

State security versus fundamental freedoms. Evaluating Polish legislative responses to terrorism and radicalization

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Abstract: Although Poland is a country of low risk of terrorism, the state security response is strong and involves relatively substantial powers vested on the services and the police. While state security is vital to protect fundamental freedoms, the role of fundamental freedoms in countering radicalization responses is also paramount. It is of utmost importance that citizens engage with the society and are able express their grievances through peacefully assembly, right to associate, and free speech. This article discusses selected challenges related to the Polish legislative counter-terrorism reforms in the context of the constitutional framework of fundamental values. During the COVID-19 pandemic the rights and freedoms were limited inconsistently with the constitutional standards, and these issues remained valid also in the later period of the epidemic threat. The article concludes with recommendations how the legal framework's response to radicalization could be improved.

2087

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1. Introduction

Preventing violent extremism requires significant efforts from the legislator because of the collision between common safety and constitutional freedoms. With the invasion of Ukraine, rise in the hate crimes statistics, and COVID-19 pandemic the Polish legislative system faced important challenges in the recent years. Since March 2020 many stricter penal regulations affecting fundamental rights have been introduced, weakening the trust of the citizens in the state¹. Moreover, administrative delicts were passed in so called 'Covid' regulations (not acts) and punished parallelly with petty offences, which might collide with the 'ne bis in idem' principle². The reason was to

¹ This applies in particular to the extension of the catalogue of crimes of specific exposure of a legal good to a threat, for example Art. 161 § 2 of the Act of 6 June 1997 Criminal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, Dz.U. 1997 nr 88 poz. 553 ze zm.) according to which a penalty from 3 months to 5 years can be imposed on anyone who, knowing that they are affected by a venereal or infectious disease, a serious incurable disease or a real life-threatening disease, directly expose another person to being infected with such a disease.

² See Grzęda E., Garwol M., Orzekanie o administracyjnych karach pieniężnych w związku z naruszeniem tzw. ustaw i rozporządzeń covidowych a odpowiedzialność za wykroczenie (w perspektywie zasady 'ne bis in idem'), *Czasopismo Prawa Karnego i*

ensure proper protection for common safety during the pandemic, but as the risk diminished, enforcement of these norms can be questioned.³ Serious constitutional doubts were raised due to the fact that the perpetrator was held responsible for the same act with both administrative and repressive legal norms (The Misdemeanor Code). What is important, the fines imposed by the administrative authorities were significantly higher. Moreover, incurring responsibility for an administrative delict does not require attribution of an intent to the perpetrator, and the commission of the act itself remains significant, regardless of the motivation or specific circumstances of the case. This example demonstrates how important is that all limitations need to be proportional.

The Polish legal system relies significantly on the proportionality principle. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights (art. 31 sec. 3 of the Constitution Republic of Poland⁴). The constitutional review is conducted before the Constitutional Court, which in applying the proportionality principle relies on the necessity rule⁵, proportionality *sensu stricto* rule⁶ and the usefulness rule⁷ – all those criteria need to be fulfilled simultaneously and breaching one will cause unproportionable breach of a human right or freedom. These principles have had an impact on the changes in last 30 years and reservations expressed by scholars in the field of state security⁸.

The aim of this article, which is a product of the Work Package 4⁹ of the Horizon 2020 project ‘De-Radicalisation in Europe and Beyond: Detect, Resolve, Re-integrate’¹⁰ is to evaluate current challenges in the Polish legislative framework related to how laws that address radicalisation comply

Nauk Penalných, No. 2, 2020, pp. 49-67.

³ It should be noted that no extraordinary measures described in the Polish Constitution were introduced at the time of the pandemic, not even the state of natural disaster (art. 232 of the Constitution), despite circumstances favourable to do so.

⁴ Constitution of the Republic of Poland as adopted by the National Assembly on 2 April 1997, Dz.U. 1997, No. 78, item 783 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.], hereinafter Constitution. Available in English at the Polish Parliament website: www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

⁵ For the first time expressed in the Constitutional Court’s judgement of January 26, 1993, U 10/92.

⁶ For the first time expressed in the Constitutional Court’s judgement of January 26, 1993 U 10/92.

⁷ For the first time expressed in the Constitutional Court’s judgement of August 20, 1992 K 4/92.

⁸ See more Garlicki L., Wojtyczek K. (2016), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II, wydanie II, Garlicki L. Zubik M. (ed.). Commentary to the Article 31, theses 33 – 34.

⁹ Federico V., Moulin-Stozek M., De-radicalisation and Integration: Legal and Policy Framework D4.1. Horizon 2020 project ‘De-Radicalisation in Europe and Beyond: Detect, Resolve, Re-integrate’ (959198).

¹⁰ See in particular Moulin-Stozek M. (2021): De-radicalization and Integration. Legal and Policy Framework. D4 Country Report. Horizon 2020 project ‘De-Radicalisation in Europe and Beyond: Detect, Resolve, Re-integrate’ (959198).

with fundamental freedoms. Constitutional values such as freedom of speech, religious freedom, and freedom to assemble are contrasted with the state security laws in Poland, emphasizing how in the last decades the acts regulating terrorism have evolved. In order to better understand the controversies arising in this context, it is important to highlight the conditions of limiting human rights and freedoms in Poland, and the recent normative changes related to constitutional law crisis.

How important is the constitutional law situation to counterterrorism is well reflected in the documents issued by the EU Commission. *The Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law* stated specifically: ‘The fact that the constitutionality of Polish laws can no longer be effectively guaranteed is a matter of particular concern as regards respect of the rule of law since, as explained in the Recommendations of 27 July and 21 December 2016, a number of particularly sensitive new legislative acts have been adopted by the Polish Parliament, such as a new Civil Service Act, a law amending the law on the Police and certain other laws and laws on the Public Prosecution Office, a law on the Ombudsman and amending certain other laws, a law on the National Council of Media and an anti-terrorism law’¹¹ Looking at the counterterrorism measures through the lenses of constitutional law will help to better assess the steps taken by the Polish legislator to prevent radicalization, which is discussed in the first part of this article. Next, the article focuses on the development of the state security laws in Poland in order to demonstrate how the state responds to radicalization and contrast it with the existing fundamental freedom protections. Finally, the article discusses hate crimes as a challenge in tackling radicalization. The jurisprudence of the Polish Supreme Court and the Constitutional Court further evidence the evolution in undertaken attempts to find legal solutions to the collision between human rights and state safety in order to respond to current challenges, outlined in the conclusions.

2. Fundamental freedoms in the Polish legal framework and prevention of radicalization

Fundamental freedoms and human rights play a significant role in preventing radicalization. The essence of the basic freedoms and rights is decided on the constitutional law level, but the details are also regulated in other types of legislation. There is a saying among Polish constitutional lawyers, accepted after Constitutional Court’s judgement of March 2, 1994¹², that each freedom or right has its core and sheath. First, this means that a lower act in the hierarchy of sources of law cannot limit a freedom or a right. On the other hand, lower acts have more possibilities to create the borders of the right or freedom¹³. The jurisprudence does not question the need to

¹¹ Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, pp. 19–20.

¹² Constitutional Court’s judgement of March 2, 1994 W 3/93. See also Constitutional Court’s judgement of 10 November, 1998 K 39/97.

¹³ See Constitutional Court’s judgement of June 14, 1999, K 11/98.

limit the rights of an individual, but it draws attention to the need to precisely indicate what is prohibited by law in the statute¹⁴.

Restrictions of individual freedoms, even in a state of emergency, must be exceptional and subject to verification¹⁵. The legislator has a duty to duly justify reasons for limiting constitutional rights¹⁶, e.g. in the drafts of each statute considered by the Parliament during the legislative procedure. Polish legislative process relies also on the *ultima ratio* principle as far as criminal law is considered, as this field of law affects personal rights and freedoms the most. According to this principle, the possibility for the legislator to impose duties using criminal law sanctions is possible only if civil or administrative measures do not ensure a proper level of protection¹⁷.

Restrictions commonly apply to those freedoms that are most likely to be breached while responding to extremism and include: inherent and inalienable dignity of the person (art. 30), legal protection of the freedom of each individual (art. 31 sec. 1), the duty to respect the freedoms of others (art. 31 sec. 2) or the equality before the law and the right to equal treatment by public authorities (art. 32 sec. 1). For example, under the Act of 10 June 2016 on anti-terrorist operations,¹⁸ the Internal Security Agency can order the blocking or demand that the electronic open source service administrator blocks access to information data with no possibility for the administrator to appeal. It can be a limitation (or even a deprivation) of the right to have a fair and public hearing, without undue delay, before a competent, impartial and independent court (art. 45 sec. 1 of the Constitution) and the right to appeal against judgments and decisions made at the first stage (art. 78 of the Constitution). Of course, the two-instance principle of judiciary proceedings is not unlimited and exceptions to this principle and the procedure for such appeals shall be specified by statute. However, in such cases judicial control is essential as such a blockade steps into the core of the freedom of speech and is not a formality. According to the Act of 10 June 2016 on anti-terrorist operations websites can be blocked for up to five days prior to obtaining permission, and up to 30 days after the permission is granted. This shows how important is the role of courts in protecting human rights. Unfortunately, if the court does not have proper measures to protect fundamental freedoms included in the statute, there is no possibility for the judiciary power to ‘create’ a new regulation¹⁹, which will be seen as an

¹⁴ See Supreme Court’s judgement of January 18, 2022, I KK 171/21, OSNK 2022/2/7.

¹⁵ See Tuleja P. (2020), *Pandemia COVID-19 a konstytucyjne stany nadzwyczajne*, ‘Palestra’ 2020, No 9, pp. 6-7.

¹⁶ For a detailed overview see e.g. K. Wojtyczek, *Ciężar dowodu i argumentacji w procedurze kontroli norm przez Trybunał Konstytucyjny*, Przegląd Sejmowy, no 1/2004, p. 22. (available online: orka.sejm.gov.pl/przegląd.nsf/0/5036D0CDA6DD8DB7C12579370043F92F/%24File/ps60.pdf – accessed on 29 December 2022); M. Florczak – Wątor, A. Dębowska, *Domniemanie konstytucyjności ustawy w świetle orzecznictwa Trybunału Konstytucyjnego*, Przegląd Konstytucyjny, no 2, 2017, p. 16.

¹⁷ Wróbel W., Zoll A. (2013), *Polskie prawo karne*, Kraków, pp. 60-61.

¹⁸ Act of 10 June 2016 on anti-terrorist operations (Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych (Dz. U. z 2016 r. poz. 904 ze zm.).

¹⁹ There is an ongoing a dispute in the Polish doctrine about ‘proconstitutional interpretation of law’ i.e. whether the court is able to confirm constitutionality of an

unjustified interference with the principle of separation of powers outlined in the art. 10 sec. 1 of the Constitution. In the Polish system the courts cannot create new norms and must interpret existing provisions according to constitutional values²⁰.

Another interesting feature of the Polish constitutional legal system in responding to radicalization is that the crimes against freedom of conscience and freedom of religion are punished harsher than crimes against honour and personal inviolability. Moreover, they are prosecuted officially by a prosecutor (not by the injured party). On the other hand, there is a discussion whether crimes against honour should be punished at all. Freedom of conscience and religion is simultaneously under the protection of the Criminal Code²¹ (crimes included in the chapter 25) and the Civil Code²² (according to article 23 the freedom of religion is understood as a personal right). It is worth to note, that the Polish Constitutional Court confirmed the constitutionality of the art. 196 of the Criminal Code in the judgment of 6th of October 2015²³: ‘the punishment of the offence of offending religious feelings by insulting in public an object of religious worship is, from the point of view of the art. 31 § 3 of the Constitution, a necessary restriction on the constitutional freedom of expression protected by the art. 54 § 1 of the Constitution, and thus the measures applied are necessary for the protection of the interests to which they are connected. In a democratic State, it is necessary to restrict freedom of expression that insults or offends religious feelings of others. What needs to be assessed, however, is the manner in which the limits of freedom of expression are defined and the intensity of the restrictions themselves’. What’s more, the claimant filed an application to the European Court of Human Rights (hereinafter: ECtHR), which passed a judgement on the 15th of September 2022²⁴, declaring a violation of the art. 10 of the European Convention of Human Rights. More precisely, the ECtHR has not discussed the constitutionality of the art. 196 of the Polish Criminal Law Code, but emphasised that the Polish courts failed to ‘carefully balance the Applicant’s right to freedom of expression with the rights of others to have their religious feelings protected and religious peace preserved in the society’. This is important especially for criminal courts in cases of where radicalization and/or hate speech is brought up, to make sure that a proper

applied norm without referring a question to the Constitutional Court. The discussion was caused by the changes (for many constitutionalists unacceptable) in the organisation of the Constitutional Court, that have been taking place since 2016. See e.g. M. Gutowski and P. Kardas (eds.). *Wykładnia i stosowanie prawa w procesie opartym na Konstytucji*, Warsaw 2017.

²⁰ See judgement of 18 May, 2004 SK 38/03, OTK-A 2004/5, poz. 45. Also P. Jablonska, *Wykładnia prokonstytucyjna w procesie sądowego stosowania prawa – przyczynek do dyskusji*, ‘Przegląd Sądowy’ 2021, no. 7- 8, pp. 142 – 143.

²¹ Act of 6 June 1997 Criminal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, Dz.U. 1997 nr 88 poz. 553 ze zm.).

²² Act of 23 April 1964 Civil Code (Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny Dz.U. 1964 nr 16 poz. 93 ze zm.).

²³ Judgement of the Constitutional Court of 6 October 2015, SK 54/13.

²⁴ See *Rabczewska v. Poland* (Application No 8257/13, Judgement of 15 September 2022).

balance between freedom of speech and freedom of religion is preserved.

Similarly, as in the case of freedom of religion, the courts struggle also with balancing freedom of speech. The repressive type of censorship is a model accepted in the Polish legal system while preventive censorship is forbidden by the Constitution (art. 54 sec. 2).²⁵ Repressive censorship occurs after the publication of the work and includes acts such as: publicly insult someone due to national, ethnic, racial, religious affiliation or because of non-denominational status, praising or encouraging to commit a crime, promoting a fascist or other totalitarian system of the state, slander and defamation, insulting religious feelings, publicly insulting the President of the Republic of Poland and other constitutional organs of the Republic of Poland. Lately, many campaigns and movements have been questioning some of these limitations, e.g. 'Delete 212 of the Criminal Law Code' campaign called for the abolition of Article 212 of the Criminal Law Code, i.e. the offense of slander.²⁶ There is general rule, however, that even extreme opinions are considered within the limits of freedom of speech. In the judgement of 31 March 2022 (ref. no. II KK 39/22), the Supreme Court admitted that realizing protective function of the art. 212 kk cannot lead to widening of criminalization²⁷. Those who question the need for the art. 212 kk, believe that civil law regulations give enough protection for the injured party, and the participation of the prosecutor in private law cases is strongly limited (art. 60 of the Code of Criminal Proceedings), penalties are lower (usually a fine) with a possibility to apply for extraordinary mitigating measures (art. 60 of the Criminal Code) and the statute of limitations in criminal law is shorter than in civil (see art. 101 § 2 of the Criminal Code versus 442¹ § 1 of the Civil Law Code)²⁸.

While discussing freedom of speech it is important to point out that Supreme Court in its jurisprudence, both in criminal and civil cases, requires from professionals (especially journalists) more reliability, proper collection of sources of information and verification of acquired knowledge (see e.g. ruling of the Supreme Court on 17 April 2018, ref. no. IV KK 296/17) in order to protect the freedoms and dignity of others. There is a problem, however, in those cases where journalistic investigation was undertaken, because there are no regulations setting standards for the journalists and the line between prohibited act and fully legal might sometimes be thin. Without special regulations it is up to the courts to decide whether there was a violation, or if the violation was a criminal or civil matter. However,

²⁵ Stożek, M., (2014) Rewolucja czy ewolucja? Transformacje ustrojowe w kierunku wolności słowa w Polsce w latach 1989-1992 [in:] Reformy ustrojowe w Polsce 1989-1998-?, L. Jurek, B. Przywora, T. Stanisławski (eds.), Wydawnictwo KUL Lublin.

²⁶ Helsinki Foundation for Human Rights, 'Delete 212 of the Criminal Law Code' campaign, available at: www.hfhr.pl/podsumowanie-kampanii-wykresl-212-kk/.

²⁷ Similarly, European Court of Human Rights, see e.g. *Kurski v. Poland* (Application No. 26115/10, Judgment of 5 July 2016).

²⁸ P. Hofmański, J. Satko, *Przestępstwa przeciwko czci i nietykalności cielesnej. Przegląd problematyki. Orzecznictwo (SN 1918–2000). 'Piśmiennictwo'*, Kraków 2002, p. 26, L. Gardocki, *Europejskie standardy wolności wypowiedzi a polskie prawo karne, 'Państwo i Prawo'* 1993, no. 3, p. 17, J. Akińcza, *Ochrona dóbr osobistych wobec mowy nienawiści* [in:] *'Mowa nienawiści na tle współczesnych zjawisk społeczno-politycznych'*, W. Pływaczewski, M. Duda, Olsztyn 2017, pp. 105–114.

especially in civil law cases, the role of free media is strongly supported²⁹.

Although there is a general ban on preventive censorship, founding a radio or television that are responsible for ‘censoring’ radical content requires obtaining a license, under the conditions included in the Broadcasting Act of 29 December 1992³⁰, e.g. it is an obligation to set up a commercial joint-stock company before broadcasting. This process is difficult, because of the conditions described in the Code of Commercial Companies that need to be fulfilled, especially in relation to monetary capital. A special administrative decision (concession) is made by the constitutional organ - The National Council of Radio Broadcasting and Television for a short period of time (10 years) and is renewable. Similarly as in other countries, Polish entities providing services by electronic means are responsible for monitoring transmitted or stored information, but their responsibility is limited by technical possibilities of the provider. It is important to note that, if the act has been committed outside of Poland, it must be also classified as a crime in the country where it took place (art. 111 § 1 of the Criminal Code) and it has practical consequences. For example, after the official Polish *Red Watch* website with neo-Nazi content was closed in Poland, it reopened in Dallas and is still being updated, so it is possible to avoid conviction not because of the lack of social harm, but because of the place where it was committed.

Freedom of speech or expression is guaranteed not only on constitutional level (art. 54 sec. 1) and in other lower-rank statutes: criminal, civil, administrative but also in the Act of 14 December 1982 on the protection of the state and official secrets³¹. Moreover, according to the Supreme Court, because of an overlap between different acts (the Act of 26 January 1984 Press Law and the Civil Code), those whose freedom of speech was affected can at the same time seek protection under different acts³². Freedom of speech is also protected by the Polish Civil Law Code (article 23). It should be also emphasised, that according to the newly added art. 156² of the Code of Civil Proceedings (that came into force on 7th November 2019³³) if there is possibility to rule the case on a different legal basis than presented by the claimant, the court is obliged to warn the parties about it. This provision helps both parties to be better informed about their procedural situation. It is a positive step taken by the Polish legislator to ensure a higher level of human rights protection that has obvious implications for protecting fundamental freedoms when dealing with state

²⁹ See e.g. Supreme Court judgement of 19 April 2022, ref. no. I CSK 1217/22). However, the courts of higher instance have not yet elaborated relevant criteria for the courts of lower instances.

³⁰ Broadcasting Act of 29 December 1992 (Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji Dz. U. 1993, nr 7, poz. 34 ze zm.).

³¹ Act of 14 December 1982 on the protection of the state and official secrets (Ustawa z dnia 14 grudnia 1982 r. o ochronie tajemnicy państwowej i służbowej, Dz.U. 1982 nr 40 poz. 271 ze zm.).

³² Judgement of the Supreme Court of 10 September 1999, ref. no. III CKN 939/98, OSNC 2000, No. 3.

³³ Act of 4 July 2019 on the change of the Code of Civil Proceedings and some other Acts (Ustawa z dnia 4 lipca 2019 roku o zmianie ustawy Kodeks postępowania cywilnego oraz niektórych innych ustaw, Dz. U. 2019, poz. 1469).

security cases³⁴.

Besides freedom of speech and religious freedom, also right to associate plays an important role in prevention of political violence, but also in prevention of state security from overstepping its role. Based on existing legislative framework those associations, political parties and organisations that violate laws e.g. promote hatred can be eliminated. In addition to Article 13 of the Constitution of the Republic of Poland, the provision of the Article 29(1)(3) of the Act of 7 April 1989 of the Law on associations³⁵ provides that a court, after a motion is filed by a supervisory authority or a public prosecutor, may dissolve an association if its activities demonstrate serious or persistent violations of the law e.g. by promoting radicalised content or hate. A similar action is possible in case of political parties³⁶.

Similarly, organising and functioning of political parties is strictly regulated by law. It is important to note that a special register is kept by the District Court in Warsaw. One of the most crucial mechanism included in the Act of 27 June 1997 on political parties is the article 14 of this Act - a legal base for the court to lodge a query to the Constitutional Court for an evaluation of constitutionality of the purposes and activities of that political party, if the court is in doubt whether the aims of a political party are consistent with the Constitution. This kind of control is possible also in the case of introducing changes in the political party's statute. If the Constitutional Court finds unconstitutionality of the purposes and activities of a political party, the District Court in Warsaw must reject its registration or delete it from the register with no right to appeal (sec. 4). The court of the lower instance is bound by the ruling of the Constitutional Court and cannot solve this legal issue on its own – it is an exception to jurisdictional independence of the court, which is a general rule in the Polish civil proceedings. This mechanism should be applied only in case of necessity to allow the citizens express their political views and to allow to take part in political life³⁷. In 2010 the District Court in Warsaw asked Constitutional Court to confirm the constitutionality of the purposes or activities of a political party 'Narodowe Odrodzenie Polski' because of controversies of allegedly having fascist content in its programme. The proceedings were discontinued due to formal reasons, but the Constitutional Court explained that using fascist symbols in political activity is forbidden and such a political association may not participate in public life³⁸.

Polish legal system struggles as well as far as freedom of assembly and state security is concerned. The Act of 24 July 2015 Law on Assemblies,³⁹ gave priority to cyclical assemblies and contains vague terms (e.g. 'events of

³⁴ Judgement of the Warsaw Court of Appeal of 13 January 2021, V ACa 226/19.

³⁵ Act of 7 April 1989 Law on Associations (Ustawa z dnia 7 kwietnia 1989 r. Prawo o stowarzyszeniach Dz. U. 1989, nr 20, poz. 104 ze zm.).

³⁶ See art. 42 of the Act of 27 June 1997 on political parties (Ustawa z dnia 27 czerwca 1997 r. o partiach politycznych Dz.U. 1997 nr 98 poz. 604 ze zm.).

³⁷ See B. Przywora, 'Instytucja partii politycznej w Konstytucji Rzeczypospolitej Polskiej z 1997 r.', *Przegląd Sejmowy* no 3, 2021, p. 100 arguing that the Constitutional Court should dissolve a party rather than the District Court in Warsaw.

³⁸ See judgment of the Constitutional Court of 6 April 2011, Pp 1/10.

³⁹ Act of 24 July 2015 Law on Assemblies (Ustawa z dnia 24 lipca 2015 r. Prawo o zgromadzeniach (Dz.U. 2015, Nr 51, poz. 1485 ze zm.).

great importance and significance for the history of Poland'), which has been criticized. It was also raised that more attention should be paid to the essence of this freedom, not the frequency or character of the organised assembly – everyone has also the right to express their freedoms also spontaneously⁴⁰. One of the most popular (and populated) political assembly in Poland is the 'Independence March'. While this is undeniably an event of 'great importance and significance for the history of Poland', there were also numerous examples of the participants engaging in hate speech, and even an incident of presenting racist and fascists banners by an extremist group.

These examples indicate that at the legislative level human rights and freedoms are stipulated broadly, and the legislator interferes when there is a collision with another value. Importantly, their limitations are often in line with the Art. 31 sec. 3 of the Constitution. However, the problem of the lack (or incompleteness) of control mechanisms exists, which can be seen on the example of the Act of 10 June 2016 on anti-terrorist operations, and this might be fixed by amending legal acts to include those measures. Even more objections may be raised to the creation of restrictions by means of a regulation, not through a statute. Such a practice is far from constitutional standards, resulting in uncertainty of individuals as to the content and limits of their freedoms.

Radicalization tendencies in the Polish society were particularly strong after the judgment of the Constitutional Court passed on 22th October 2020⁴¹ when the Court found the art. 4a par. 1 point 2 of the Act of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy⁴² inconsistent with the Constitution. This Article stipulated that abortion was allowed if prenatal tests or other medical reasons indicated a high probability of severe and irreversible fetal impairment or an incurable life-threatening disease of the human foetus. This judgement caused widespread public protests in most Polish cities. However, the crowds of discontented Polish women were also accompanied by different kinds of radical organizations including Antifa or extreme anti-clericals groups. This resulted in a significant rise in crimes against religious believers even up to 100% – in 2016 there were 59 proceedings and in 2021 – 106⁴³. This statistic includes the most serious crimes, such as attacks against churches, physical attacks of priests or – as in Siedlce – the murder of a Franciscan friar. The injuries were also reported to be suffered by the peaceful protesters from the hands of counterdemonstrators and the police. The coercive measures used by the Police were questioned as disproportionate to the level of danger posed by

⁴⁰ Stożek, M. (2015) 'Rola Komisji Weneckiej w ochronie prawa do wolności zgromadzeń w Polsce' In: 'Instytucje Ochrony Praw Człowieka', Edited by B. Szmulik, A. Pogłódek, B. Przywora (Monografie Instytutu Prawa Ustrojowego: Warsaw).

⁴¹ Judgement of the Supreme Court of 22 October 2020, ref. no. K 1/20.

⁴² Act of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy (Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, Dz. U. 1995, nr 17, poz. 78 z późn. zm.)

⁴³ wiadomosci.dziennik.pl/wydarzenia/artykuly/8478410,zbigniew-ziobro-wyrok-abp-marek-jedraszewskiego-kosciol-solidarna-polska.html (accessed on 15 January 2023).

the participants of the demonstration⁴⁴. Many of the interventions of public officials against peaceful demonstrators were considered inadequate, and the arrests unjustified or illegal as a result of judicial review⁴⁵. Importantly, at the same time, the ban on organizing spontaneous assemblies was in force, imposed by § 26 of the Regulation of the Council of Ministers of March 19, 2021 on the establishment of certain restrictions, orders and bans in connection with the state of epidemic⁴⁶. At that time, it was only possible to organize gatherings of up to 5 people. The ban was introduced as a regulation, not in the form of a statute.

Yet, the protests taking place during the COVID-19 pandemic revealed another problem related to respecting by public authorities the personal freedom defined in art. 41 sec. 1 of the Constitution. The purpose of peaceful spontaneous assemblies is to express dissatisfaction with certain facts that have occurred in social life. It is commonly claimed that acting within the freedom or right to which individuals are entitled must not create negative consequences for them, especially within criminal law. During the pandemic, it was possible to introduce restrictions not as much on exercising of the freedom of assembly, but on the manner of its implementation⁴⁷. It would be enough to order the participants of the assembly to wear masks – it would be a minor interference in the exercise of the freedom of assembly, justified because of the need to ensure public safety, especially in the field of health protection. It would be difficult to consider that it would be a disproportionate limitation of this freedom to order wearing of masks during a protest taking place during an increased epidemic threat, and it would also protect the health and lives of the participants without incurring social or financial costs. Failure to comply with this requirement would only give rise to liability for an offense against public order specified in Art. 54 of the Code of Misdemeanors⁴⁸. In this configuration, the allegation of disproportionately limiting freedom, as indicated in the art. 31 sec. 3 of the Constitution is unfounded. It should be emphasized again that the introduction of certain orders should be made via a statute, not a regulation.

Moreover, quite often right to privacy is being invoked by the political

⁴⁴ See bip.brpo.gov.pl/sites/default/files/2022-07/Informacja%20Roczna%20RPO_2021_dostepna.pdf, accessed on 15 January 2023, pp. 201-202. Also A. Syryt, B. Przywora, K. Dobrzeniecki, Freedom of Assembly in the COVID-19 Pandemic and the Limits of its Restraints in the Context of the Experiences of the Republic of Poland and the United States of America, *Białostockie Studia Prawnicze* 2022 vol. 27 No 2, pp. 63-65.

⁴⁵ As of July 16, 2021, the District Court for Warsaw-Śródmieście in Warsaw decided that it had approved 343 complaints see: bip.brpo.gov.pl/sites/default/files/2022-07/Informacja%20Roczna%20RPO_2021_dost%C4%99pna.pdf, p. 110 (accessed 17 January 2023).

⁴⁶ Regulation of the Council of Ministers of March 19, 2021 on the establishment of certain restrictions, orders and bans in connection with the state of epidemic (*Rozporządzenie Rady Ministrów z 19 marca 2021 r. w sprawie ustanowienia określonych ograniczeń, nakazów i zakazów w związku z wystąpieniem stanu epidemii*, Dz. U. 2020, poz. 512).

⁴⁷ bip.brpo.gov.pl/sites/default/files/Informacja_RPO_za_2020.pdf, p. 200 (accessed on 17 January 2023).

⁴⁸ Act of 20 of May 1971 Code of Misdemeanors (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczeń*, Dz.U. 1971 nr 12 poz. 114 ze zm.)

opposition and human rights organizations.⁴⁹ The Polish surveillance laws, when it comes to intelligence agencies, might affect right to privacy regulated in the art. 47 of the Polish Constitution. The Act of 10 June 2016 on anti-terrorist operations does not provide procedural safeguards to ensure that a person, should she or he be made aware of surveillance, can challenge it and have access to an effective remedy against unlawful surveillance.⁵⁰ Surveillance is regulated i.a. in the Act of 24 of May 2002 on the Internal Security Agency and the Foreign Intelligence Agency,⁵¹ the Act of 10 June 2016 on anti-terrorist operations,⁵² the Act of 6 April 1990 Police Law⁵³ and the Code of Criminal Procedure.⁵⁴ All of these acts include limitations of human rights in preparatory proceedings. It is obvious that during this stage of criminal proceedings keeping things in secret is necessary, however the right to defence and a professional lawyer have constitutional grounds (art. 42 sec. 2 of the Polish Constitution) and these are also general principles according to the art. 6 § 1 of Polish Code of Criminal Procedure.

Another restriction that is objected is a regulation included in the Act of 10 June 2016 on anti-terrorist operations,⁵⁵ which says that if a third or fourth level of state alarm is announced, the Minister of Internal Affairs may prohibit public assemblies. There is no possibility for the court to verify the justification of the decision taken by the administrative organ. It could be considered as a gap in the Polish legal system and factual deprivation of civic freedoms declared to everyone on the constitutional level (art. 57 of the Constitution). Even limiting the right of an individual for reasons of public security does not make it possible to exclude the essence of that right, including the right to a court. However, it is possible to limit it based on the principle of proportionality expressed in the art. 31 sec. 3. Importantly, the right to a court cannot be restricted even during martial law and state of emergency according to the art. 233 sec. 1 of the Polish Constitution.

Another important issue is the impact of anti-terrorism measures on groups at risk of discrimination and racism, especially towards Muslim migrants and refugees. In this context, the European Network Against

⁴⁹ See e.g. Human Rights First, Poland's Anti-Terror Law Recommendations for U.S. officials attending Warsaw NATO Summit 2016, available from: www.humanrightsfirst.org/resource/poland-s-anti-terror-law.

⁵⁰ The Panoptykon Foundation, 'Stanowisko Fundacji Panoptykon w sprawie projektu ustawy o działaniach antyterrorystycznych' [The position of the Panoptykon Foundation on the bill on anti-terrorist activities] obserwatoriumdemokracji.pl/wp-content/uploads/2016/04/Panoptykon_uat_opinia_10.05.2016.pdf.

⁵¹ Act of 24 of May 2002 on the Internal Security Agency and the Foreign Intelligence Agency (Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu Dz. U. z 2010 r. Nr 29, poz. 154 ze zm.).

⁵² Act of 10 June 2016 on anti-terrorist operations (Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych (Dz. U. z 2016 r. poz. 904 ze zm.).

⁵³ Act of 6 April 1990 Police Law (Ustawa z dnia 6 kwietnia 1990 r. o Policji Dz.U. 1990, Nr 30, poz. 179 ze zm.).

⁵⁴ Criminal Procedure Code of 6 of June 1997 (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (Dz.U. z 1997 Nr 88, poz. 555 ze zm.).

⁵⁵ Act of 10 June 2016 on anti-terrorist operations (Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych (Dz. U. z 2016 r. poz. 904 ze zm.).

Racism⁵⁶ observed that although Polish legislation usually does not explicitly target Islam, there are instances where Muslims became the direct focus of anti-terrorist activities. For example, according to the draft regulations accompanying Poland's Anti-Terrorism Act 2016 list activities or actions deemed 'terrorist related' in a 'catalogue of terrorist incidents' include information about any plans for establishing Islamic universities, visits to prisons by Islamic clerics or representatives of Islamic institutions; and participating in chats and forums on radical Muslim websites.⁵⁷ After all, in order to prevent radicalization, the Polish legal framework protects minority rights and guarantees the equal protection of national and ethnic minorities, no matter of their population in the country.⁵⁸ The governmental agencies, including local ones, are obliged 'to take appropriate measures to promote the full and effective equality of minority groups in economic, social, political, and cultural life, as well as to protect members of minorities from discrimination, hostility, or violence'. The purpose of the Act is rather to protect the position of the minorities than punish anyone breaching their rights or freedoms – it does not include punitive measures against hate speech but adopts a more 'positive approach' in its prevention.

The general crimes against public order or humanity are in the Polish Criminal Code. In turn, offenses committed by persons eligible for or performing military service are included in art. 681 - 694 of the Act of March 11, 2022 on defense of the homeland⁵⁹. Moreover, in 2010 Poland also adopted the Act of 3 December 2010 on equal treatment⁶⁰, which provides an exhaustive list of protected characteristics: gender, ethnic origin, nationality, religion and religious denomination, political view, disability, age, and sexual orientation. In art. 3 sec. 3. of this Act harassment is defined as 'any unwanted conduct whose aim or effect is violating the dignity of a natural person and creating around them an intimidating, hostile, degrading, humiliating or offensive atmosphere'. Those affected can bring civil law claims and seek damages and/or compensation based on the art. 13 of the Act. There is a normative presumption of breaching the law by the defendant and they are obliged to prove their innocence (art. 14 sec. 2 and 3 of the Act). Despite this, it was repeatedly raised at the European and international level that this regulation fails to provide effective protection to individuals who

⁵⁶ European Network Against Racism, 'Suspicion, discrimination and surveillance: The impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe', www.enar-eu.org/wp-content/uploads/suspicion_discrimination_surveillance_report_2021.pdf.

⁵⁷ Office of the Prime Minister 'o działaniach antyterrorystycznych oraz o zmianie niektórych innych ustaw' [On anti-terrorist activities and on amending other acts] 16 March 2016 orka.sejm.gov.pl/Druki8ka.nsf/0/9CCA65458151278AC1257FB50049D701/%24File/516.pdf<B.

⁵⁸ Act of 6 January 2005 on national and ethnic minorities and regional language (Ustawa z dnia 6 stycznia 2005 r. o mniejszościach narodowych i etnicznych oraz o języku regionalnym Dz.U. 2005 nr 17 poz. 141 ze zm.).

⁵⁹ Act of March 11, 2022 on defense of the homeland (Ustawa z dnia 11 marca 2022 roku o obronie ojczyzny, Dz. U. 2022, poz. 2035).

⁶⁰ Act of 3 December 2010 on equal treatment (Ustawa z dnia 3 grudnia 2010 r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania, Dz. U. 2010 Nr 254 poz. 1700 ze zm.).

have been victims of discrimination on various grounds.⁶¹ This requires to include more effective measures in the Act of 3 December 2010 on equal treatment, especially such as statutory exemption for injured party from bearing court costs, as is generally accepted in the labour law cases⁶². More effective measures that protect individual rights will prevent radicalization and, in this way, strengthen state security laws in Poland.

3. Evolution of the state security laws in Poland

One of the primary duties of the Republic of Poland is to safeguard the independence and inviolability of its territory, the freedom and rights of and the security of citizens (art. 5 of the Constitution). The concept of security should be understood as ‘counteracting all, and especially unlawful, threats and attacks aimed at the functioning of citizens, proceeding within the framework of the law and with their good will, in the spirit of trust in state authorities’. State security is the obligation to ensure actual security to the citizens, which applies not only to protection against external actions interfering with the integrity of the state, but also to ensure uninterrupted functioning in the closest community⁶³.

From a legal perspective, state security should also be understood as a state in which fundamental freedoms and human rights as well as the principles defining constitutional axiology are protected⁶⁴, while the state of threat to security should be assessed situationally, as the Constitutional Court stated in the judgment of 30 September 2008⁶⁵. This justifies the restriction of freedom and human rights (art. 31 par. 3 of the Constitution)⁶⁶. State security, as well as security in general, should be analyzed in relation to specific threats. Security is a state in which a given entity does not feel any threats. State security should be considered in a broad sense e.g. political, military, economic security (including, for example food security), social, cultural, ideological and ecological⁶⁷. This was particularly noticeable during the COVID-19 pandemic, where states reacted to the pandemic in

⁶¹ See, e.g., the Concluding Observations of the UN Human Rights Committee on Poland, 23 November 2016; www.refworld.org/docid/5975bfbb4.html.

⁶² See Art. 96 par. 1 point 4 of the Act of 28 July 2005 on court costs in civil cases (Ustawa z dnia 28 lipca 2005 roku o kosztach sądowych w sprawach cywilnych, Dz. U 2022, poz. 1125 ze zm.).

⁶³ See Constitutional Court judgements of 21 June 2005, P 21/05, OTK-A 2005/6/65 and of 3 July 2001, K 3/01, OTK 2001/5/125.

⁶⁴ See P. Tuleja (2021), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Issue II, P. Tuleja (ed.), Commentary to article 31, thesis 2.

⁶⁵ Constitutional Court judgement of 30 September 2008, K 44/07, OTK-A 2008/7/126.

⁶⁶ K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999; Przywora B., *Bezpieczeństwo państwa jako przesłanka dopuszczalności ograniczenia praw i wolności osób pełniących funkcje w służbie publicznej*, [w:] *Konstytucja Rzeczypospolitej Polskiej w pierwszych dekadach XXI wieku wobec wyzwań politycznych, gospodarczych, technologicznych i społecznych*, red. S. Biernat, “Zagadnienia Sądownictwa Konstytucyjnego nr 1(3)/2012, s. 243-251.

⁶⁷ L. Bosek, M. Szydło, *Komentarz do art. 31 ust. 3*, [w:] *Konstytucja RP. Tom I. Komentarz do art. 1–86*, red. M. Safjan, L. Bosek, Warszawa 2016, nb. 95-97.

different ways⁶⁸. The Constitution provides for the obligation of public authorities to combat epidemic diseases and prevent health-related diseases (art. 68 par 4 of the Constitution). If the number of infections and epidemics is increasing, public authorities should be able to act actively and immediately implement legal regulations and perform their constitutional functions). The point is that the state, in the face of a threat, should guarantee the protection of the most important values – life and health, and at the same time maintain the possibility of uninterrupted functioning of its supreme organs for as long as possible⁶⁹.

The understanding of the term ‘state security’ has also been shaped by the Polish past. Historically it was referred mostly in the context of the defence from military aggression and today also as far as prevention of extremism or crime is concerned. After democratic transition in Poland, the ‘newly-born’ state faced new challenges in prevention of extremism⁷⁰. The approach needed to be changed immediately – in a communist reality mainly common crimes were committed but as significant changes occurred in terms of financial criminality, and crimes surrounding new financial reality emerged. Also, at that time migration increased, as well as international cooperation. It was necessary to change the Polish national security system. In 1990 the Office for State Protection (‘Urząd Ochrony Państwa’) was created. The office was staffed mainly by the officers who served in the communist special services i.e. ‘Security Service’ (‘Służba Bezpieczeństwa’) and this fact was seen by many with reservation. It was supposed to be an apolitical institution, but it has often been used for political purposes or engaged in such matters, therefore it was soon exchanged with another agency.

The legal framework on state security first underwent a further important evolution in 2002 when the Internal Security Agency was established based on the Internal Security Agency and Foreign Intelligence

⁶⁸ M. Florczak-Wątor, *Niekonstytucyjność ograniczeń praw i wolności jednostki wprowadzonych w związku z epidemią COVID-19 jako przesłanka odpowiedzialności odszkodowawczej państwa*, „Państwo i Prawo” 12/2020, s. 5-22K. Dobrzeniecki, B. Przywora, *Extraordinary legal measures and their application as a response of states to the first wave of the COVID-19 pandemic*, „Polish Science Yearbook”, vol. 51/2022, pp.1-13 (DOI: doi.org/10.15804/ppsy202211), czasopisma.marszalek.com.pl/images/pliki/ppsy/51/ppsy202211.pdf; K. Dobrzeniecki, B. Przywora, *Legal basis for introducing restrictions on human rights and freedoms during the first wave of the COVID-19 Pandemic* „Review of European and Comparative Law”, no 46(3)/2021, 43-65; doi.org/10.31743/recl.12439; Moulin-Stozek M. (2020): Polish education law: Evaluation of its response to COVID-19, Yearbook of Education Law, Edited by C. Russo (Education Law Association: University of Virginia Press), pp. 303-310, S. Trociuk, *Prawa i wolności w stanie epidemii*, Warszawa 2021; Wybrane zagadnienia prawa medycznego wobec wyzwań pandemii wywołanej wirusem SARS-CoV-2, red. J. Sobczak, A. Rogacka-Łukasik, Częstochowa-Poznań 2022, pp. 149-162.

⁶⁹ See K. Dobrzeniecki, *Prawo wobec sytuacji nadzwyczajnej. Między legalizmem a koniecznością*, Toruń 2018.

⁷⁰ Stożek, M., *Rewolucja czy ewolucja? Transformacje ustrojowe w kierunku wolności słowa w Polsce w latach 1989-1992* [w:] *Reformy ustrojowe w Polsce 1989-1998-?*, L. Jurek, B. Przywora, T. Stanisławski, Wydawnictwo KUL Lublin 2014.

Agency Act.⁷¹ The second legislative milestone was enacting the Act of 10 June 2016 on anti-terrorist operations,⁷² which also amended 31 other acts regulating this issue. Establishing Internal Security Agency and Foreign Intelligence Agency in 2002 was a response to liquidation of Office for State Protection. Based on art. 21 of the Internal Security Agency and Foreign Intelligence Agency Act of 24 May 2002⁷³, the Internal Security Agency officers have both operational and investigative power. The same article in par. 3 vested on the officers also the same investigative powers as the police has under the Code of Criminal Procedure.⁷⁴ In this Act some of the rules for undertaking anti-terrorist activities by the Polish services were regulated, especially in the field of cooperation between different institutions dealing with radicalization. The newly-passed Act significantly increased powers of services, which has been criticised for affecting human rights (e.g. broader and sometimes unjustified access to information about citizens with strongly limited control of the court).⁷⁵ It raised doubts whether the services will be used for political reasons, e.g. limiting the rights for the opposition or affecting elections. Undoubtedly, the introduction of instruments strengthening the security of the state into the legal order should be considered justified, while the premises for interfering with the interests of individuals should be defined as strictly as possible, above all preserving the essence of the threatened right or freedom.

Recently, other significant provisions regulating responding to violent extremism were also amended: the Act of 13 April 2016 on the safety of trade in explosives precursors⁷⁶, Act of 6 June 1997 Criminal Code⁷⁷ in the scope of strengthening the legal tools related to counteracting financing of terrorism and against foreign fighters, and the Act of 1 March 2018 on counteracting money laundering and financing of terrorism.⁷⁸ The creation of further legal mechanisms to limit terrorist activity is a positive phenomenon, especially when the state's interference affects it at the early

⁷¹ Internal Security Agency and Foreign Intelligence Agency Act of 24 May 2002 (Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu (Dz. U. z 2010 r. Nr 29, poz. 154 ze zm.).

⁷² Act of 10 June 2016 on anti-terrorist operations (Ustawa z dnia 10 czerwca 2016 r. o działaniach antyterrorystycznych (Dz. U. z 2016 r. poz. 904 ze zm.).

⁷³ Internal Security Agency and Foreign Intelligence Agency Act of 24 May 2002 (Ustawa z dnia 24 maja 2002 r. o Agencji Bezpieczeństwa Wewnętrznego oraz Agencji Wywiadu (Dz. U. z 2010 r. Nr 29, poz. 154 ze zm.).

⁷⁴ In particular *see* Article 312 in connection with Article 311 of the Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Dz.U. z 1997 Nr 88, poz. 555 ze zm.).

⁷⁵ See e.g. Human Rights First, Poland's Anti-Terror Law Recommendations for U.S. officials attending Warsaw NATO Summit 2016, available from: www.humanrightsfirst.org/resource/poland-s-anti-terror-law.

⁷⁶ Act of 13 April 2016 on the safety of trade in explosives precursors (Ustawa z 13 kwietnia 2016 r. o bezpieczeństwie obrotu prekursorami materiałów wybuchowych Dz. U. 2016 poz. 669 ze zm.).

⁷⁷ Act of 6 June 1997 Criminal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny Dz.U. 1997 nr 88 poz. 553 ze zm.).

⁷⁸ Act of 1 March 2018 on counteracting money laundering and financing of terrorism (Ustawa z 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu Dz.U. 2018 poz. 723 ze zm.).

stage of collecting funds intended for this conduct. However, the term ‘radicalization’ needs to be applied beyond just terrorist threat. Quite often political radicalization can result in hate crimes.

4. Hate crimes as a challenge in tackling radicalization

There is a tendency observed by the researches that after a terrorist attack in another country, the level of hate crimes committed might increase⁷⁹. Unfortunately, there is no legal definition of a hate crime under Polish law, but in the Polish legal system the definition developed by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe is used⁸⁰. According to that definition any criminal act can be classified as hate crime if the victim, premises or other purpose of the crime are selected on the basis of their actual or presumed connection with a group that can be distinguished on the basis of presumed race, nationality or ethnic origin, language, colour, religion, sex, age, physical or mental disability, sexual orientation or other similar characteristics. Bias motivation in hate crimes is gathered since 2015 in an electronic database of the Police and the Ministry of Interior and Administration. The most common crimes with bias motivation were: already mentioned art. 119 §1 of Criminal Code (hereinafter: kk) (unlawful threat), art. 126a kk (publicly calling to destroy in full or in part, any ethnic, racial, political or religious group, or a group with a different perspective on life, also art. 195 §1 kk (malicious interference with a the public performance of a religious ceremony of a church or another religious association), art. 196 kk (offending the religious feelings of other persons by outraging in public an object of religious worship or a place dedicated to the public celebration of religious rites), It is important to highlight also crimes described in the 32nd chapter of Criminal Code, e.g. art. 256 § 1 kk (publicly promoting a fascist or other totalitarian system of state or inciting hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination) and art. 257 kk (publicly insulting a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination).⁸¹

It is commonly accepted in the Polish case law that both online and offline hate speech is punishable and can lead to a conviction, as it functions on the international level⁸². Moreover, in 2014 General Prosecutor confirmed that in the Guidelines for conducting criminal proceedings in hate

⁷⁹ See e.g. Moulin-Stozek M., (2021) *Trends of Radicalization in Poland*. D4.1 Country Report. Horizon 2020 project ‘De-Radicalisation in Europe and Beyond: Detect, Resolve, Re-integrate’ (959198).

⁸⁰ Karsznicki K., (2012) *Przestępstwa popełniane z pobudek rasistowskich lub ksenofobicznych*, *Prokuratura i Prawo* 2.

⁸¹ Ministry of Justice, ‘Informator Statystyczny Wymiaru Sprawiedliwości’. Available at: isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/. (accessed on 1th March 2021).

⁸² See UN Human Rights Council, Resolution 20/8 on the Internet and Human Rights, A/HRC/RES/20/8, June 2012, that recognized that the ‘same rights that people have offline must also be protected online’.

crimes,⁸³ which have to be followed not only by the prosecutors, but also by the police and the officers of the Internal Security Agency. The Guidelines are a source of ‘soft’ and internal law within these organs but gain more importance in practice. Poland has also ratified the Council of Europe Convention on Cybercrime, as well as its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and some changes towards online contexts have already been executed in the Polish legislation⁸⁴. Due to this ratification, the art. 256 § 2 was added to the Criminal Code⁸⁵, punishing publicly promoting a fascist or other totalitarian system of state or inciting hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination through media. The element of ‘promoting’ is understood widely as every activity conducted by the perpetrator showing their acceptance for a totalitarian system⁸⁶ and the element ‘of publicly’ is interpreted as a possibility for numerically indeterminate audience to see the message sent by the perpetrator. These provisions did not face any allegation of unconstitutionality⁸⁷.

One of the most important legal documents responding to radicalization and extremism is the Criminal Code.⁸⁸ Terrorist offence is defined in art. 115 par. 20 kk: it is an act committed with the aim of: 1) seriously terrorizing a large number of people, 2) forcing a public authority of the Republic of Poland, or another state or international organization, to take or not to take a certain course of action, 3) cause a serious disturbance in the political system or economy of the Republic of Poland or another state or international organization and also a threat to commit such an act is penalised according to cited provision. Other crimes with ‘terroristic’ features may involve offences against public safety regulated in the chapter XX of the Criminal Code (see art. 163, 164, 165, 165a, 166, and 167 kk) and also war crimes regulated in the chapter XVI and include assaults on government representatives (art. 134 kk and art. 136 kk). Perpetrator committing one of those crimes is subjected to high penalties (even life imprisonment, e.g. art. 134 kk), but at the same time, definitions of these prohibited acts are not precise, for example, terms such as ‘immediate danger’ (art. 164 § 1 kk) or ‘danger to life and health of multiple persons or

⁸³ General Prosecutor, Wytyczne Prokuratora Generalnego w zakresie prowadzenia postępowań o przestępstwa z nienawiści, Warszawa, dnia 26 lutego 2014 r. (ref. no. PG VII G 021/54/13).

⁸⁴ There are more convictions for ‘hate crimes’ seen in statistics, but the percentage of convictions in relation to conducted preparatory proceeding is still low, less than a few percent, see: hatecrime.osce.org/hate-crime-data (accessed on 8th of January 2023).

⁸⁵ Act of 6 June 1997 Criminal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, Dz.U. 1997 nr 88 poz. 553 ze zm.).

⁸⁶ Judgement of the Supreme Court of 8 February 2019, ref. no. IV KK 38/13.

⁸⁷ See. Domagała P. (2019), ‘Jeszcze o propagowaniu faszystowskiego ustroju państwa w świetle polskiego prawa karnego (kilka uwag na marginesie artykułu prof. Witolda Kuleszy)’, *Państwo i Prawo*, no 5. Dadak W. (2018), ‘Przestępstwa motywowane uprzedzeniami (o problemach z analizą przestępczości z nienawiści)’, *Czasopismo Prawa karnego i Nauk Penalnych*, no. 4.

⁸⁸ Act of 6 June 1997 Criminal Code (Ustawa z dnia 6 czerwca 1997 r. Kodeks karny, Dz.U. 1997 nr 88 poz. 553 ze zm.).

property of substantial extent' (art. 165 § 1 kk). This gives lot of discretion in interpretation and might not comply with the principle of the protective function of criminal law⁸⁹.

Besides the Criminal Law Code, terrorist crimes are present also in other legal acts. One of the most interesting examples is the 2011 amendment to the Act of 3 July 2002 Aviation Law⁹⁰ that introduced in Article 2 the definition of the term 'act of unlawful intervention in civil aviation', which includes an attack of a terrorist character. One of the most interesting judgements passed by the Polish Constitutional Court in this context was a judgement of 30th September 2008⁹¹. The First President of the Supreme Court filed a motion to the Constitutional Court questioning the constitutionality of the art. 122a of Aviation Law that allowed to shoot down a civic airship in case of suspicious of using it for a terroristic attack. The Constitutional Court founded agreeably this regulation unconstitutional as the dignity of human and protection of life need to be valued higher than a suspicion of a terroristic attack. The Constitutional Court emphasised both the significance of the measures that need to be undertaken in combating terrorism but also limitations of using those measures, especially in the context of evaluating the proportionality rule.

In order to prevent terrorism and extremism some of relevant institutions gained specific powers, but their usage may sometimes collide with constitutional values. In extreme circumstances a state of emergency⁹² may be introduced, which might severely limit freedoms, human and civil rights. In ordinary circumstances organs that prevent extremism use their general powers based on the Code of Criminal Procedure⁹³ (hereinafter: *kpk*) such as: interrogation (art. 177 *kpk*), search and seizure (art. 217 *kpk*) or bodily examination (art. 207 *kpk*). Investigative and judiciary organs have right to demand the necessary assistance from the state institutions, government administration and local government bodies as well as entrepreneurs providing services of general interest (art. 15 § 2 *kpk*). Challenging terrorism requires special legal instruments to be introduced, e.g. undercover agents, special investigating methods or sting operations. It should be highlighted that competences of the Agency of Interior Security were further increased in the Act of 13 May 2011 amending the Act of 29

⁸⁹ Until 2020 crimes against public safety constituted a small percentage of the total crime rate, and often were not recorded in police statistics. Currently, we do not have data for the years 2021-2022, to consider possible changes during the period of the pandemic.

⁹⁰ Act of 3 July 2002 Aviation Law (Ustawa z dnia 3 lipca 2002 r. Prawo lotnicze, Dz.U. 2002 nr 130 poz. 1112 ze zm.).

⁹¹ Constitutional Court judgement of 30 September 2008, K 44/07.

⁹² Act of 29 August 2002 on Martial law and on the competences of the Supreme Commander of the Armed Forces and the rules of his subordination to the constitutional organs of the Republic of Poland (Ustawa z dnia 29 sierpnia 2002 r. o stanie wojennym oraz o kompetencjach Naczelnego Dowódcy Sił Zbrojnych i zasadach jego podległości konstytucyjnym organom Rzeczypospolitej Polskiej Dz. U. 2002 Nr 156, poz. 1301 ze zm.); Act of 21 June 2002 on the emergency state (Ustawa z dnia 21 czerwca 2002 r. o stanie wyjątkowym Dz. U. 2002 Nr 113, poz. 985 ze zm.).

⁹³ Criminal Procedure Code of 6 of June 1997 (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego (Dz.U. z 1997 Nr 88, poz. 555 ze zm.).

November 2000 Atomic Law⁹⁴ giving the officers of the Agency the right to carry out inspections at nuclear power plants. The combating of terrorism financing is regulated in the Act of 1 March 2018 on counteracting money laundering and financing of terrorism⁹⁵ and sets up the standards for the prevention procedures. This Act puts obligations on entities such as banks, which are responsible for detecting risk of money laundering and providing measures protecting their clients (art. 33 of the Act), which is a reasonable presumption that prevention of these phenomena can be also supported by non-state actors. This has important consequences for drafting timely and circumstantial-appropriate prevention plans.

5. Conclusion

Each state faces challenges when balancing security with human rights and constitutional freedoms. According to the art. 8 sec. 1 of the Polish Constitution, this document shall be the supreme law of the Republic of Poland. Breaching (or even unjustified limiting) of constitutional principles may be seen as a breach of the Constitution or a statue and responsible officials might be accountable before the State Tribunal⁹⁶. Furthermore, the efficient functioning of the Constitutional Court guarantees protection of human rights. In Poland the main issue remains the current constitutional law crisis⁹⁷ that prevents to appropriately respond to constitutional fundamental freedom challenges in the protection of state security and prevention of radicalization. Because of this, some authors argue that Poland falls within a coherent concept of ‘illiberal constitutionalism’, that can be distinguished from other similar notions of constitutionalism.⁹⁸ There is an

⁹⁴ Act of 29 November 2000 Atomic Law (Ustawa z dnia 29 listopada 2000 r. Prawo atomowe Dz.U. 2001 Nr 3 poz. 18 ze zm.).

⁹⁵ Act of 1 March 2018 on counteracting money laundering and financing of terrorism (Ustawa z dnia 1 marca 2018 r. o przeciwdziałaniu praniu pieniędzy oraz finansowaniu terroryzmu Dz.U. 2018 poz. 723 ze zm.).

⁹⁶ According to the art. 198 sec. 1 of the Polish Constitution for violations of the Constitution or a statute if committed within the scope of the office, the following persons shall be constitutionally accountable to the State Tribunal: the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces. Term ‘violation’ is not defined in any legal act, but because of the importance of the constitutional norms and quasi-penal character of this liability, it is interpreted widely – as every violation of any constitutional provision.

⁹⁷ More about constitutional crisis in monographs by W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, 2019 and P. Radzewicz, P. Tuleja (eds.) *Konstytucyjny spór o granice zmian organizacji i zasad działania Trybunału Konstytucyjnego czerwiec 2015 - marzec 2016*, Warszawa 2017. Also, P. Radzewicz, *Kryzys konstytucyjny i paradygmatyczna zmiana konstytucji*, ‘Państwo i Prawo’ 2020, no. 10, pp. 4–7.

⁹⁸ T. Drinóczi, A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*, Routledge, London, 2021), pp. 2–3.

undesirable practice of recognizing the binding force of some of the judgments, depending on the discretion of the person interpreting the provisions⁹⁹. Uncertainty and legal chaos undoubtedly make it difficult to counteract phenomena that threaten the functioning of the society, while limiting the protection of individual rights.

The Polish framework needs essential changes and new solutions. Even the scarce research that exists indicates that the legal framework might not fully comply with the constitutional and human rights standards. This has been particularly noticeable during the pandemic period. In the beginning of the pandemic, especially due to the chaos in every societal level, the legislative mistakes made by the legislator were excusable. However, later it was necessary to adapt the provisions to constitutional requirements, which was not done despite the passing of the time and the reduced level of threat¹⁰⁰. These reservations were valid both in 2020 and 2021. During the pandemic, there was a noticeable tendency to introduce repressive regulations, which, in the opinion of the legislator, were there to ensure public safety. It is not difficult to see that the restrictions made during this tough period have caused the opposite reaction – instead of calming the public mood, they provoked protests¹⁰¹. It also certainly did not appear that repressive mechanisms, including criminal law, ensured better security at an individual level. It may be seen as a paradox that although the Polish legislation on radicalization is guided by an approach focused mainly on criminalization and prosecution, at present civil law mechanisms ensure higher level of protection than criminal and are more accessible to the injured party independently filing a motion to the court¹⁰².

This article also lists as a challenge in the Polish context the detrimental impact on fundamental freedoms of the existence of gaps and inaccuracies in the definitions of the criminal acts in the Criminal Code related to terrorism and radicalization. Therefore, another step to protect fundamental freedoms could be to introduce more precise descriptions of the essential elements in the definitions of these acts. This will prevent wide discretion in interpretation of these provisions and comply with the principle ‘nulla poena sine lege’ included in the Polish Constitution (art. 42 sec. 2).

State security is one of the fundamental constitutional values and requires special protection. The state's duties include combating the threats, but at the same time the public authorities should guarantee the protection of the most important values and maintain uninterrupted functioning of the supreme organs for the longest time. On the other hand, the legislator is

⁹⁹ See: T. Pietrzykowski, *Polski kryzys konstytucyjny widziany oczami pozytywisty prawniczego*, ‘Państwo i Prawo’ 2022, no. 3, pp. 12 – 13.

¹⁰⁰ See bip.brpo.gov.pl/sites/default/files/2021-12/Raport_RPO_pandemia_2021.pdf (accessed on 14 January 2023), pp. 57-62.

¹⁰¹ In addition to the aforementioned women’s strike, it is worth to mention less numerous strikes of entrepreneurs in 2021 and 2020 see www.money.pl/gospodarka/okradam-swoja-rodzine-przedsiębiorcy-pomoc-rzadu-idzie-dla-wybranych-6618793510378112a.html (accessed 17 January 2023) and www.rmf24.pl/raporty/raport-koronawirus-z-chin/polska/news-zostaniemy-tu-na-noc-protest-przedsiębiorców-w-warszawie,nId,4482294 (accessed 17 January 2023).

¹⁰² However, the civil law measures could still be strengthened, for example, by fully exempting the claimant from court costs.

supposed to introduce restrictions on freedoms and human rights. In the context of the principle of proportionality, it should be unacceptable to violate the principle of exclusivity of a statute by ‘transferring’ statutory matters to lower-level acts and, based on them, interfering with the essence of constitutional freedoms and rights.

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