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CRIMINAL LAW AGAINST TERRORISM – LOOKING FOR AN EFFICIENT SOLUTION

Fighting terrorism is undoubtedly a complex undertaking, a challenge that is never fully completed. It includes developing proper criminal law and criminal procedure. As lawyers, we need to answer the question of what solutions represent proper anti-terrorism measures in the field of criminal justice. Many believe that in the current circumstances “proper” equals efficient. This article not only aims to describe different concepts of efficiency in the criminal law, but also it ventures to question the applicability of efficiency as an indicator of the success of anti-terror criminal law. The case of suicide bombers is the main matter under consideration here but a lot of the following remarks apply also to other acts of terrorism. As an extreme example of terrorist activity suicide attacks constitute a hard case for modern criminal justice in a number of aspects.

Even though young men are still the most likely group to take part in such attacks, the strategy of terrorist groups in the field of recruitment is changing. One reason is that, as we do not associate women with the danger of terrorism, we are less alert thereto, which, in turn, makes it easier for women to execute a plan of bombing. Another reason is that using a woman or a child for suicide bombing is better for the organization, as usually it does not cause a loss of a trained fighter. The second statement is especially true in less protected areas like Nigeria that are currently fighting Boko Haram. In such areas, conducting an attack does not require skills and experience of a trained soldier, therefore it makes no sense to risk a life of a person that may be useful for the organization in other fields.

Although it is rooted in many philosophical concepts, economic analysis is not a comprehensive philosophy of law. One may say it is rather a tool a philosopher may use. Nevertheless, this tool became highly influential in the 20th century. It uses economic and econometric methods for the purposes of an analysis of law¹. Its universal character results in its applicability to many branches of law and, therefore, it penetrates the modern way of thinking about the law, it is often used

¹ R. Stroiński, *Wprowadzenie do ekonomicznej analizy prawa (Law and Economics)*, (in:) M. Bednarski, J. Wilkin (eds.), *Ekonomia dla prawników i nie tylko*, Warszawa 2008, pp. 482–526.

in public debate and has a strong influence on legislatures². This essay discusses the economic approach, therefore the very first thing to elaborate on is the nature of such an approach as against criminal law. An initial presumption of economic analysis is that all actors on the market, including individuals committing crimes, act rationally in order to maximize something (e.g. money, utility, pleasure etc.)³. In other words, law and economics are based on the micro-economic theory of rational choices⁴. The idea of rational choices may be seen as highly questionable as applied to suicide bombers, but let's leave that doubt behind for a moment. Another, questionable, presumption is that actors on the market want to maximize something, therefore they are looking for efficient solutions. Note that there is nothing that is desired equally by everybody.

Explaining the concept of efficiency in the context of law is not as simple as it may seem. Initially, it applied to the process of production. To produce something efficiently means either to produce as much as it is possible with given resources, or to produce a given number of goods with as little resources as possible⁵. Unfortunately, this concept may not be easily transposed to the field of criminal law. That is why law and economics has developed more complex concepts of law efficiency. What is worth keeping in mind is that those concepts use different measures to compare given situations. In order to create a comparison of any kind a scale is needed. It could be a number indicating money, time, amount, temperature or anything else we use to describe volume in a certain state. No comparison can be made without a common measurement, for example comparing wind and a mountain seems impossible. So the question arises: how do you measure the law, or, more precisely, its effect? There are as many right answers to that question as measures we can imagine.

One of the commonly used ones is subjective utility which an individual associates with a certain state. Such a subjective indicator is used by the Pareto concept of effectiveness. According thereto, the superior solution is the one that gives a guarantee that it is impossible to make anyone better off without making somebody else worse off⁶. Therefore, a change shall be done (including a change of law) if it would improve the situation of at least one individual without worsening the position of anybody else⁷. This concept not only is highly subjective, but also hard to apply, as there are very few changes in the legal system and in the world in general that can be implemented without making anybody worse off.

² J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów o ekonomii prawa*, Warszawa 2007.

³ R. Cooter, T. Ulen, *Ekonomiczna analiza prawa*, Warsaw 2011, p. 20.

⁴ B. Bouckaert, G. De Geest (eds.), *Encyclopedia of Law and Economics*, Cheltenham 2000, p. 384.

⁵ R. Cooter, T. Ulen, *Ekonomiczna analiza...*, p. 20.

⁶ *Ibidem*.

⁷ J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów...*, p. 30.

Another criterion, used even more commonly, is wealth. Even though it is getting nearly impossible to measure it in very complex situations or in a long time perspective, it provides an objective indicator for assessment of nearly every change in a legal system. Kaldor Hicks' concept of efficiency uses wealth to find out in what circumstances gainers gain enough to compensate the losers. This possibility of compensation constitutes a more effective solution and justifies a change (including a change of law that leads to an alternative allocation of goods)⁸. The compensation itself need not be made⁹. Pure existence of the possibility to make one leads us to the "profit and loss" type of analysis.

As private law serves mainly individuals, criterions such as subjective utility or wealth seem to measure properly the success of legal solutions. Criminal law is different on a very basic level. On the one hand, it clearly protects the rights and interests of individuals. On the other, the reason for its existence is much more complex, based on our common sense of justice and human dignity.

Law and economics gives us a heterogeneous, but in its essence rather simple justification for the criminal law and criminal policy. Their aim should be to reduce social costs of criminal activity¹⁰. Deterrence may be seen as a component of this theory or an independent aim. Some scholars focus more on controlling social phenomena rather than deterring the individual¹¹. But at the end of the day, from the economic point of view, there is no doubt that rational crimes exist. A crime is rational if and only if the gain from committing it outweighs expected punishment (punishment for a given crime X the probability of its imposing). In such circumstances, the perpetrator gains more than he loses, therefore a rational individual would commit the crime¹². Even though the crimes described above are rational, the state still has an obligation to fight them. It is so because the criminal's gain should not constitute a social gain (at least not always). There are two ways to prevent somebody from committing a rational crime. All of them are a matter of criminal policy more than the law itself. A state could invest in education etc. to improve non-economic factors that compel people to obey the law. Secondly, it may try to impose more severe punishments or improve the rate of detectability to outweigh the profits from crime. Such an action is a matter of criminal law.

To fully understand systemic problems in the case of a suicide bombing, it is necessary to elaborate a bit on the nature of and reasons that stand behind the idea of achieving political and social goals via violence and terror. Undoubtedly, suicidal bombing is just one of the strategies used for that purpose, clearly one of the most extreme and quite widespread throughout the world. It is not

⁸ J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów...*, p. 36.

⁹ R. Cooter, T. Ulen, *Ekonomiczna analiza...*, p. 54.

¹⁰ *Ibidem*, p. 597.

¹¹ S. Shavell, *Foundations of Economic Analysis of Law*, Cambridge 2004, chapter 24, p. 3.

¹² R. Cooter, T. Ulen, *Ekonomiczna analiza...*, p. 600.

a new phenomenon nor is it limited to one culture or an ethnic group, however it is nowadays most commonly associated with and used by Islamic groups like ISIS or Boko Haram. There are just a few things common among groups using such a strategy. All of them constitute some kind of a political minority or at least an organization (including state-type) that is denied expression and exercise of their views¹³. Inability to do so in a political way may be caused by lack of power or international recognition or the unacceptable nature of the presented views. Whether a cause for terrorist activity is just or unjust is subjective and as such it is not going to be a subject of this essay.

Aware of the fundamental reason for the existence of terrorism, one is more likely to understand its nature better. It should be perceived as a way of communication, a violent theatre designed to send a message to the world¹⁴. In fact, terrorists are not genuinely interested in the number of resultant casualties, but rather in the reaction their attack causes. The goal may be political, like withdrawal of foreign military forces¹⁵, releasing a prisoner or, more generally, spreading fear and uncertainty among the society¹⁶. What is worth mentioning here is that not only is an “enemy” the one to receive the message. A suicide bombing sends a message also to potential supporters in the country where the attack takes place¹⁷. It is a declaration of power and determination. An attack like a suicide bombing, reported and commented on via social media, praised in radical mosques etc., may serve as a recruitment tool, especially as terrorist organizations broaden their recruitment to include women and children¹⁸.

The effect described above may be bolstered or weakened by the media, including social media. As terrorists seek to send a message, one of the most effective strategies to reduce the incentive to carry out an attack is to limit media attention devoted thereto. At the same time, probably no modern, democratic society would accept censorship in any form. Therefore, there are proposals to create a Media Ethical Code¹⁹. A soft law of that kind does not restrict the media, but rather creates a good standard that in the long-time perspective could have an influence on social security. That is why I consider soft media law a rational and possibly effective compromise between safety and freedom of speech.

Taking into consideration all the factors mentioned above, it becomes clear that terrorism, and especially suicide bombers’ attacks, are rational crimes in

¹³ K. S. Williams, *Textbook on Criminology*, Oksford, New York 2004, p. 494.

¹⁴ R. Borkowski, *Terroryzm ponowoczesny. Studium z antropologii polityki*, Toruń 2011, p. 260.

¹⁵ The most famous example of a fully successful attack of that type was the Madrid bombing. Afterwards, the Spanish government decided to withdraw its military forces from Iraq.

¹⁶ W. Cooper, *Methods for confronting suicide terror*, (in:) O. Faik, H. Morgenstern (eds.), *Suicide Terror – understanding and confronting the threat*, Hoboken 2009, p. 344.

¹⁷ R. Borkowski, *Terroryzm ponowoczesny...*, p. 263.

¹⁸ W. Cooper, *Methods...*, p. 352.

¹⁹ *Ibidem*, p. 235.

the mind of a terrorist. If he is willing to become a martyr, which means death in highly unpleasant circumstances, as a civilized society we are not able to create a punishment more severe than what he is preparing for himself. The European legal tradition identifies human life as central, one of the most important values, therefore the state should not be able to take more from a suicide bomber than what he is about to sacrifice for his beliefs anyway. This conflict arises from the fundamental inconsistency between our common hierarchy of values, punishment based thereon, and the mindset of terrorists. Their view on the hierarchy of values consists of contempt towards life seen as a mean, rather than respect for the individual and their dignity.

Even if an unsuccessful suicide bomber is sentenced to life imprisonment, they achieve their goals at least in some respects. First of all, in line with his initial intentions, albeit in a different manner, they become a kind of a martyr in that they are going to spend the rest of their life in prison, in custody of the group they were fighting against. A failure to kill people does not mean a complete failure, as the captured suicide attacker may become an inspiration for a future generation of terrorists. An example of an imprisoned "brother" may be a useful recruitment tool and, as a result, multiply the final number of casualties in the long run. Moreover, if information about a planned attack becomes public, in a certain way it has a similar effect to an attack itself. A mere attempt rises the level of uncertainty and fear in society, it may cause social pressure on the government to take or withdraw from certain actions. Together with a lack of a clear distinction between domestic and external dangers and the anonymity of terrorists, such a situation significantly rises tensions in society²⁰. Finally, depending on how advanced the preparations were, information thereon may lead to doubts about the state's ability to prevent terrorist attacks. These considerations give rise to a very simple conclusion. A modern democratic state is not able to raise the severity of the punishment and the likelihood of detection enough to deter a suicide bomber from carrying out an attack. The motivation of such a terrorist is usually transcendental, in common speak irrational, completely different than that of left-wing European terrorism²¹. As a result, neither the probability of exposure nor the severity of punishment, which are usually used as tools of deterrence, have strong influence on the decision making process of a suicide bomber.

Applicability of law and economics to the criminal law has been widely discussed and even now one can hardly identify any consensus on the matter. The approach that seems to be the most convincing is a moderate theory of limited application²². The accuracy of economic analysis is defined by the character of a matter (e.g. punishment) and the type of crime. Not in every case do basic presumptions of economic thinking turn to be true. Therefore, from the economic

²⁰ R. Borkowski, *Terroryzm ponowoczesny...*, p. 61.

²¹ *Ibidem*, p. 60.

²² See J. Stelmach, B. Brożek, W. Z. Załuski, *Dziesięć wykładów...*, pp. 139–141.

point of view, criminal law has hardly any influence on a suicide bombing, as it is usually an unreasonable act. However, this conclusion does not question the necessity of adjusting criminal law, and the whole criminal policy, to the changing world. What we need to remember is that although the economic point of view is sometimes highly valuable, it is not the only one. Taking into consideration the factors described above, its application to such a problem remains highly questionable, as it does not give any practical answer thereto. In fact, there are many other goals to be realized by criminal law, not only prevention, deterrence and minimization of damage. Some scholars openly question the applicability of effectiveness as a determinant of criminal law²³. There are many reasons that lead me to join them in those doubts. One of them is the limited applicability of the rational choice doctrine, especially with regard to describing the criminal behaviour of individuals. This is an inconsistency between what we perceive as rational and what a given individual can see as such. What is more, criminal law clearly does not focus only on the individual. In many aspects it is rather community-focused. In fact, I see no possibility to justify the existence of criminal law in a modern country only by reference to one of those approaches. On the one hand, there is a clear and strong need for a law that would protect citizens from wrongdoings of others²⁴. On the other, our system of law shall reflect high values like truth, justice, good and beauty, which were enshrined in the Preamble to the Polish Constitution²⁵. The Constitution, as the most important and high-ranked act of law, mentions human dignity as a value that cannot be infringed by any legal instrument. In the case of criminal law, requirements of consciousness and guilt must be fulfilled²⁶. It expresses a hierarchy of values shared in a country, conduces towards preservation of social peace, as well as protection of dignity, both that of the victim and the perpetrator. Basically, it is a tool that serves a plethora of purposes, not only restoring a profit and loss balance in the society.

I consider those non-efficiency-focused aims of criminal law to have equal importance to effectiveness and other economically focused ones. Moreover, if the economic justification of a criminal norm is weak, these non-economic factors may prove decisive in shaping the law. Therefore, we should be rather focused on values shared among the community rather than the effectiveness of punishments for suicide bombing and other forms of terrorism. Basing criminal policy on fear neither preserves the spirit of liberal democracy, nor does it protect citizens in an effective way. It does not mean that punishments for terrorism should not be severe. Contrary, if there is growing disapproval of violence as a means

²³ B. Brożek, *Ekonomiczna analiza prawa karnego*, (in:) J. Stelmach, M. Soniewicka (eds.), *Analiza ekonomiczna w zastosowaniach prawniczych*, Warszawa 2007, p. 81.

²⁴ R. Cooter, T. Ulen, *Ekonomiczna analiza...*, p. 589.

²⁵ More about the meaning of this reference: W. Dziedziak, *O prawie słusznym (perspektywa system prawa stanowionego)*, Lublin 2015, p. 79 *et seq.*

²⁶ D. Husak, *Overcriminalization. The limits of the criminal law*, Oxford 2008, p. 96.

of communication in society, criminal law should express it in a balanced, unprejudiced way.

What was said regarding criminal law in its strict sense, does not apply fully to criminal policy as a whole. We need to keep in mind that there are non-economic reasons for people to obey the law. Even though some actions are rational crimes, most of us do not commit crimes because of religious or ethical beliefs, customs or the care for our reputation. The list of reasons is long and diverse, but what can be said is that most of the things that stop people from committing rational crimes have something to do with personal morality, a sense of community and the complex process of upbringing. In case of terrorism, a sense of involvement and empowerment also plays a crucial role.

If we are able to identify the circumstances that, combined, create a good environment for terrorism, we shall move to looking for an effective way to eliminate them. As there is no way to deter a determined terrorist from committing the crime, we need to take one step back and prevent such an individual from radicalizing. It is not the role of criminal law to do so. Appropriate steps should be taken in the fields of policy, education and integration in order to eradicate the factors that may trigger violence. Some scholars believe that such an approach is not appropriate while dealing with religiously motivated terrorism²⁷. Taking into consideration that behind religious fundamentalism there are usually the same motives as in the case of political terrorism (exclusion, lack of perspectives and recognition), a change of circumstances could lead to a decrease in popularity of such extreme ideas. This process cannot be quick or simple, as the background of most acts of terror usually includes difficult history, religious, ethnical or cultural incoherence. Nevertheless, a political solution, if prepared with respect for the positions of both sides, has the potential to be long lasting and stable. The conclusion of the British-Irish conflict may serve as one example.

Apart from criminal law and long-term antiterrorist policy, there is another field that needs an efficient solution to preserve public security. That is intelligence, police work, surveillance, criminal procedure and other rules that apply at the stage of identifying a terrorist before an attack. It is crucial for the law to allow for efficient actions of the state in order to prevent a possible attack. The main aim is to correctly identify a suspect, possibly together with other organization members, and arrest them before a bombing or another act of terrorism happens. For the reasons described above, the exact punishment is not of huge importance.

Nowadays, many states have an ability to analyse personal data obtained from computers and smartphones in a way that allows them to spot possibly dangerous people at a relatively early stage of preparation. Not all of those techniques are being (officially) used due to standards of privacy protection. The question of how to find a balance between how far the state is allowed to step into citizens' privacy

²⁷ R. Borkowski, *Terroryzm ponowoczesny...*, p. 272.

and what should be done to maintain safety is one of the most discussed issues in the modern world. It is an ongoing bargain, unfortunately in some parts of the world governed by fear and emotions. There is no one right answer to the question of how much freedom a modern society is ready to give up for its safety. Balancing those two values is partly a matter of personal choice. This paper does not aim to recommend anything, especially as I am convinced that a proper solution depends strongly on the current national and international situation of the country in question as well as the commonly shared hierarchy of values. However, below there are some factors that should be taken into consideration by every responsible and conscious community.

First of all, it is desirable to be possessed of proof for the efficiency of an implemented criminal legal solution. As surveillance alone does not raise the level of security, the state should present at least some proof that data acquired thereby conduces to the effort of preventing terrorist attacks or identifying terrorists. At the same time, the use of data acquired in such an extraordinary way to investigate less severe crimes should be limited. A lack of such proof triggered a serious discussion in the USA a few years ago. Notwithstanding that most citizens agreed that in some cases detention without trial and violent methods of investigation are acceptable, the public opinion was outraged by the fact that such techniques were commonly used even though they did not contribute to any surveillance success. This experience may serve as a warning that extensive attempts to acquire information from an individual are not the most efficient investigation strategy.

The second aspect that is, in my opinion, worth mentioning is that there are some values so crucial to our culture that their core should not be subjected to limitations by the state. According to the Polish Constitution, human dignity is one of them. You can possibly identify two reasons for that. First is the nature of freedoms or values arising from human dignity. Second is the fact that protecting a modern, democratic society cannot be successful if done by destroying its foundation. In other words, we cannot live in a democratic state without at least a basic level of freedom and privacy. Without them a country preserves safety whilst inching towards totalitarianism. Currently, the discussion concerning limits of state power includes not only USA, but also Israel. Due to the extensive and sometimes violent character of the Israeli Army's actions, some of them have been described as "state terrorism"²⁸. Even though such a term may seem extreme, it highlights the psychological aspect of the Israeli strategy, which allows them to survive surrounded by hostile neighbours.

Taking into consideration all the factors above, it becomes clear that although efficiency is a very useful category in many aspects of life, it finds limited applicability in the case of suicide bombers. In this regard, I find no possible punish-

²⁸ K. Liedel, *Terroryzm bliskowchodni*, (in:) K. Liedel, J. Marszałek-Kawa, S. Wudarski (eds.), *Polityczne metody zwalczania terroryzmu*, Toruń 2006, p. 69.

ment that improves the efficiency of criminal law. It is quite a common opinion among experts that in the field of surveillance and investigation techniques, a modern state should do much to improve the efficiency of its actions. A limit to such improvement should be defined by a compromise between freedom and security, designed and agreed to in a democratic way by the society. Unfortunately, we have not been able to reach such a compromise as our views on the importance of freedom and personally felt level of fear differ a lot. What I want to especially stress is that we should not be afraid to look for a just criminal law. Not always is a state going to successfully deter an individual from committing a crime, and for many reasons the popularity of given criminal behaviour rises and decreases in time. What should be constant about our law is that it should give a just response to a wrongdoing.

Summary

This article deals with the problem of modern terrorism, especially suicide bombing, and problems for the criminal law that arise from this phenomenon. It focuses on the limited applicability of the economic analysis of law in the case of religiously motivated terrorism and identifies causes and effects of those limitations. The main aim is to identify problems that may be solved by an effectively designed criminal law and those that need a more complex, possibly value-based approach.

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KEYWORDS

terrorism, economic analysis of law, punishment, deterrence, fairness

SŁOWA KLUCZOWE

terroryzm, ekonomiczna analiza prawa, kary, odstraszanie, funkcja sprawiedliwościowa