaviour, such as terrorist financing, *association de malfaiteurs*, support for terrorism offences or preparation of terrorist acts, has become the utmost priority in harmonizing criminal law and other international standards[31].

4.2. POLAND

The first steps of Polish counter-terrorism legislation occurred in the socialist era. Since then it has been evolving thanks to the changing states of affairs. The first step, undertaken by the Polish People's Republic, was aimed at unifying

[30] *Ibidem*, pp. 4–9.

[31] UN Office on Drugs and Crime, *Preventing terrorist acts: criminal justice strategy integrating rule of law standards in implementation of United Nations anti-terrorism instruments*, New York 2006, pp. 8–22. Published at https://www.unodc.org/pdf/terrorism/TATs/en/3IRoLen.pdf (visited July 10, 2016).

Polish regulations with the universal jurisdiction of multilateral United Nations sector conventions[32]. After 1989, Poland widened its catalogue of antiterrorist UN conventions[33] and as a new member of the Council of Europe (November 1991) adopted the European Convention on the Suppression of Terrorism. Subsequently, after the country's accession to the European Union (May 2004), Poland began the process of implementation[34] of the basic EU regulations[35].

In contrast to German law, Polish legislation provides a definition of a terrorist offence in Article 115 § 20 of the Polish Criminal Code. Polish lawmakers defined a terrorist offence as a prohibited act, which is subject to imprisonment with the upper limit of at least 5 years, committed for one of three purposes. These aforementioned acts consist of serious intimidation of many people; compelling a public authority of the Republic of Poland or another international organization or authority to take or refrain from certain activities; and calling a serious disturbance in the system or the economy of the Polish Republic, another country or an international organization – as well as threats to commit such an act[36].

New Polish anti-terrorism law entered into force on July 2, 2016, only a few months after an initial draft was proposed. The rushing of legislative measures was the result of upcoming international events organised in Poland – the North Atlantic Treaty Organisation (NATO) Summit and the World Youth Day in Cracow in July 2016[37]. These events, which welcomed notable world leaders and millions of international pilgrims, required special preparation with intelligence service coordination for potential security threats.

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[32] These included: *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (Tokyo, September 14, 1963), *Convention for the Suppression of Unlawful Seizure of Aircraft* (Hague, December 16, 1970), *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal, September 23, 1971), *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomats Agents* (New York, December 14, 1973) and *Convention on the Physical Protection of Nuclear Material* (Vienna, March 3, 1980).

[33] These included: *International Convention against the Taking of Hostages* (New York, December 17, 1979), *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (Rome, March 10, 1988) and *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* (Rome, September 10, 1988). Today, all these UN conventions form a full catalogue of antiterrorist acts. See United Nations Treaty Collection – Text and Status of the United Nations Conventions on terrorism – at http://www.un.org/en/counterterrorism/legal-instruments.shtml (visited July 10, 2016).

[34] For example: *Council Framework Decision of 13 June 2002 on combating terrorism* (2002/475/HA).

[35] P. Daranowski, (in:) K. Roach (ed.), *Comparative Counter-Terrorism Law*, Cambridge 2015, pp. 425– 428.

[36] Polish Criminal Code of June 6, 1997, art. 115 § 20.

[37] Polish Press Agency, *New anti-terrorism laws in force for WYD 2016*, February 2, 2016. Available at http://www.pap.pl/en/news/poland/news,464454,new-anti-terrorism-laws-in-force-for-wyd-2016---ministry.html (visited July 10, 2016).

In a nutshell, the new Act on Anti-Terrorist Activities aims at integrating the Polish protection system by introducing sufficient coordination mechanisms and management of transmission of information among existing agencies. More accurately, it includes the introduction of remand for up to 14 days before judicial review occurs, immediate expulsion from Poland once somebody is thought to be a threat to national security, as well as temporary closure of borders in the event or a risk of terrorism. Moreover, security services are allowed to conduct surveillance of foreign citizens for as long as 3 months without prior court approval. Under this regulation, the Internal Security Agency will have easier access to databases which would include their ability to control foreigners' telephone conversations, emails and to wiretap telecommunication devices. Last but not least, the law enables, under certain circumstances, the police and border guard officers, ISA agents as well as soldiers of the Armed Forces to use a weapon against a person being in the process of committing an act of terrorism, which may cause their death or a direct threat to their life or health[38].

The new surveillance law in Poland raises concerns in terms of undermining the privacy rights of citizens and foreigners by, *inter alia*, increasing government's access to digital data[39]. Worth considering is also the complaint of the Polish Ombudsman against the new anti-terrorist law to the Constitutional Court. Adam Bodnar claims that this document contains some legal defects and infringements of the Constitution as well as the EU's Charter of Fundamental Rights and the European Convention on Human Rights[40]. First of all, he argues that despite the significant aim of the law to strengthen the anti-terrorist protection system as well as ensure public safety, it is imprecise and too general. According to the Ombudsman, the regulations fail to explain exhaustively who and for what reason can be controlled by secret services, nor does it precisely define what an act of terrorism means. Consequently, the law enables special services to gain wide-ranged and uncontrolled competences, which may result in arbitrary or unjustified decisions. The complaint underlines that the flaws of the new law are caused by an unnecessary rush of the government and its ignorance towards remarks made by experts as well as social organisations. The legislative procedure was

[38] Act on Anti-Terrorist Activities of June 10, 2016, Journal of Laws of the Republic of Poland, item 904.

[39] L. Tomkiw, *Poland's New Surveillance Law Is Latest Controversial Legislation Passed By Law And Justice Party*, "International Business Times", May 2, 2016. Available at http://www.ibtimes.com/polands-new-surveillance-law-latest-controversial-legislation-passed-law-justice-2295539 (visited July 10, 2016).

[40] *Rzecznik Praw Obywatelskich skarży ustawę antyterrorystyczną do Trybunału Konstytucyjnego*, official announcement on the Polish Ombudsman's website, July 11, 2016. Available at https://www.rpo.gov.pl/pl/content/rzecznik-praw-obywatelskich-skarży-ustawę-antyterrorystyczną-do-trybunału-konstytucyjnego (visited July 10, 2016).

said to be inadequate to the seriousness of the aim and the matter regulated by the counter-terrorism law[41].

It seems that, in the eyes of non-governmental organisations and the Ombudsman, Polish lawmakers may have fallen short of achieving a healthy balance between national security and civil liberties. The interim merit of preventing terrorist attacks, ensured by harsh and repressive regulations, would be just a short-term solution that cannot guarantee public order and civil safety for a long time without violating the democratic system. What is more, implementing regulations of such importance in a rush and without resorting to expert opinions may have perpetuated distrust among the public opinion towards the legal processes of the government.

4.3. GERMANY

The shock of 9/11 attacks has profoundly influenced the security and control policies in Germany, especially after realizing that this act of terrorism was planned in Hamburg[42]. After 9/11, the German Parliament enacted statues with harsher preventive and repressive measures, which included stronger surveillance, control by the police and introduction of intelligence agencies[43]. Still, it is worth mentioning that there is no legal definition of terrorism in German law – only in several parliamentary documents (Bundestags-Drucksache) it is described as an international threat, supported by a supra-national network of logistical alliances and operative structures[44]. German legislation wanted to strengthen cooperation between the police, prosecution services and intelligence agencies nationally and internationally. Major German intelligence agencies may request data from banks, financial institutions, post offices, telecommunication companies and airlines[45].

In 2002, Security Packages I and II were enacted. These included a wide range of control mechanisms which enabled security agencies to use them while trying to find wanted persons. The activity of extremist organisations was banned. In fact, after the introduction of this new legislation, human rights groups placed Germany in the top five of the list of nations responsible for curtailing civil liberties after 9/11[46]. Moreover, Germans must tolerate the collection and recording of

[41] Complaint of the Polish Ombudsman to the Constitutional Court, VII.520.6.2016.VV/AG. Available at https://www.rpo.gov.pl/sites/default/files/Wniosek%20do%20TK%20w%20sprawie%20ustawy%20antyterrorystycznej%2011%20lipca%202016.pdf (visited July 10, 2016).

[42] C. J. M. Safferling, *Terror and Law: German Responses to 9/11*, "Journal of International Criminal Justice" 2006, Vol. 4, No. 5, p. 1153.

[43] One of the most important ones was the Suppression of Terrorism Act (*Terrorismusbekämpfungsgesetz*) enacted on January 9, 2001.

[44] *Ibidem*, p. 1156.

[45] *Ibidem*, p. 1159.

[46] L. Jarvis, M. Lister, *Anti-Terrorism, Citizenship and Security*, Manchester 2015, p. 30.

personal data including fingerprints and biometric data on their passports as well as ID-cards[47].

One of the solutions undertaken by the German Parliament was to establish the Aviation Security Act (2005), whose purpose was to ensure security of the airspace against hijacking, sabotage and terrorism. It aimed at implementing harsher security screenings and other military measures to be taken by the federal government concerning aboard terrorism. The Act contained section 14(3), pursuant to which, whilst an aircraft is being hijacked, the defence minister has a power to force it to land, use a threat of launching anti-aircraft weapons and ultimately to shoot down the civilian passenger plane if it can be assumed that it has been transformed into a weapon "against human life"[48]. In fact, the Federal Constitutional Court stated that section 14(13) of the Act violated art. 35 of the Grundsetz (German Federal Constitution) – domestic security is a matter for federal states and not the federal government. Additionally, it impinges upon the right to life according to art. 2(1) and dignity of the person under art. 1(1) of the Grundsezt. In 2005, it was declared to be unconstitutional because of the aforementioned issues together with the fact that, by virtue of art. 87a (1), armed forces can be used only for the sole purpose of defensive operations or in order to avert an imminent danger to the existence of the free democratic order of Germany or one of its states[49]. Additionally, an order carried out on the basis of section 14(3) may turn out to be inadequate to the danger posed by a plane hijacked by terrorists.

Moreover, the Federal Constitutional Court declared another piece of legislation, the Federal Criminal Police Office Act (2009), partially unconstitutional in 2016. In order to omit fragmentation of competences, the act transferred most prerogatives in the realm of combating terrorism to the Federal Criminal Police Office – these included special surveillance based on observation, audio and visual recording of private homes and general monitoring of other confidential situations without judicial approval at all or one month after detection. The Constitutional Court ruled that some provisions concerning investigative powers do not conform to the principle of proportionality, rendering the surveillance system unspecific and too broad. Citizen freedoms prescribed in art. 13 (inviolability of the home) and 10 (secrecy of telecommunications) of the German Grundsetz were deemed to be threatened[50].

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[47] C. J. M. Safferling, *Terror and Law...*, pp. 1158–1159.

[48] Act on the Reorganisation of Aviation Security Tasks (German: *Luftsicherheitsgesetz*) of January 11, 2005, BGBI I, No. 78.

[49] R. Youngs, *Germany: Shooting down aircraft and analyzing computer data*, "International Journal of Constitutional Law" 2008, Vol. 6, No. 2, pp. 332–335.

[50] J. Gesley, *Germany: Federal Constitutional Court Declares Terrorism Legislation Partially Unconstitutional*, "Global Legal Monitor", The Library of Congress, April 20, 2016. Available at http://www.loc.gov/law/foreign-news/article/germany-federal-constitutional-court-declares-terrorism-legislation-partially-unconstitutional/ (visited July 10, 2016).

In June 2015, another German anti-terrorism legislation, which implemented the "Foreign Terrorist Fighters" resolution of the UN, entered into force[51]. The new law focused mostly on penalizing traveling outside of the country with the intent of receiving terrorist training (art. 89a of the German Criminal Code) as well as terrorist financing (art. 89c). The justification for introducing these laws lies in governmental statistics which show that the number of Germans travelling to join the Islamic suddenly rose from 550 in January 2015 to 700 in June 2015[52]. Still, some opponents, like van Lijnden, have accused the Act of being unconstitutional, as it pre-emptively criminalizes behaviour that does not fulfil all elements of an offence[53].

The most recent German package of anti-terrorist laws is called the Act to Improve Information Exchange in the Fight Against International Terrorism, which entered into force on July 30, 2016. It amends several existing acts[54] and gives German domestic intelligence agencies more means of control to effectively oppose international terrorism[55]. The law aims at strengthening the federal government's intelligence services and executes an expansion of the system of international information-sharing between foreign intelligence agencies by authorising the Federal Office for the Protection of the Constitution to create and make use of a common database. Moreover, the regulations introduce tightened means of control of prepaid mobile phones by obliging telecommunications companies to verify the identity of their customers so that authorities will be able to match a phone number to an individual during an investigation[56].

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[51] The document is called the Act on Amending the Crime of Preparation of a Serious Violent Offence Endangering the State.

[52] J. Gesley, *Germany: New Anti-Terrorism Legislation Entered Into Force*, "Global Legal Monitor", The Library of Congress, July 10, 2015. Available at http://www.loc.gov/law/foreign-news/article/germany-new-anti-terrorism-legislation-entered-into-force/ (visited July 10, 2016).

[53] C. B. van Lijnden, *Strafbarkeit im Vorfeld des Vorfeldes?*, "Legal Tribune Online", February 4, 2015. Available at http://www.lto.de/recht/hintergruende/h/neues-anti-terror-gesetz-ausreise-strafbar-vorverlagerung/ (visited July 10, 2016).

[54] These include: amendments to the Act on the Federal Office for the Protection of the Constitution, the Telecommunications Act, and the Federal Police Act.

[55] *Gesetz zum besseren Informationsaustausch bei der Bekämpfung des internationalen Terrorismus of 29 July 2016* [Act to Improve Information Exchange in the Fight Against International Terrorism], BGBl I Nr. 37.

[56] J. Gesley, *Germany: Act to Improve Anti-Terror Information Exchange in Force*, "Global Legal Monitor", The Library of Congress, September 8, 2016. Available at http://www.loc.gov/law/foreign-news/article/germany-act-to-improve-anti-terror-information-exchange-in-force/ (visited August 10, 2016).

4.4. GREAT BRITAIN

The history of British legislation concerning terrorism shows that, at the outset, it acted as a response to the attacks of the Irish Republican Army. The Prevention of Violence Act, enacted in 1939, served as a direct ancestor to the Prevention of Terrorism Acts (established between 1974–1989). In the 21st century, these were replaced by a series of Terrorism Acts confronting the threat posed by radical Islamic organisations within the United Kingdom.

To begin with, a striking difference from German and Polish law is that the British legislation provides a legal definition of terrorism in the Terrorism Act 2000[57]. Moreover, it introduces a broad definition of a terrorist[58] as well as the possibility of seizure of terrorist cash or other "terrorist property". The Act enabled the police to keep a terrorist suspect in detention for up to seven days[59], which was doubled by the Criminal Justice Act 2003[60], as well as to arrest a person, "who is reasonably suspected to be a terrorist" without a warrant (Section 41). In 2006, after the London bombings, the British Parliament enacted another Terrorism Act that condemned encouragement of terrorism or other inducement of members of the public, referring to the commission, preparation or instigation of acts of terrorism[61]. Furthermore, it revised the period of detention of terrorist suspects without charges to 28 days[62]. The Terrorism Prevention and Investigation Measures Act 2011 abolished control orders, a product of the Prevention of Terrorism Act 2005, and authorized "terrorism prevention and investigation measures" to be introduced by the Secretary of State only if enumerated conditions were fulfilled, so that it could be justified as a "relevant decision"[63]. The scope of the Secretary of State's powers has been limited: forced relocation, outright bans on Internet access and phone use as well as some prohibitions on association with others were dropped. Nevertheless, numerous preventive regulations remain in place, such as the overnight residence measure (curfew), travel measure (restrictions on leaving a specified area or travelling outside it), electronic communication device meas-

[57] Terrorism Act 2000, s (1): It states that "terrorism" means the use or threat of action where "the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause".

[58] Terrorism Act 2000, s 40(1) and (2): "terrorist" means "a person who has committed an offence under chosen sections of the Act, or is or has been concerned in the commission, preparation or instigation of acts of terrorism – also to a person who has been, whether before or after the passing of the Act".

[59] Terrorism Act 2000, s 41(5) in accordance with s 29(3).

[60] Criminal Justice Act 2003, s 306(4)"(3A)(b).

[61] Terrorism Act 2006, s 1(1).

[62] Terrorism Act 2006, s 23(7)(3)(b).

[63] Terrorism Prevention and Investigation Measures Act 2011, s 2(1).

ure as well as reporting, association or communication with other persons and constant monitoring measures[64].

A striking example of British anti-terrorism legislation concerns the Data Retention and Investigatory Powers Act 2014. The DRIP aims at broadening the security services' access to "relevant communications data", which can be reduced to phone and Internet records of individuals[65]. Although it ensures the appointment of an independent reviewer of investigatory powers, some scholars claim that the DRIP does not strike an appropriate balance between security and privacy. As a result, it may lead to inappropriate and disproportionate retention of data in a democratic society[66].

In July 2015, the High Court in London ruled that the introduced surveillance powers are unlawful and must be restrained. It underlined the importance of complying with European law, particularly Articles 7 and 8 of the EU Charter of Fundamental Rights[67], which represents a strict view on state access to data[68]. Nevertheless, the UK government appealed the judgment to the Court of Appeal. The Court has asked the Court of Justice of the European Union to rule on whether the previous decision was adequate and if the DRIP expanded the scope of art. 7 and 8 of the EU Charter[69]. It will take a considerable amount of time to answer these questions by the CJEU. In actuality, the case has turned out to be even more sophisticated after the UK's EU referendum and the results of the Brexit poll.

Last but not least, one of the latest laws introduced by the Parliament was the Counter-Terrorism and Security Act 2015. The CTSA introduces further temporary restrictions on travel. It enables the government to seize and retain travel documents while a person is suspected of intending to leave Great Britain or the United Kingdom in connection with terrorism-related activity[70]. Besides, the law allows the Secretary of State to impose a "temporary exclusion order", which bars an individual from returning to the UK until they meet certain conditions – these

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[64] M. Ryder, *Control orders have been rebranded. Big problems remain,* "The Guardian", January 28, 2011. Available at https://www.theguardian.com/commentisfree/libertycentral/2011/jan/28/control-orders-protection-of-freedoms-bill (visited July 10, 2016).

[65] Data Retention and Investigatory Powers Act 2014, s 1 and s 2.

[66] G. N. La Diega, *Striking a Balance among Security, Privacy and Competition*, "Diritto Mercato Tecnologia", January 1, 2015. Available at http://www.dimt.it/2015/01/21/striking-a-balance-among-security-privacy-and-competition-the-data-retention-and-investigatory-powers-act-2014-drip/ (visited July 10, 2016).

[67] Art. 7, 8 of UE Charter stand for a right of everybody to privacy and protection of personal data.

[68] *R. (on the application of Davis) v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin). The judgement is available online at https://www.judiciary.gov.uk/wp-content/uploads/2015/07/davis_judgment.pdf (visited July 10, 2016).

[69] Pinsent Masons, *EU court hears case on UK data retention laws*, "Out-Law.com", June 12, 2016. Available at http://www.out-law.com/en/articles/2016/april/eu-court-hears-case-on-uk-data-retention-laws/ (visited July 10, 2016).

[70] Counter-Terrorism and Security Act 2015, s 1.

address mostly the suspicion that the individual is, or has been, involved in terrorism-related activity[71].

5. DIFFICULTIES CONCERNING INVESTIGATION AND PROSECUTION OF TERRORISTS

Undoubtedly, there is a clear surge among policy makers of early investigative mechanisms. Today's forms of terrorism relate mostly to lone wolf attackers, so called "sleepers" and suicide bombers. It is hard to predict when and how a terrorist attack will be carried out – it can actually be perceived as a fight against unknown. That is why many policies aim at extending the borders of criminalization by covering chains of preparations in order to prevent further terrorist actions, especially violent attacks against the public.

The change of character of so called 'new terrorism' can be easily explained by an example from German law, which aims at blocking the terrorist threat of the German Red Army Fraction. In the 1970s legislators established section 129a in the German Criminal Code, which severely punishes forming a terrorist group. The focus of the provision is to protect the community from terrorist groups by arresting its founders, members or supporters, and to hold them criminally responsible for being part of the organisation[72]. Nevertheless, today's forms of terrorist attacks differ significantly from the ones envisioned by that legislative initiative. Terrorism has evolved from specific perpetrators and organized groups to decentralized, impersonal networks whose actions are motivated by the spread of Islamic fundamentalism[73]. Contemporary terrorism has started to resemble underground resistance organisations, in which arrested members are easy to replace without the threat of their confidential information spreading. Thus, it seems reasonable to assume that criminal law can often be ineffective against modern terrorism without the introduction of punishment for planning and preparing acts of terror by decentralized groups, which still respects the frames of constitutional law[74].

Moreover, we can observe many issues concerning the prosecution of terrorists. To begin with, an alleged act of terrorism is not an isolated incident, but one that originated in a complex organized structure and therefore testimony of group

[71] Counter-Terrorism and Security Act 2015, s 2.

[72] L. Wörner, *Expanding Criminal Laws by Predating Criminal Responsibility – Punishing Planning and Organizing Terrorist attacks as a Means to Optimize Effectiveness of Fighting Against Terrorism*, "German Law Journal" 2012, Vol. 13, No. 9, p. 1042.

[73] O. Lepsius, *Liberty, Security, and Terrorism...*, p. 438.

[74] L. Wörner, *Expanding Criminal Laws by Predating Criminal...*, p. 1043.

members is extremely rare. This can be usually obtained by offering a mitigation of punishment in return for cooperation. Though it must be underlined that internal evidence can be acquired only through informants that usually would risk their lives while giving testimony at trial. The usage of hearsay evidence may introduced, however its importance is said not to be very high. Additionally, external evidence (which means one that is not directly related to the terrorist) has usually weak circumstantial value as well. Last but not least, investigative difficulties are deepened by new evolving forms of terrorist organizations. Investigations and trials are a time-consuming and expensive matter, and problems are exacerbated by the problematic flow of information between intelligence services from different states[75]. The accurate response to these obstacles lies in constructing global mechanisms which would unify the procedural differences as well as simplify international cooperation in investigating terrorist criminals and potential terrorists[76].

6. CONCLUSIONS

In today's world, newly implemented legislative regulations aim at destroying the emergence of terrorism. It is beyond question that the reason behind states' efforts to combat terrorism is its duty of protecting life and other personal and material rights of citizens by resorting to prevention rather than counteraction. Criminal justice responses have changed their direction from sanctioning committed crimes to averting the danger of their occurrence. In other words, instead of responding to illicit behaviour as an *ultima ratio*, the criminal law has employed more prognostic thinking, which strives to prevent "a future wrong".

Nevertheless, legal regulations discussed above prove that in some cases basic rights are sacrificed for the sake of crime control and prevention of terrorism. It was shown that some states wanted to implement harsh anti-terrorist solutions that were precluded by general principles of law, especially of the constitutional rank. Despite the danger of terrorism and the justified idea of preventive war with its consequences, states must adhere to the rule of law if they are to remain fully democratic.

Taking into account evaluated sources, an effective rule of law-based criminal justice response to terrorism involves not only adequate laws and practices, but also specialized training and capacity building connected with international

[75] C. J. M. Safferling, *Terror and Law...*, p. 1162.

[76] One already introduced tool is the European Criminal Record Information System, called ENCRIS – it is a computerised system allowing faster and easier transmission of information on criminal convictions in the European Union.

cooperation to react effectively to the complex nature of terrorism. Additionally, international organisations, like the United Nations, strive to implement universal legislative instruments against terrorism to investigate and prosecute terrorist organisations and their acts of terror.

A fundamental question arises as to what extent a legal system can efficiently avert this peril without causing social turmoil by violating civil liberties. While the introduction of draconian criminal law measures would most effectively defeat terrorism, it would also diminish the values of democracy and individual liberty. National security and privacy do not have to be mutually exclusive goals, once surveillance purports to represent a specific response to perceived threats rather than impose general control of citizens. Last but not least, legislators and practitioners should embrace the idea that regulations must preserve balance and proportionality between national security and civil liberties. The crux of the matter is that counter-terrorism actions and protection of human rights are not conflicting goals, but the contrary – they are the fundamental basis for the fight against terrorism, which ultimately ensures permanent security.

Summary

Terrorism has become one of the major issues of international criminal law policy. A sudden change of public perception of terrorism has occurred since 9/11 attacks – from regional groups of fundamentalists, terrorists have become an international threat to worldwide security. This fact has profoundly influenced anti-terrorist policies – from responsive actions to rather preventive and forward-looking strategies. As the opposing values of national security and civil liberties render the criminal justice response to be so complex to introduce, this work underlines the significance of balance and proportionality in waging a war on terror. Moreover, an evaluation of legislative mechanisms introduced by the United Nations police makers as well as those adopted in Germany, Poland and Great Britain will be made. Lastly, the work outlines the most common impediments that befall the investigation and prosecution of terrorists. By taking the aforementioned aspects into consideration, it will be determined which fundamental features will most effectively ensure an adequate criminal justice response and preserve the civil liberties derived from the principle of a democratic state ruled by law.

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