

Judgement of 30th September 2008, [K 44/07](#)

Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened

Type of proceedings: abstract review Initiator: First President of the Supreme Court		Composition of Tribunal: 5 judge	Dissenting opinions: 0
Legal provisions under review: Permissibility of shooting down a civil aircraft if it is necessary for state security considerations, and where the aircraft is found to have been used for unlawful acts, in particular as a means of a terrorist attack [Article 122a of the Act of 3 rd July 2002 – The Aviation Law]		Basis of review: Principle of a democratic state ruled by law Protection of human dignity Principle of proportionality Protection of human life [Constitution: Article 2, Article 30, Article 31 paragraph 3, Article 38]	

The challenged regulation envisaged the possibility of shooting down a passenger aircraft in the event of a threat to the security of the state, and where an organ of the air defence command found that the aircraft in question had been used for unlawful acts, in particular as a means for carrying out a terrorist attack. It follows from the substantiation of the governmental draft that the amendment aimed at the adoption of legal solutions that would make it possible to respond to any potential threat from aerial terrorist attacks, and which would allow the air forces of the North Atlantic Treaty Organisation to operate in Polish airspace.

The applicant identified a few reasons that, in his opinion, question the constitutionality of the challenged provision. It stems from the literal wording of the challenged regulation that it is permissible to sacrifice the lives of passengers and crew of a plane for, *inter alia*, the protection of legal values whose status in the hierarchy of constitutional values is lower than human life. Furthermore, the decision to destroy the aircraft would only necessitate undertaking prior ineffective attempts to contact the crew of the plane (infringement of Article 31 paragraph 3, read in conjunction with Article 38 of the Constitution).

The provision also gave rise to doubts as to whether the downing of a plane with passengers on board would constitute the necessary measure for the protection of lives of other people threatened by the terrorist attack. The provision also lacked an explicit declaration that in order to shoot down an aircraft there would have to be no doubts that the aircraft was intended to be used as a means for a terrorist attack. In the opinion of the applicant, such specification of the prerequisites for shooting down a plane had not satisfied, *inter alia*, the requirements of sufficient statutory specificity (Article 2 of the Constitution).

The First President of the Supreme Court emphasised that human life may not be evaluated according to the quantitative criterion or the chance of survival. A regulation envisaging an authorisation of an

organ of public administration to deliberately cause the death of passengers of a plane in order to protect other persons threatened by the terrorist attack infringes the constitutional principle of protecting the life of every human being (Article 38), as well as the principle of proportionality (Article 31 paragraph 3).

In the assessment of the applicant the challenged provision also infringed the constitutional prohibition on violating human dignity, which is absolute in its nature and does not allow for any limitations (Article 30). The authorisation to shoot down a plane with passengers on board deprives these persons of legal protection and renders them objects of a rescue operation aimed at minimising losses on the ground caused by the terrorist attack. This, in turn, results in the infringement of the obligation to treat each person as a subject.

Following the consideration of the case presented herein, the Constitutional Tribunal, on 28th October 2008, issued a signalling procedural decision (reference number S 4/08) addressed to the Sejm, in which the Tribunal pointed out that in order to ensure the integrity of the legal order of the Republic of Poland there existed a necessity of undertaking a legislative initiative in respect of the permissibility of shooting down a foreign civil aircraft in accordance with the provision of Article 18b paragraph 2 point 2 or 3 of the Act of 12th October 1990 on the protection of the state border.

RULING

Article 122a of the Act of 3rd July 2002 – the Aviation Law does not conform to Article 2, Article 30 and Article 38, read in conjunction with Article 31 paragraph 3 of the Constitution.

PRINCIPAL REASONS FOR THE RULING¹

1. “From the purely pragmatic perspective, to produce an effect in the form of the loss of binding force of a challenged provision, it would be sufficient to pronounce its non-conformity to the principle of diligent legislation. [...] Yet, in the opinion of the Tribunal, of central constitutional and axiological significance are [...] issues [...] that are material-legal in nature.
2. The notion of “terrorism” does not have one universally accepted definition; it is most frequently understood as an “unjustified or unlawful use of force or violence against persons or property, aiming at intimidation or coercion of a government or civil society, and, in further perspective – aiming at the promotion of particular political, social or financial objectives”. The essence of terrorist activities lies in the fact that they are usually aimed at persons who do not have any direct influence on satisfying the objectives set by perpetrators, while a condition of their effectiveness is the infliction of a considerable psychological effect (intimidation motive) and the attainment of potentially strong social and media overtones. [...] Regardless of the differences in defining the notion of terrorism and terrorist attack, the general assumption that both the object

¹ The below-presented arguments are excerpts from the reasoning for the ruling, quoted in chronological order.

and the goal of a terrorist attack [...] is always the deprivation of life of the greatest number of people cannot be defended, [...] since one cannot rule out the possibility that the aim of such attack may *in casu* be property of significant value, transportation and industrial infrastructure structures, cultural goods, taking hostage, etc.

3. The analysis of relevant international acts [i.e. documents of the United Nations and of the Council of Europe – editorial note] revealed that the obligation to counteract terrorism and the therewith connected necessity of weighting values, such as public security and rights and freedoms of the individual, does not authorise the establishment of more liberal assessment standards than those normally applied. Similar findings were obtained upon the analysis of domestic constitutional norms. Under the rule of the Constitution of the Republic of Poland of 2nd April 1997, of decisive importance in this regard is Article 228 and the following articles which provide for the constitutional and procedural consequences of extraordinary measures. [...] Pursuant to Article 233 paragraph 1 of the Constitution, in none of the above circumstances may the statute specifying the scope of limitation upon freedoms and rights of the person and the citizen in times of martial law and states of emergency limit (*inter alia*) the freedoms and rights specified in Article 30 and Article 38. [...] the assessment of the constitutionality of a regulation envisaging the possibility of shooting down a civil aircraft in the event where it has been used contrary to the law, in particular, as a means of an aerial terrorist attack, should be undertaken in accordance with the universally binding and interpreted constitutional standards. Independent of any disputes pending against the background of foreign legislations over the legal qualification of the state of affairs resulting from a concentrated terrorist attack, in the light of the Polish Constitution it is impossible – without the initiation of an appropriate formal procedure – to categorise such a state as one of the above-mentioned extraordinary measures. Furthermore, what seems to be of particular significance in the present case is the fact that not even in times of martial law or state of emergency are the rights laid down in Article 30 and 38 of the Constitution subject to any limitation.
4. [...] the legislator may not (...) by way of vague formulation of the content of provisions grant the organs that are supposed to apply them excessive freedom in the determination of the subjective and objective scope thereof. This assumption may generally be defined as the principle of specificity of statutory interference in the sphere of rights and obligations of the legal norm's addressees. Exceeding a certain degree of ambiguity of legal provisions may constitute an independent prerequisite for declaring the non-conformity thereof to the principle of a democratic state ruled by law, as expressed in Article 2 of the Constitution [...]. For the assessment of conformity of a given legal provision's content to the principles of correct legislation, it is, *inter alia*, necessary to determine whether the provision is precise enough to ensure consistent interpretation and application [...].
5. On the grounds of the required degree of precision of legal provisions, Article 122a of the Aviation Law fails to pass the test of constitutionality, undertaken from the perspective of Article 2 of the Constitution. Among the prerequisites justifying the decision to destroy a civil aircraft with passengers on board are such ambiguous phrases as "state security considerations" or the necessity to ascertain that a civil aircraft has been used for "unlawful acts". [...] in the light of linguistic interpretation, at issue may be the whole range of obligations and prohibitions, stemming from the current legal system and connected with, e.g. the smuggling of people or goods smuggling. The protec-

tion of state security may, in turn, be connected with the necessity to protect state secrets, the infrastructure that is necessary for the undisturbed functioning of organs public authority organs, etc. Furthermore, in the light of Article 31 paragraph 3 and Article 38 of the Constitution, it is even possible to adopt an initial assumption that the prerequisite “state security considerations” does not, as a matter of principle, overlap with the protection of “life and health of citizens” or the protection of “public order”.

6. Human life is the highest value in our civilisation and legal culture. Furthermore, according to the Constitution, such legal value as human life is not subject to any differentiation. Both Polish and foreign constitutional jurisprudence emphasise the significance of the right to legal protection of life as the most fundamental right of the individual, conditioning the possession and realisation of any other rights and freedoms. However, the significance of the right to life goes beyond the individual-subjective context thus understood.
7. [...] the protection of human life also remains in close connection with the democratic state ruled by law clause. “Such a state can only exist as a commonwealth of people, and only people may be the legitimate carriers of rights and obligations laid down in such a state. Life is the fundamental attribute of a human being. Hence, the deprivation of life annihilates the human being as the carrier of rights and obligations. If the essence of the rule of law is a set of fundamental directives inferred from the essence of law enacted in a democratic manner, and providing for the minimum level of fairness thereof, then the foremost such directive in a state ruled by law must be the respect for the value without which it is impossible to recognise a person as a carrier of rights, i.e. human life from its beginning”.
8. [...] the constitutional obligation to protect life, or, put differently, the right to legal protection of the life of every human being, has a double meaning. The legal protection of life, as guaranteed by Article 38 of the Constitution, should, above all, be understood as the prohibition on depriving a human being of their life. In this “protective” context, the legal protection of life is a consequence of the “right to life” vested in every person. [...] besides this “protective” content of the right to life, Article 38 of the Constitution also envisages an obligation incumbent upon public authorities to undertake positive activities aiming at the protection of life. [...] The protection of human life may not solely be understood as the protection of a minimum set of biological functions necessary for existence, but as the guarantee of normal development as well as the attainment and maintenance of a good psychophysical condition, characteristic of a particular developmental age (stage of life)”. Accordingly, the above-identified positive aspect of the right to legal protection of life encompasses the positive obligations of a state, which is confirmed in the jurisprudence of both the European Court of Human Rights and constitutional courts of other European states. Hence, in the event of a potential terrorist or military threat or civil unrest of different origin, the obligation to ensure the safety of its citizens would constitute one other element of the legal protection of life. [...].
9. The right to legal protection of life is not absolute in its nature. [...] The statement that human life, in each stage of its development, is a constitutional value and is subject to protection, does not signify that the intensity of the protection in each stage of life and in all circumstances should be the same. The intensity and type of legal protection is not a simple consequence of the value of the interest protected. The intensity and type

of legal protection is influenced, apart from the value of the interest protected, by a number of factors of different nature that have to be taken into account by the ordinary legislator when deciding upon the type and intensity of legal protection. The protection should, however, always be sufficient from the perspective of the value to be protected [...].

10. The Constitutional Tribunal has allowed for the limitation of the legal protection of life where it is necessary on account of the need to protect or realise other constitutional values, rights or freedoms. Based on this assumption, the Tribunal identified the general criteria that may legalise the deprivation of life, emphasising that it is necessary to determine: „a) whether the legal value whose violation is to be legalised by the legislator is a constitutional value; b) whether the legalisation of the violation of the legal value in question may be justified on the grounds of constitutional values (...); c) whether the legislator respected the constitutional criteria for resolving such collisions, and, in particular, whether it observed (...) the requirement of proportionality”.
11. Consequently, Article 38 of the Constitution, which guarantees the legal protection of the life of every human being, comprises, *inter alia*, the prohibition on introducing to the ordinary legislation the death penalty and other institutions that would allow state organs to intentionally and purposefully deprive a human being of their life.
12. The well-established jurisprudence of the Constitutional Tribunal defines the prerequisites and the model for the assessment of the constitutionality of legal solutions that specify the manner in which collisions between the constitutionally protected legal values should be solved on the basis of the provision of Article 31 paragraph 3 of the Constitution. The provision in question contains a cumulative list of prerequisites for the admissibility of the limitation upon the exercise of constitutional rights and freedoms. The prerequisites are: the statutory form of the limitation, the existence of a necessity to introduce the limitation in a democratic state ruled by law, the existence of a functional relation between the limitation to be introduced and the realisation of interests laid down in Article 31 paragraph 3 (state security, public order, protection of the natural environment, health and public morals, the freedoms and rights of other persons), as well as the prohibition on violating the essence of a given right or freedom [...]. The statement that the limitations may only be introduced when they are necessary in a democratic state ruled by law requires one to consider whether the regulation introduced is capable of leading to the intended results; whether the regulation in question is indispensable for the protection of public interest with which it is connected; whether the effects of the regulation introduced are proportional to the burdens it places upon the citizen.
13. The assessment methodology developed on the basis of Article 31 paragraph 3 of the Constitution may also be applied to solutions that limit the legal protection of life, however, with two important limitations. First, the prerequisite of necessity must be interpreted particularly restrictively, in the direction convergent with the criterion of “absolute necessity”, as developed in the jurisprudence of the European Court of Human Rights on the basis of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms [...]. Compared to general standards, each instance of the limitation upon the legal protection of human life must be regarded as the *ultima ratio* measure. Second, on account of the fundamental nature of the right to life in the constitutional axiology, not all interests enumerated in Article 31 paragraph 3 of

the Constitution may justify solutions that violate the right at issue. Without further elaboration, it is possible to conclude that the limitation upon the legal protection of the life of a human being imposed for the purpose of protecting interests ranking lower in the constitutional hierarchy, e.g. related to ownership and other property rights, public morals or even health of other persons, would be totally unacceptable in a democratic state ruled by law, implementing the principles of social justice and protecting life as well as the inalienable dignity of the person. Accordingly, the limitation upon the right to legal protection of life is conditional upon the existence of a situation in which the right cannot be reconciled with analogous rights of other persons. This prerequisite may generally be defined as the requirement of a symmetry of values: the sacrificed and the saved one.

14. The provision of Article 122a of the Aviation Law cannot be reconciled with [...] the constitutional standard of the legal protection of the right to life and the prerequisites for the limitation thereof. [...] First, in view of the unusually general content of Article 122a of the Aviation Law as well as the unclear system of references and the delegation to a sub-statutory regulation of essential elements of an assessment undertaken while taking a decision on the destruction of an aircraft, it is necessary to acknowledge that the statutory form of a regulation, required in such circumstances, has not been fully observed [...]. [...] Second, the mechanism prescribed by Article 122a of the Aviation Law [...] has to be regarded, in many cases, as inadequate for the intended goal. As the hypothetical calculations regarding both the duration of flight [within the territory of Poland] and the response time of air defence forces demonstrate, there is no possibility to take and execute a correct decision on most approaches to Polish airports. [...]. Third, it is difficult to agree with the argument that the challenged regulation is indispensable for the protection of a constitutionally protected legal value that does not stand lower in the constitutional hierarchy than the value sacrificed, while the effects thereof remain in appropriate proportion to the burdens imposed by the regulation. [...] human life is not subject to evaluation on account of age, state of health of the individual, the expected life span or any other criteria. Each person, including the passengers of a plane flying in the airspace of a given state, has the right to have their life protected by that state. The self-granted authorisation of the state to kill these persons, if only for the protection of lives of other people, remains in contradiction with the right at issue. That said, it is necessary to emphasise that the assessment of the threat for the persons on the ground is, by and large, always hypothetical, whereas for the persons on board the decision to shoot down an aircraft is a real and irreversible threat, which, in fact, means certain death. [...] Fourth, even if it were possible, as the *ultima ratio* measure, to justify the destruction of an aircraft which has been used to carry out a terrorist attack, and on board of which there are only perpetrators who have chosen to die in order to kill other persons, it is by no means permissible to expose to certain death passengers and crew members, who are not aggressors but rather the victims of the perpetrators.
15. [...] the challenged provision of Article 122a of the Aviation Law infringes the guarantees of the right to life as well as the legal protection thereof, as stemming from Article 38 of the Constitution. The opposite conclusion cannot be justified either by the construction of a “uniform weapon”, with the passengers of the hijacked plane thus becoming part thereof, or by a “tacit consent” to the above-described activity of state authorities in the event of a terrorist attack, or, finally, by a statement that the obligation to protect the life of persons remaining in the area thought to be the aim of a ter-

rorist attack “lifts” an analogous obligation to protect the lives of passengers and the crew of the RENEGADE aircraft. Finally, it does not seem justifiable in the Polish constitutional order to create special theoretical or philosophical-legal concepts of “suspension” or “modification” of civil right guarantees in times of „war on terrorism”. The obligation to guarantee security, which constitutes a component of the right to legal protection of life in its positive aspect, is incumbent upon the state in regard to both the persons staying on the ground and those on board a plane. The failure on the part of the state to effectively fulfil the obligation does not release the state from the observance of the negative aspect of the right to legal protection of life, i.e. the prohibition on a deliberate deprivation of life of innocent people.

16. On the basis of Article 30 of the Constitution human dignity should be recognised as a constitutional value, which is of fundamental significance to the axiological basis of current constitutional solutions. A democratic state ruled by law is a state founded on the respect for the individual, and, in particular, on the respect for, and the protection of, life and human dignity. The two values are, as a matter of fact, directly interconnected. [...] The recognition of both the inalienable dignity of a person as a constitutional principle and the rights of every human being – irrespective of their qualification, psychophysical condition or their current personal situation – constitutes the basis for regarding the individual as the carrier of rights. This statement prescribes a certain manner of practice for state organs, including the legislative and executive branch of power. A human being should be treated as a free, autonomous subject, capable of developing their own personality and shaping their own conduct.
17. From the perspective of the analysed basis of review, the provision of Article 122a of the Aviation Law would not have resulted in [...] so serious constitutional doubts if it had only envisaged the shooting down of a plane with only perpetrators on board, since these people themselves provoked the situation: they decided of their own free will to die, simultaneously threatening the lives of innocent people. If they are shot down, they die in a fight they have themselves started. Accordingly, they cannot be said to have been treated as objects. Such an ultimate legal measure, when used against persons on board who are not aggressors, i.e. the remaining passengers and crew, certainly violates their personal dignity.
18. [...] it is possible to conclude that the application of the challenged provision results in the “depersonalisation” and “reification” of those persons on board the RENEGADE aircraft who are not aggressors (i.e. passengers and crew members). The persons become solely the object of a rescue operation, aiming at the prevention of potential further losses that could result from a guided terrorist attack. Simultaneously, the argument that passengers and the crew of the RENEGADE aircraft have found themselves in the situation solely as a result of an unlawful activity of perpetrators must be considered false, for it is indirectly indicative of a failure of the state to fulfil its positive protective obligations.
19. While undertaking a “vertical” assessment of the compatibility between the elements of the legal system in such a pivotal subject-matter as the weighting of public security issues and the right to legal protection of lives of particular individuals, including those on board the RENEGADE aircraft, the Constitutional Tribunal unequivocally gives priority to such values as life and human dignity. These values constitute the foundation of the European civilisation and outline the semantic content of humanism,

a notion that is central to our culture (including the legal one). The values are inalienable in a sense that they do not allow for any “suspension” or “forfeiture” in a particular situational context. Humanism is not an attitude which is a peculiar decorum followed solely in times of peace and prosperity, but rather a value whose best measure are critical situations, sometimes extremely difficult. From the point of view of the most rudimentary assumptions of our legal system, the opposite conclusion would have to be rendered unacceptable. The Tribunal is convinced that since it is possible to fight against organised crime or conduct a regular war without the need to completely negate or “suspend” the fundamental rights and freedoms of the citizen, it is also possible to fight terrorism without the far-reaching interference in the fundamental right of the uninvolved persons, namely their right to life.”

[Translation: *Marek Łukasik*]

Provisions of the Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 30. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Art. 31. [...] 3. 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. 38. The Republic of Poland shall ensure the legal protection of the life of every human being.

Art.228. 1. In situations of particular danger, if ordinary constitutional measures are inadequate, any of the following appropriate extraordinary measures may be introduced: martial law, a state of emergency or a state of natural disaster.

2. Extraordinary measures may be introduced only by regulation, issued upon the basis of statute, and which shall additionally require to be publicized.

3. The principles for activity by organs of public authority as well as the degree to which the freedoms and rights of persons and citizens may be subject to limitation for the duration of a period requiring any extraordinary measures shall be established by statute.

4. A statute may specify the principles, scope and manner of compensating for loss of property resulting from limitation of the freedoms and rights of persons and citizens during a period requiring introduction of extraordinary measures.

5. Actions undertaken as a result of the introduction of any extraordinary measure shall be proportionate to the degree of threat and shall be intended to achieve the swiftest restoration of conditions allowing for the normal functioning of the State.

6. During a period of introduction of extraordinary measures, the following shall not be subject to change: the Constitution, the Acts on Elections to the Sejm, the Senate and organs of local self-governments, the Act on Elections to the Presidency, as well as statutes on extraordinary measures.

7. During a period of introduction of extraordinary measures, as well as within the period of 90 days following its termination, the term of office of the Sejm may not be shortened, nor may a nationwide referendum, nor elections to the Sejm, Senate, organs of local self-government nor elections for the Presidency be held, and the term of office of such organs shall be appropriately prolonged. Elections to organs of local self-government shall be possible only in those places where the extraordinary measures have not been introduced.

Art.233. 1. The statute specifying the scope of limitation of the freedoms and rights of persons and citizens in times of martial law and states of emergency shall not limit the freedoms and rights specified in Article 30 (the dignity of the person), Article 34 and Article 36 (citizenship), Article 38 (protection of life), Article 39, Article 40 and Article 41, para.4 (humane treatment), Article 42 (ascription of criminal responsibility), Article 45 (access to a court), Article 47 (personal rights), Article 53 (conscience and religion), Article 63 (petitions), as well as Article 48 and Article 72 (family and children).

2. Limitation of the freedoms and rights of persons and citizens only by reason of race, gender, language, faith or lack of it, social origin, ancestry or property shall be prohibited.

3. The statute specifying the scope of limitation of the freedoms and rights of persons and citizens during states of natural disasters may limit the freedoms and rights specified in Article 22 (freedom of economic activity), Article 41, paras. 1, 3 and 5 (personal freedom), Article 50 (inviolability of the home), Article 52, para. 1 (freedom of movement and sojourn on the territory of the Republic of Poland), Article 59, para. 3 (the right to strike), Article 64 (the right of ownership), Article 65, para. 1 (freedom to work), Article 66, para. 1 (the right to safe and hygienic conditions of work) as well as Article 66, para. 2 (the right to rest).