

IMPLEMENTATION OF THE EUROPEAN UNION'S REGULATIONS ON TERRORIST OFFENCES IN POLISH PENAL LAW

Krzysztof Wiak, hab. Ph.D., University Professor

Department of Criminal Law, Faculty of Law, Canon Law and Administration

at the John Paul II Catholic University of Lublin

e-mail: wiakk@kul.lublin.pl; <https://orcid.org/0000-0003-0947-570X>

Summary. The paper discusses the regulations pertaining directly to the problem of combating terrorism, first introduced into Polish penal law in 2004. The drafters' intention was to adjust Polish law to the standards established by various legal instruments of the European Union, in particular set out in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. Among the new regulations, the definition of an offence of a terrorist nature (Art. 115, para. 20 PC) is of practical significance. The concept of an offence of a terrorist nature is a reference point for all the anti-terrorist measures adopted in Polish penal law. It has been used by the legislator criminalizing acts being of a pre-terrorist nature. Among these provisions there are offences such as: participation in an organized group, financing terrorism, abetting and public provocation to commit an offence of a terrorist nature, recruitment and training for terrorism, illegal border crossing.

Key words: terrorism, terrorist offences, penal law

INTRODUCTION

Terrorist acts damage human life and health, freedom of individuals, violate public order and disrupt international relations. Nowadays terrorism has taken on particularly dangerous forms and constitutes a major threat to democracy and to security in EU member states. Due to the international nature of terrorism, Poland cannot feel completely free from this threat.

The phenomenon of terrorism is in many ways differentiated and conditional upon complex social, historical, political and religious factors. This is reflected in the multitude of definitions, both academic and normative, that highlight substantial differences in the selection of the constituent elements of the concept of terrorism and in determining its boundaries [Schmid and Jongman 1988, 5–6]. It is important to note that although as yet, there is no global consensus regarding a definition of terrorism, the concept of terrorist offences for legal purposes has been agreed within the EU [Dumitriu 2004, 585–87]. The implementation of these provisions into domestic law is a formidable challenge to the dogmatics of criminal law in Poland.

1. HISTORICAL BACKGROUND

Polish penal law of the interwar period (1918–1939) failed to propose either a normative definition or specific regulations on terrorism; in addition, no constituent elements of a terrorist offence were identified. However, the conduct typical of terrorist activity could be regarded as a prohibited act criminalized in the Penal Code of 11 July 1932.¹

At that time a representative of the Polish doctrine of penal law, R. Lemkin presented a project for recognizing acts of terrorism as separate types of offences. He wrote back in 1935 that terrorism in its broadest sense means, “to intimidate the population by means of violent acts” [Lemkin 1935, 561]. He proposed introducing into the Penal Code of 1932 provisions relating to “domestic terrorism” and “international terrorism.” The terrorist nature of an offence was decided by the requirement that the offender resorted to it “in order to cause widespread unrest or intimidation” or “to cause general unrest or to damage international relations.”

The Penal Code of 19 April 1969² introduced a new type of offence called in the literature as “terrorist attack” [Buchała 1989, 602; Gubiński 1974, 160–61; Popławski 1989, 161]. It was perpetrated by a person who “with the intent hostile to the People’s Republic of Poland” committed a violent assault on the life of a public or political activist (Art. 126 PC). In addition, other regulations could be used for the classification of terrorist offences, mainly related to: sabotage, acts against life and health or acts against public order.

In the Polish legal literature of this period, there were opinions voiced in favour of the separate regulation of the issue of terrorist acts [Wiak 2012, 128–30], but the new Penal Code of 6 June 1997³ originally still retained the model adopted in the former codifications of classifying terrorist acts based on the types of offences contained in the code’s special part. However the criminalization of certain new offences appeared, such as: taking control of an aircraft or vessel (Art. 166 PC), placing hazardous devices or substances on a vessel or aircraft (Art. 167, para. 1 PC), destroying or preventing the operation of a navigation device (Art. 167, para. 2 PC), or taking a hostage (Art. 252 PC). Among the statutory constituent elements of such acts, there were no requirements as to the aim, motives or reasons directing the perpetrator that would unambiguously ascertain their terrorist nature.

¹ Regulation of the President of the Republic of Poland of 11 July 1932, the Penal Code, Journal of Laws No. 60, item 571.

² Act of 19 April 1969, the Penal Code, Journal of Laws No. 13, item 94 [henceforth cited as: PC].

³ Act of 6 June 1997, the Penal Code, Journal of Laws No. 88, item 553 as amended.

2. IMPLEMENTATION OF EUROPEAN LAW IN POLISH PENAL LAW

The regulations pertaining directly to the problem of combating terrorism were first introduced into Polish penal law by Act of 16 April 2004 amending the Penal Code.⁴ These obligations were scheduled to be met before 1 May 2004, i.e. before Poland's accession to the European Union. The drafters' intention was to adjust Polish law to the standards established by various legal instruments of the European Union, in particular set out in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism.⁵

First of all, Council Framework Decision of 13 June 2002 imposed an obligation to adopt a common definition of terrorist offences. According to Art. 1, sect. 1 of the Framework Decision, the EU member states should take the necessary measures to ensure that the intentional acts referred to below, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: a) seriously intimidating a population; b) unduly compelling a Government or international organization to perform or abstain from performing any act; c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization – would be deemed to be terrorist offences.

The catalogue of the prohibited acts included: a) attacks upon a person's life which may cause death; b) attacks upon the physical integrity of a person; c) kidnapping or hostage taking; d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; e) seizure of aircraft, ships or other means of public or goods transport; f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; i) threatening to commit any of the acts listed in (a) to (h).

Council Framework Decision of 13 June 2002 required Member States to establish such criminal penalties for all terrorist offences that would be effective, proportionate, dissuasive, and would reflect the seriousness of such offences.

Several years later Council Framework Decision 2002/475/JHA of 13 June 2002 was replaced by the new Directive (EU) 2017/541 of the European Par-

⁴ Act of 16 April 2004 amending the Penal Code and other selected acts, Journal of Laws No. 93, item 889.

⁵ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. European Communities L 164/3, 22.06.2002.

liament and of the Council of 15 March 2017 on combating terrorism.⁶ According to Art. 3, sect. 1 of the Directive, member states shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2: a) attacks upon a person's life which may cause death; b) attacks upon the physical integrity of a person; c) kidnapping or hostage-taking; d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; e) seizure of aircraft, ships or other means of public or goods transport; f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life; h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; i) illegal system interference, as referred to in Art. 4 of Directive 2013/40/EU of the European Parliament and of the Council⁷ in cases where Art. 9, sect. 3 or point (b) or (c) of Art. 9, sect. 4 of that Directive applies, and illegal data interference, as referred to in Art. 5 of that Directive in cases where point (c) of Art. 9, sect. 4 of that Directive applies; j) threatening to commit any of the acts listed in points (a) to (i).

According to Art. 3, sect. 2 the aims referred to in paragraph 1 are: a) seriously intimidating a population; b) unduly compelling a government or an international organisation to perform or abstain from performing any act; c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The provisions of the Framework Decision of 13 June 2002 and of the Directive of 15 March 2017 should be regarded as important factors in the unification of legal systems of the EU member states. Among others, of key importance is the agreement reached on the criteria of terrorist offences and criminal liability. Outlined in this legal act, the minimum standards [Baab 2003, 59] governing the penal law measures aimed to combat terrorism require national legislators to initiate appropriate legislative action, which directly affects the formation of a uniform model of cooperation in criminal matters.

⁶ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, O.J. EU L 88/6, 31.03.2017.

⁷ Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, O.J. EU L 218/8, 14.08.2013.

3. STATUTORY CRITERIA OF AN OFFENCE OF A TERRORIST NATURE

The obligation to adjust Polish law to European standards was the immediate reason for embedding counter-terrorism measures in the Penal Code. Among the new regulations, the definition of an offence of a terrorist nature (Art. 115, para. 20 PC) is of practical significance. It is a reference point for all the solutions on combating terrorism adopted in Polish penal law.

According to this provision, an offence of a terrorist nature is a prohibited act subject to a penalty of deprivation of freedom whose maximum limit is at least 5 years, committed so as to: 1) seriously intimidate many people; 2) force a public authority of the Republic of Poland or of any other state or an international organization to take or refrain from certain acts; 3) cause serious disturbances in the system or economy of the Republic of Poland, of another state or an international organization, and a threat to commit such an act.

When making a selection of offences to be regarded as terrorist, the legislator requires in the first place that these should be punishable acts subject to a custodial penalty with a maximum limit of at least 5 years. The list of offences designated in the above clause is fairly general and broad. In the existing regulations, there is a considerable group of offences named in the specific part of the Penal Code (in more than 200 provisions) that fit the statutory punishability condition. In this regard, the provisions contained in the Penal Code are materially different from the solutions adopted both in the Art. 1 of the Framework Decision of 13 June 2002 and in the Art. 3, para. 1 of the Directive of 15 March 2017, where the list of terrorist offences is limited to 9 and 10 points respectively. Similarly, in most EU countries such taxative selections have been made.⁸

Considering the current legal state of affairs, two major concerns come into view. On the one hand, there is the risk that despite the very extensive catalogue of offences, it will fail to include acts that may reveal the manifestations of a terrorist activity. The list of wrongdoings contained in the Art. 115, para. 20 PC fails to include, for example, an aggravated assault on a person belonging to the diplomatic personnel of a foreign state (Art. 136, para. 2 PC) and influencing the public

⁸ Cf. e.g. the provisions of: Art. 218A of the Criminal Code of the Republic of Malta of 10 June 1854, amended, https://www.legislationline.org/download/id/8555/file/Malta_Criminal_Code_amDec2019_en.pdf [accessed: 27.03.2020], Art. 311, sect. 1 of the Criminal Code of the Czech Republic of 8 January 2009, https://www.legislationline.org/download/id/6370/file/Czech%20Republic_CC_2009_am2011_en.pdf [accessed: 27.03.2020], Art. 100a of the General Penal Code of Iceland of 12 February 1940, amended, <https://www.legislationline.org/download/id/6159/file/General%20Penal%20Code%20of%20Iceland%201940,%20amended%202015.pdf> [accessed: 27.03.2020], Art. 108 of the Criminal Code of the Republic of Slovenia of 20 May 2008, https://www.legislationline.org/download/id/3773/file/Slovenia_CC_2008_en.pdf [accessed: 27.03.2020], Art. 97 of the Criminal Code of the Republic of Croatia of 21 October 2011, https://www.legislationline.org/download/id/7896/file/Croatia_Criminal_Code_2011_en.pdf [accessed: 27.03.2020].

activity of a state body (Art. 224, para. 1 PC). There is also no criminalization of “preparation” to commit an offence of a terrorist nature. Serious doubts appear as to whether all real terrorist threats meet the criteria of a forbidden act, e.g. because of the lack of an individualised victim [Michalska–Warias 2019, 41–50; Wiak 2009, 240–41].

On the other hand, there are doubts raised as to whether, in the light of the requirements resulting from respecting human rights and criminal policies, the scope of instances of criminalized conduct will turn out insufficient. Art. 3, sect. 1 of the Directive of 15 March 2017, next to the list of offences, includes a requirement that each of them “given their nature or context, may seriously damage a country or an international organisation.” Such a substantive criterion has not been introduced by the Polish legislator, for this reason it is an legislative error and legal loophole. A better solution would be to introduce an unambiguous substantive criterion, as stated in Art. 3, sect. 1 of the Directive of 15 March 2017. This would constitute a sufficient guarantee against the use of Art. 115, para. 20 PC for punishing the perpetrators of offences that indeed meet the required statutory criteria, but whose relatively low degree of social harm argues against linking them to terrorism [Borgers 2012, 68–82]. At this point there is a clear inconsistency between EU law and Polish criminal law.

As already noted, for the establishment of an offence of a terrorist nature, the legislator requires that the offender should reveal the intention of achieving one of the three aims listed in Art. 115, para. 20 PC. The fact that deserves particular attention is that no references are made to motivation driving the person to commit an offence. The relevant position adopted by the Polish legislator corresponds to that adopted in European Union law [Saul 2003, 328] and is based on the acceptance of opinions voiced in the literature on the subject that the explanation of the phenomenon of terrorism does not necessarily need to entail the reference to motivation [Walter 2004, 29–30]. The omission of motivation in the definition helps avoid previously identified difficulties in determining whether the offender actually wished to pursue a political agenda, or whether he or she was linked to groups using violence to attain ideological ends. Moreover, this provision will also encompass offences committed without any clear political or ideological backdrop, as well as action taken because of, for instance, the desire to “show off” or impress friends.

In Polish penal law, the consequences of committing an offence of a terrorist nature in the first place refer to sanctions, namely the punishment and its size. The legislator laid down that such provisions on the imposition of penalty should apply to the offender as if he or she were a multiple recidivist (Art. 65, para. 1 PC). The provision forces the court to impose an extraordinarily stringent penalty for the attributed offence. It may impose it up the maximum of the mandatory term increased by a half.

4. CRIMINALIZATION OF OFFENCES RELATED TO A TERRORIST ACTIVITY

The implementation of a comprehensive strategy against terrorism requires not only a well-advised response to the committed offence of a terrorist nature, but also needs measures aimed to prevent its accomplishment. This may be achieved by the criminalization of specific conduct involving the furnishing of such conditions that facilitate and provoke terrorist activity, i.e. being of a pre-terrorist nature. Among these provisions there are wrongdoings such as: participation in an organized group, financing terrorism, abetting and public provocation to commit an offence of a terrorist nature, recruitment and training for terrorism, illegal border crossing. The concept of an offence of a terrorist nature is a reference point for such provisions.

The 16 April 2004 amendment to the Penal Code adjusted the liability for participating in an organized criminal group or association (Art. 258 PC) by introducing two new types of this offence: participation in an organized group or association seeking to commit a terrorist offence, punishable by deprivation of freedom from 6 months to 8 years (para. 2), and establishment and directing a group or an association seeking to commit a terrorist offence regarded as a crime punishable by deprivation of freedom from 3 to 15 years (para. 4).

The Act of 25 June 2009,⁹ thereafter amended by the Act of 9 October 2015¹⁰ and the Act of 23 March 2017,¹¹ introduced a new provisions contained in Art. 165a PC. In accordance with para. 1, that person is held criminally liable who collects, transfers or offers means of payment, financial instruments, securities, foreign exchange values, property rights, or other movable or immovable property with the intent of financing an offence of a terrorist nature, or an offence provided for in Art.: 120, 121, 136, 166, 167, 171, 252, 255a or 259a PC. This offence is punishable by 2 to 12 years of deprivation of freedom. Whoever makes the property referred to in para. 1 available to an organised criminal group or association having as its purpose the commission of the crime referred to in that provision, a person participating in such group or association or a person intending to commit such crime, is subject to the same penalty (Art. 165a, para. 2 PC).

The Act of 20 May 2010¹² amended the provision of Art. 240, para. 1 PC laying down a legal obligation to reporting particularly serious offences. Under the mentioned article, any person is held criminally liable and subject to a penalty of up to 3 years of deprivation of freedom who, having credible information about

⁹ Act of 16 April 2004 amending the Penal Code and other selected acts, Journal of Laws No. 93, item 889.

¹⁰ Act of 9 October 2015 amending the Penal Code and other selected acts, Journal of Laws item 1855.

¹¹ Act of 23 March 2017 amending the Penal Code and other selected acts, Journal of Laws item 768.

¹² Act of 20 May 2010 amending the Penal Code, the Act on the Police, the Regulations introducing the Penal Code and the Code of Penal Procedure, Journal of Laws No. 98, item 626.

the preparation, attempt or commission of an offence of a terrorist nature, fails to report the offence to a law enforcement authority.

In accordance with the provision Art. 255a, para. 1 PC, introduced by the Act of 29 July 2011,¹³ thereafter amended by the Act of 10 June 2016,¹⁴ that person is held criminally liable who distributes or publicly presenting content that may make it easier for committing terrorist crimes in its intent, to such offence has been committed. This offence is punishable by deprivation of freedom from 3 months to 5 years. The same punishment shall be subject to, who in order to commit crimes of a terrorist nature participates in training that can allow the committing such a crime (Art. 255a, para. 2 PC).

In accordance with the provision Art. 259a PC, introduced by the Act of 10 June 2016, that person is held criminally liable who crosses the border of the Republic of Poland in order to commit in the territory of another state an offence of a terrorist nature or offences referred to in Art. 255a or Art. 258, para. 2, or 4. This offence is punishable by deprivation of freedom from 3 months to 5 years.

5. THE INTERNAL COHERENCE OF POLISH PENAL LAW AND THE HARMONIZATION OF PRACTICES IN THE EU MEMBER STATES

The obligation to adjust Polish law to European standards was the immediate reason for embedding counter-terrorism measures in the Penal Code.

On the one hand, these solutions arouse much controversy. Objections are raised to the sole legal construction of the offence of a terrorist nature (Art. 115, para. 20 PC). There are a number of difficulties in the legal classification that surface because, when describing the notion of an offence of a terrorist nature, the legislator uses highly vague and evaluative expressions (e.g. “seriously intimidate,” “cause serious disturbances”). There is also no criminalization of “preparation” to commit an offence of a terrorist nature.

Another problem is associated with the significant discrepancies between the Polish definition of terrorist offences and that same EU concept contained in the Framework Decision of 13 June 2002 and in the Directive (EU) of 15 March 2017, whose implementation was supposed to expedite the harmonization of dissimilar counter-terrorism measures in the EU member states. This resulted from both the objective difficulties associated with the need to convey such a complex form of crime to a normative framework, taking into account the obligations under EU law, as well as purely technical conditions of translating into Polish the wording used in EU law.

¹³ Act of 29 July 2011 amending the Penal Code, the Code of Penal Procedure and the Act on Criminal Liability of Collective Entities for Punishable Offences other selected acts, Journal of Laws No. 191, item 1135.

¹⁴ Act of 10 June 2016 on anti-terrorist activities, Journal of Laws item 904.

On the other hand, despite the reservations mentioned in this article, it seems appropriate to adapt to the existing dogmatic structure of the Penal Code for the sake of combating terrorism. This largely concerns the response to the offence of a terrorist nature. Its perpetrators are subject to the provisions tightening the penalty concerning multiple recidivism.

Despite the many objections raised against the dogmatic structure adopted in the Penal Code with a view to meeting the obligations arising from the Council Framework Decision of 13 June 2002 on combating terrorism and from the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism, the actual introduction of the definition of an offence of a terrorist nature should be rated as more than positive. It should become a reference point for all, not just penal, counter-terrorism measures and thus ensure the internal cohesion within the national legal order.

REFERENCES

- Baab, Frédéric. 2003. "The Judicial Cooperation within the European Union in the Fight Against Terrorism." In *Terrorism, Victims, and International Criminal Responsibility*, ed. Ghislaine Doucet, 58–63. Paris: SOS Attentats.
- Borgers, Matthias. 2012. "Framework Decision on combating terrorism: Two questions on the definition of terrorist offences." *Criminal Law, Empirical and Normative Studies* 1:68–82.
- Buchała, Kazimierz. 1989. *Prawo karne materialne*. Warszawa: Wydawnictwo PWN.
- Dumitriu, Eugenia. 2004. "The E.U.'s Definition of Terrorism: The Council Framework Decision on Combating Terrorism." *German Law Journal* 5, no. 5:585–602.
- Gubiński, Arnold. 1974. *Zasady prawa karnego*. Warszawa: Wydawnictwo PWN.
- Lemkin, Rafał. 1935. "Teroryzm." *Gazeta Sądowa Warszawska* 41:561–64.
- Michalska-Warias, Aneta. 2019. "Threat to Commit an Offence of a Terrorist Character According to Article 115 § 20 of the Polish Criminal Code – Selected Interpretation Problems." *Studia Iuridica Lublinensia* vol. XXVIII, 3:41–50.
- Popławski, Henryk. 1989. *Przestępstwa przeciwko podstawowym interesom politycznym PRL*. Warszawa: PWN.
- Saul, Ben. 2003. "International Terrorism as a European Crime: The Policy Rationale for Criminalization." *European Journal of Crime, Criminal Law and Criminal Justice* 4:323–49.
- Schmid, Alex P., and Albert J. Jongman. 1988. *Political Terrorism. A New Guide to Actors, Authors, Concepts, Data Bases, Theories, and Literature*. New Brunswick: North-Holland.
- Walter, Christian. 2004. "Defining Terrorism in National and International Law." In *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, ed. Christian Walter, Silja Vöneky, et al., 23–44. Berlin–Heidelberg: Springer.
- Wiak, Krzysztof. 2009. *Prawnokarne środki przeciwdziałania terroryzmowi*. Lublin: Wydawnictwo KUL.
- Wiak, Krzysztof. 2012. *Terrorism and Criminal Law*. Lublin: Wydawnictwo KUL.

IMPLEMENTACJA UREGULOWAŃ UNII EUROPEJSKIEJ DOTYCZĄCYCH PRZESTĘPSTW TERRORYSTYCZNYCH W POLSKIM PRAWIE KARNYM

Streszczenie. Artykuł omawia regulacje dotyczące przeciwdziałania terroryzmowi wprowadzone po raz pierwszy do polskiego prawa karnego w 2004 r. Zamierzeniem projektodawców było dostosowanie polskiego prawa do standardów wyznaczonych w różnych aktach prawnych Unii Europej-

skiej, a w szczególności w decyzji ramowej Rady 2002/475/WSiSW z 13 czerwca 2002 r. w sprawie zwalczania terroryzmu.

Wśród nowych uregulowań istotne znaczenie ma definicja przestępstwa o charakterze terrorystycznym (art. 115 § 20 k.k.). Pojęcie to stało się punktem odniesienia dla wszystkich antyterrorystycznych norm wprowadzonych do polskiego prawa karnego. Posłużył się nim ustawodawca dokonując kryminalizacji czynów popełnianych na przedpolu terroryzmu, do jakich należą: branie udziału w grupie terrorystycznej, finansowanie terroryzmu, nawoływanie do popełnienia przestępstwa o charakterze terrorystycznym, rekrutacja na potrzeby terroryzmu czy nielegalne przekroczenie granicy.

Słowa kluczowe: terroryzm, przestępstwa terrorystyczne, prawo karne

Informacje o Autorze: Dr hab. Krzysztof Wiak, prof. KUL – Katedra Prawa Karnego, Wydział Prawa, Prawa Kanonicznego i Administracji Katolickiego Uniwersytetu Lubelskiego Jana Pawła II; e-mail: wiakk@kul.lublin.pl; <https://orcid.org/0000-0003-0947-570X>