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## **State Security and the Constitutionally Protected Human Rights and Freedoms in the Light of the Polish Constitution of 1997**

**Keywords:** terrorism, terrorist attack, state security, human rights and freedoms, right to life, civil aircraft

**Słowa kluczowe:** terroryzm, atak terrorystyczny, bezpieczeństwo państwa, prawa i wolności człowieka, prawo do ochrony życia, cywilny statek powietrzny

### **Summary**

Ensuring the security of the state is one of the primary responsibilities of its authorities, which can take a number of legal measures for that purpose. In this context, however, a question can be asked whether the protection of a value such as the security of the state can justify the limitation of human rights and freedoms and, if so, how deep such state's interference in constitutionally protected rights and freedoms can be. In particular, can the basic human right – the right to life be sacrificed for the protection of the state security? The conflict between these values has been illustrated by the amendment of the Polish Aviation law adopted in 2004. It allowed under certain conditions to shoot down a civil aircraft with passengers on board. The regulation was subject to the constitutional review conducted by the Polish Constitutional Tribunal and was declared unconstitutional. However, the emergence of new forms of terrorism and the escalation of this phenomenon in Europe, which characterizes the beginning of the twenty-first century, cause that the problem still remains valid.

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**Streszczenie****Bezpieczeństwo państwa oraz konstytucyjna ochrona praw i wolności człowieka w świetle Konstytucji RP z 1997 r.**

Zapewnienie bezpieczeństwa państwu należy do podstawowych obowiązków jego organów, które mogą w tym celu podejmować szereg środków prawnych. W tym kontekście zadać jednak można pytanie czy dla ochrony wartości jaką jest bezpieczeństwo państwa mogą zostać ograniczone prawa i wolności jednostki, a jeżeli tak, to jak daleko może sięgać ingerencja państwa w tym zakresie. Czy można ograniczyć podstawowe prawo człowieka – prawo do ochrony życia dla ochrony bezpieczeństwa państwa? Konflikt między tymi wartościami ilustruje polska regulacja, jaką w 2004 r. wprowadzono do prawa lotniczego, pozwalająca w określonych przypadkach zestrzelić samolot cywilny z pasażerami na pokładzie. Regulacja ta stała się przedmiotem orzeczenia Trybunału Konstytucyjnego, który uznał ją za niekonstytucyjną. Niemniej jednak pojawienie się nowych form terroryzmu oraz eskalacja tego zjawiska w Europie, która charakteryzuje początek XXI w. sprawia, że problem pozostaje wciąż aktualny.

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The “security” is a multidimensional concept that refers to many areas of public life. It is referred to when talking about, for example, security of mass gatherings, environmental security, security of cultural goods, food security as well as human security. However, the notion of “security” is primarily associated with the state and in that context the protection of the “state security” is the basic responsibility of state authorities. The claim that state security equals the security of the people usually is true, but there is a small number of cases in which these values can be in conflict. The problem that appears then is how far the state can interfere the constitutional rights and freedoms of an individual in order to protect the security of the state. The further question that can be asked is if it is possible to restrict the basic human right – the right to life in order to protect such value as the security of the state. All these issues have become particularly important and relevant in the face of the need to combat terrorism and look for the appropriate legal tool to achieve that aim.

There is no one legal definition of “state security” in Polish law, but the notion is used by the Constitution of 1997<sup>2</sup> in several contexts. Art. 5 provides that the Republic of Poland shall safeguard the security of the citizens, art. 26 provides that the Armed Forces of the Republic of Poland shall ensure the security and inviolability of its border, art. 31 allows for imposing limitation upon the exercise of constitutional freedoms and rights when it is necessary in a democratic state for the protection of its security or public order, art. 45 provides the exceptions to the public nature of hearings before a court if it is necessary because of the state security, art. 53 p. 5 provides that the freedom to publicly expressed religion may be limited if it is necessary for the defense of the state security, art. 61 p. 3 provides the same in reference to the right to obtain information on the activities of organs of public authority as well as persons discharging public functions, art. 74 provides that public authorities shall pursue policies ensuring the ecological security of current and future generations, art. 126 p. 2 provides that the President of the Republic shall endure the security of the state and according to art. 130 shall take the oath in which he/she swear to safeguard the security of the state, art. 135 establishes the National Security Council as the advisory organ to the President of the Republic regarding internal and external security of the state, art. 146 p. 4 provides that the Council of Ministers shall, in particular, secure the internal and external security of the state, and finally, art. 230 provides that in case of threats to the security of citizens, the President of the Republic may, on request of the Council of Ministers, introduce a state of emergency.

However, the concept of “state security” has been defined by the Polish doctrine of constitutional law<sup>3</sup>. According to B. Banaszak, the security of the state is equal to the security of citizens referred to in art. 5 of the Constitution because the concept of “state” can be understood as the synonym of the collective of citizens creating that state<sup>4</sup>. P. Sarnecki points out that “state security” is an

<sup>2</sup> The Constitution of the Republic of Poland adopted on 2 April 1997, published in the Official Journal of Laws 1997, No. 78, item 483.

<sup>3</sup> The views of the Polish doctrine on the concept of the “state security” have been gathered and Publisher, see J. Jaraczewski, *Bezpieczeństwo państwa jako wartość chroniona w konstytucji RP*, [In:] *Konstytucja Rzeczypospolitej Polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych, gospodarczych, technologicznych i społecznych*, ed. S. Biernat, Warszawa 2013, p. 63 and next.

<sup>4</sup> B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, p. 177.

undefined concept which content must be clarified in the individual cases of the application of art. 31 par. 3 of the Constitution<sup>5</sup>. On the other hand, J. Karp points out that state security is “a condition in which there is no threat to the existence of the state and its democratic system. The security of the state includes within its scope a directive to take care of its sovereignty, territorial integrity and defense potential, even if there is no threat from other states or terrorist”<sup>6</sup>. Another approach has been presented by W. Wołpiuk, who indicates that art. 5 of the Constitution expresses the legislator’s decision to establish “state security” a value superior to the protection of the freedoms and rights of an individual and its security, which allows for a breach in their protection. State security is associated with the notion of the common good and therefore the state cannot be considered as a separate being completely detached from the needs and interests of citizens. Therefore, the state and its security shall have priority over the protection of human rights and freedoms which in certain circumstances can be limited. W. Wołpiuk recognizes security as a kind of meta-value, pointing to the impossibility of implementing the essential qualities and values of a democratic state ruled by law without enduring the adequate state security<sup>7</sup>.

The conflict between the two values – the state security and a constitutionally protected right or freedom – can take a very practical dimension. Such conflict that concerns the most fundamental right to life can be illustrated by the regulation introduced to the Polish Aviation Law<sup>8</sup> which caused a lot of controversy and was subject to the constitutional review conducted by the Constitutional Tribunal. The controversial art. 122a was introduced to the Aviation Law by the act of 2 July 2004 amending the Act on state border protection<sup>9</sup> and stated that “If state security demands it and air defense authority

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<sup>5</sup> P. Sarnecki, *Uwagi do art. 31*, [In:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, T. IV, ed. L. Garlicki, Warszawa 2005, p. 38.

<sup>6</sup> J. Karp, *Bezpieczeństwo państwa*, [In:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz encyklopedyczny*, eds. W. Skrzydło, S. Grabowska, R. Grabowski, Warszawa 2009, p. 108 and next.

<sup>7</sup> W.J. Wołpiuk, *Bezpieczeństwo państwa i pojęcia pokrewne. Aspekty konstytucyjnoprawne*, [In:] *Krytyka prawa. Niezależne studia nad prawem*. Vol. II: *Bezpieczeństwo*, ed. W. Sokolewicz, Warszawa 2010, p. 181 and next.

<sup>8</sup> The Act of 3 July 2002 – Aviation Law, consolidated text the Official Journal of Laws 2006, No. 100, item 696, with later amendments.

<sup>9</sup> The Act of 2 July 2004 on the amendment of the Act on state border protection and some other statutes, published in the Official Journal of Laws 2004, No. 172, item 1805.

decides, having considered in particular the information from states air traffic control authority, that a civilian aircraft is being used unlawfully, and in particular in a terrorist attack, the aircraft may be destroyed in accordance with the regulations laid out in the Act of 12 October 1990 on state border protection<sup>10</sup>. The initiative to adopt the above regulation came from the Ministry of National Defense and it was clearly inspired by the events of 11 September 2001 in America when terrorists attacked the World Trade Center and Pentagon from the air. However, before discussing the origins, detailed content and the effects of the Polish regulation, the international context concerning the legal bases as well as the “practice” of shooting down civilian aircrafts should be briefly presented. Despite the fact that there have been no such incidents in Poland, what is happening in the world today is also reflected in the Polish law and internal constitutional situation.

In the twentieth century the international law generally prohibited the use of weapons against civilian aircrafts. In practice, however, the acts of such unlawful interference happened. The reasons were different and in many cases the issue of the responsibility has never been solved. It was significant that the firing side usually recognized the accidents as a result of a mistake while the injured side as a deliberate act of terror. Since 1926 there have been eighteen such cases in different part of the world, but four of them can be briefly presented as an example. On 27 June 1955, a civil aircraft Lockheed L-149 of the Israeli line El-Al was shot down by Bulgaria near Petricz and 58 people lost their lives. The plane was flying from London to TelAviv and while trying to bypass the storm in the air corridor over Yugoslavia it entered by mistake Bulgarian airspace. It was established later that the mistake was caused by the lightening which disrupted the operation of radio compass. Initially, Bulgaria defended itself by accusing the Israeli pilots that they illegally invaded its airspace. In the end, the authorities admitted that the attack was started too hastily without a proper warning and decided to pay compensations to victims’ families. Bulgaria has never officially recognized its responsibility, however, the International Court of Justice in the proceedings initiated by Israel expressed the opinion that in the light of international law there was no reason to use weapon by Bulgaria. On 1 September 1983 an aircraft of South

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<sup>10</sup> The Act of 13 October 1990 on the state border protection, published in the Official Journal of Laws 1990, No. 78, item 461, with later amendments.

Korean lines Korean Air flying from Anchorage to Seoul was shot down by the USSR near Sakhalin, which caused the death of 269 people on board. On 3 July 1988 the US cruiser “Vincennes” shot down the aircraft Airbus A300 B2–203 of the Iranian Airlines Iran Air flying from southern Iran to Dubai while it was over the Iranian waters of Persian Gulf in a standard air corridor. The Americans claimed that they confused the Airbus with the F-14, however, the Congress did not agree to pay compensations to victims as it recognized that the US did not exceed international law as the accident happened during the Iran-Iraq war and the USS Vincennes before firing rockets tried to establish radio contact with the Airbus. On the other hand, the Iranian government declared the attack a deliberate act of barbarism and aggression. The last notorious incident occurred on 17 November 2014 when the Boeing 777 of Malaysia Airlines flying from Amsterdam to Kuala Lumpur was shot down in Donetsk region in Ukraine and 298 persons were killed. The issue of responsibility for this accident is still open<sup>11</sup>.

The above incidents (in particular one from 1983) raised the need to adopt legal instruments in order to eliminate the incidents of shooting down civilian aircrafts. On 10 May 1984 the Protocol relating to an amendment to the Chicago Convention of 1944 on International Civil Aviation was signed in Montreal<sup>12</sup> which introduced art. 3 bis providing that “the contracting states recognize that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered”. It is interesting that in the course of the debate on protecting the safety of civil aircrafts during the session of the International Civil Aviation Organization (ICAO) the problem of potential conflict between two values – the respect for territorial sovereignty and security on one hand and the protection of life and personal

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<sup>11</sup> About the incidents of shooting down military and civil aircrafts see: A. Ważny, *Zestrzelenie samolotu cywilnego typu renegade w ocenie TK*, “Edukacja Prawnicza” 2009, No. 10 (109); M. Żylicz, *Zestrzelenie cywilnego statku powietrznego jako delikt prawa międzynarodowego*, “Państwo i Prawo” 2009, Issue 6, p. 24 and next.

<sup>12</sup> The Protocol entered into force on 1 October 1998 and has been ratified by 152 parties, including Poland which ratified it in 1999. Konwencja o zwalczaniu bezprawnych czynów skierowanych przeciwko bezpieczeństwu lotnictwa cywilnego, sporządzona w Montrealu dnia 23 września 1971 r., published in the Official Journal of Laws 1976, No. 8, item 37; 2006, No. 48, item 348.

security of innocent people onboard on the other – appeared. The delegations represented different approaches from emphasizing the need of absolute prohibition of the use of weapons against civil aircrafts to expressing concerns that such prohibition would encourage the unlawful use of such aircrafts and opinions that some exceptions to the ban were necessary.

The situation changed after the events of 11 September 2001 when civil aircrafts were used as flying bombs in the attacks on the World Trade Center and the Pentagon in the USA and led to death of almost 3,500 people. That started the new era of terrorism characterized not only by the appearance of new forms of terrorism endangering the global security but also the escalation of this phenomenon, particularly in Europe<sup>13</sup>. All this started the discussion, also in Poland, on the implementation of legal measures that would allow to effectively respond to the thread of terrorism, including the thread of using civil aircrafts to attack from the air<sup>14</sup>. As a result, on 2 June 2004 the above mentioned amendment introducing art. 122 a to the Aviation Law was adopted at the initiative of the government. The new law provided that a plane that crossed the Polish border or was flying in the Polish airspace without permission, could be asked to leave the Polish airspace, change direction or altitude of the flight or land at the appointed airport. After warning shots such plane could be also forced to land by the Polish Air Force and in case of further non-compliance with the subpoenas – destroyed. In January 2005 the Council of Ministers adopted a regulation specifying the procedures in case of the need to shoot down the plane hijacked by terrorists that could pose a threat. The decision about whether to force the plane to land or shoot was to be taken by the Minister of Defense or the Commander of the Polish Air Force. It should be emphasized that in the light of this regulation, as well as art. 18b of the Act on state border protection, it was also acceptable to shoot down a civilian aircraft with passengers and crew on board as a reaction to the so-called “act of unlawful interference in civil aviation” (commonly called the “hijack” or “abduction” of the aircraft by third parties) also made in order to use the aircraft as a tool of a terrorist attack from the air. How-

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<sup>13</sup> Zob. M. Glanc, *Glosa do wyroku TK z dnia 30 września 2008 r.*, Sygn akt 44/07, “Gdańskie Studia Prawnicze – Przegląd Orzecznictwa” 2010, No. 2, p. 215 and next.

<sup>14</sup> A. Ważny, op.cit.; see also: *Uzasadnienie rządowego projektu ustawy*, the Sejm Dokument No. 2523.

ever, Poland is not the only state that introduced the above regulation. Similar provisions were also adopted in Germany in 2005 or in Russia in 2006. In Germany they caused a lot controversy and were questioned before the Federal Constitutional Tribunal which found them unconstitutional.

The issue of using weapon by the state against a civil aircraft is particularly controversial because it involves a conflict between the right of the state to use force in certain circumstances in order ensure security of the state and its obligation to respect the fundamental rights of every human being – the right to life and the right to safety. These rights have been clearly expressed in the Universal Declaration of Human Rights of 1948 and then confirmed in the acts of the Council of Europe and the European Union. Art. 30 of the Polish Constitution provides that the freedoms and rights of persons and citizens are based on the inherent and inalienable dignity of the person which shall be inviolable. The respect and protection thereof shall be the obligation of public authorities. All these became an argument that the use of weapons against civil aircraft with passengers on board shall be not permitted as it violates the fundamental constitutional standards of a democratic state.

Accepting such way of thinking, the First President of the Supreme Court referred to the Constitutional Tribunal with a request to review the constitutionality of art. 122a of the Aviation Law, particularly to check its compliance with art. 2, art. 26, art. 30, art. 31 p. 3 and art. 38 of the Constitution. He pointed out that the destruction of a civil aircraft was associated with causing death of people onboard, therefore, the order issued by the Minister of National Defense would *de facto* mean deliberate killing of people who were not aggressors. The right to life, protected by the Constitution, is not absolute, however, its limitation in case of conflict with other legally protected values must respect the principles of proportionality, appropriateness and subsidiarity of legal regulation according to art. 31 par. 3 of the Constitution. It was also pointed out that art. 122a of the Aviation law made a general reference to the abstract concept of “state security” and art. 18b of the Law on the state border protection to the concept of “security reasons”. The reference was also made to the concepts of “terrorist attack” and “illegal activities” which were unspecified and, above all, did not indicate the type of goods or values that could be protected at the expense of the lives of passengers onboard. Such reg-



ulation did not fit the standards of the proportional principle and, moreover, was opposed to an absolute obligation to respect human dignity.

On 30 September 2008, the Constitutional Tribunal decided on the unconstitutionality of art. 122a of the Aviation law as it violated the requirements of a democratic state ruled by law<sup>15</sup>. The Tribunal pointed out that there was an insurmountable barrier in the interference of the state in its citizens' rights and freedoms and also the terrorism should be fought with respect for individual rights. What is more, the constitutional guarantees of human rights become particularly important in a crisis situation and art. 122a, under the banner of the fight against terrorism, allowed for intentional homicide. Deliberate killing cannot be a part of war against terrorism, even if it aims to protect other lives.

The principle of respect for the inherent and inalienable dignity of the human is considered the most important constitutional value in a democratic state ruled by law. As it has been rightly pointed out by the Tribunal, the man should be treated by public authorities as a free and autonomous entity, having full right to shape his behavior. No exceptions to this rule are acceptable because it has an absolute character. The Tribunal had no doubt that the application of the above mentioned provision of the Aviation law would result in depersonification and reification of passengers on board of the aircraft classified as renegade.

The law in question was also considered to violate the right to life guaranteed by art. 38 of the Constitution. The Constitutional Tribunal indicated that the content of the constitutional protection of human life is twofold. On one hand, it has been formulated in a positive way and requires the state to do everything possible to enable the realization of the right to life by all persons. On the other hand, it can be perceived in a negative way, which means, that the state should refrain from any actions that could violate that right. Providing state authorities with the right of the deliberate deprivation of life in the name of its protection would be *de facto* the negation of the essence of this right.

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<sup>15</sup> The decision of the Constitutional Tribunal of 30 September 2008, Case No. K 44/07. See also: M. Glanc, *op.cit.*, J. Kulesza, *Glosa do wyroku TK z dnia 30 września 2008 r., K 44/07*, "Państwo i Prawo" 2009, Issue 9, p. 122 and next; F. Ludwin, *Glosa do wyroku TK z 30.09.2008 r. K 44/07*, "Przegląd Prawniczy Uniwersytetu Warszawskiego" 2011, No. 1–2, p. 287 and next.

Art. 122a of the Aviation law was also found incompatible with the principle of a democratic state ruled by law expressed in art. 2 of the Constitution, in particular because it was not sufficiently specified. The Tribunal pointed out that while determining the conditions allowing to shoot down a civil aircraft with passengers onboard the legislator used concepts, such as “national security”, “activities contrary to the law” or “terrorist attack”, which did not have a legal definition and were differently interpreted by the doctrine. This could lead to excessive freedom in determining the substantive scope of the challenged provision.

As a result of the judgment of the Constitutional Tribunal, art. 122a of the Aviation law lost its binding force at the moment of the publication of the judgment in the Official Journal of Laws. However, there is still legal possibility to shoot down a civil aircraft according to provisions specified in art. 18b of the Law on the state border protection. According to art. 18b par. 2c in connection to par. 2a, in the event of failure to comply with any of the calls and commands, the foreign civil aircraft can be destroyed by shooting down if there are no people onboard or there are only terrorist. Such solution is theoretically rational, although in practice the ability to shoot down such aircraft is supposed to be very limited, because the entity authorized to make such decision – the Operational Commander of the Armed Forces – will be rarely able to establish with certainty that there are no third parties apart from terrorist on board.

Especially during a terrorist attack there is a high risk of mistake. The experts also point out that the above regulation may also have a negative result, as it will provide an additional incentive for potential assassins to take hostages on board, as well as terrorists may deliberately mislead the security authorities that there are other persons on board. As a result, this provision has a great chance not to have any practical application.

It should be also noticed that the representatives of the Polish Army have postulated changes to the law. They have found the current legal regulations relating to, among others, defense against terrorist threats from the air insufficient and have proposed the adoption of a comprehensive law on the Polish air defense. The working draft was prepared by the Operational Command of the Armed Forces. At the meeting of the parliamentary defense committee the Operational Commander of the Armed Forces pointed out that the condition of the air defense in Poland greatly hampers the tasks of the minister of national defense to undertake actions aimed to secure facilities and populations against terrorist threats from the

air. He has emphasized the urgent need to adopt legislation regulating the issues of the air defense of the country as there is no possibility to respond to asymmetric threats from the air at the moment. The current legislation also does not refer to potential cases of a terrorist attack which would use a plane hijacked just after taking off from a Polish airport so has not crossed the state border.

“Preliminary draft” of law on the air defenses of Poland was commissioned by the Ministry of National Defense. In May 2014 the Council of Ministers also started to work on the amendment of the law on state borders protection and the law on the general duty to defend the Republic of Poland<sup>16</sup>. The aim of the regulation was to introduce legislation regulating to, inter alia, the decision-making process of warning shots and warning about the destruction of the aircraft in the Polish airspace<sup>17</sup>. However, these legislative works stopped after the parliamentary elections in Autumn 2015 which were lost by the then ruling party.

Nevertheless, as a conclusion it should be pointed out that the problem of the relation between the two values – the state security and the constitutionally protected right to life is still current. So far, the Constitutional Tribunal in Poland has clearly stated that it is unacceptable in the light of standards applied in a democratic state ruled by law to deliberately sacrifice the lives of innocent individual people in order to protect the common good. However, the new wave of terrorism that has affected Europe and World at the beginning of XXIst century allows to expect that the problem can appear again in a critical situation in which the above mentioned conflict will *de facto* mean the need to make a choice between the protection of the right to life of an individual and the protection of lives of many people.

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<sup>16</sup> Law of 21 November 1967 on the general duty to defend the Republic of Poland, published in the Official Journal of Laws 1967, No. 44, item 220, with later amendments.

<sup>17</sup> See: <http://bip.kprm.gov.pl/kpr/form/r1349,Zalozenia-projektu-ustawy-o-zmianie-ustawy-o-ochronie-granicy-panstwowej-oraz-us.html> (14.10.2016).

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