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THE CRIME OF TAX FRAUD IN SPAIN

JUAN CARLOS FERRÉ OLIVÉ*

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1. INTRODUCTION

A long legislative evolution of the Spanish criminal law system, which is to protect the State Treasury and social security administration, results in determination of offences and illegal acts, which is referred to in literature as "an axis of economic penal law".[1] Those legally protected interests that were earlier unknown have now become one of the most rapidly developing criminal law fields. It is not possible to discuss all the issues connected with those offences in this paper.[2] Thus, the analysis is limited to basic aspects of tax fraud (Article 305 Spanish Criminal Code, hereinafter: SCC).[3]

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1 M. Bajo Fernández, [in:] M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública*, Madrid 2000, p. XIII.

2 For more, see J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública y la Seguridad Social*, Tirant lo Blanch, Valencia 2018.

3 Article 305 para. 1 Criminal Code: "Any person who, whether by action or omission, defrauds the state, regional or local treasury, avoiding the payment of taxes or deductions, or amounts that should have been deducted, or payments on account, wrongfully obtaining rebates or likewise enjoying fiscal benefits, provided that the amount of the defrauded payment, the unpaid amount of deductions or payments on account or the amount of the rebates or fiscal benefits wrongfully obtained or enjoyed exceeds one hundred and twenty thousand euros, shall be punished with a prison sentence of between one and five years and a fine of up to six times the aforesaid amount, unless his tax situation has been brought into compliance with the terms of section 4 of this article. The mere filing of returns or making of voluntary payments does not preclude fraud, where other facts provide evidence of that. In addition to the sentences stated, the person accountable shall lose the possibility of receiving state grants and aid and the right to enjoy fiscal or social security benefits or incentives for a period of between three and six years".

2. LEGAL-TAX RELATION

The recognition of tax fraud requires that a perpetrator have one or a few tax obligations and legal-tax relations with the tax administration.[4] It is a very important element because in case there are no such relations, a perpetrator may be prosecuted for an offence against property. It takes place, e.g. when a perpetrator deceives the tax administration claiming VAT return, although he has had no tax obligation whatsoever. Article 305 para. 1 SCC, which regulates tax fraud, functions as a blank norm. This means that in order to check if its features are matched (if it is fraud in the form of tax evasion or undue tax exemption), it must be established whether tax obligations resulting from tax regulations have been breached. This makes it possible to establish whether there is a legal-tax relation between the parties, i.e. the tax administration, a taxpayer or his proxy and an activity that is subject to taxation that results in an unfulfilled tax obligation.[5] For determination of that, the provisions of the General Tax Act or acts regulating particular taxes necessary to identify tax obligation and its due amount are applied with the use of the factual and evaluative criteria.[6] A taxpayer's financial obligations include due tax payment (Article 19 General Tax Act, hereinafter: TA) and contribution to sustain public expenditure (Article 31 para. 1 Spanish Constitution), which are enforced by the tax administration. There are also other obligations such as collection of advance payments and bank transfers. On the other hand, formal obligations are important, i.e. timely submission of tax returns in a special form, which makes it possible to calculate due tax amounts and proper bookkeeping that also results in tax obligations. Tax massification of the last decades hampers or prevents exhaustive control of an individual taxpayer's situation. Such a state requires generalisation of obligations that become the essence of the above-mentioned legal-tax relation. This relation, administrative in nature, consists in calculation and collection of taxes.[7]

The offence under Article 305 SCC can be recognised in case of failure to fulfil a tax obligation and because of that is connected with a concept used in tax law, which precisely, with the use of statutes and ordinances, lays down taxpayers' obligations.[8] It especially concerns data essential from the taxation point of view of tax authorities responsible for tax collection (formal obligations) and payment obligation (financial obligation).[9]

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[4] C. Martínez-Buján Pérez, *Derecho Penal Económico y de la Empresa. Parte Especial*, 5th edition, Tirant lo Blanch, Valencia 2015, p. 622; F. Morales Prats, *De los delitos contra la Hacienda Pública y contra la Seguridad Social*, [in:] G. Quintero Olivares (dir.), *Comentarios a la Parte Especial del Derecho Penal*, 10th edition, Aranzadi, Navarra 2016, p. 1042; I. Ayala Gómez, *Los delitos contra la Hacienda Pública relativos a los ingresos tributarios: el llamado delito fiscal del art. 305 del Código Penal*, [in:] E. Octavio de Toledo (dir.), *Delitos e infracciones contra la Hacienda Pública*, Valencia 2009, p. 98.

[5] F. Pérez Royo, *Los delitos y las infracciones en materia tributaria*, Instituto de Estudios Fiscales, Madrid 1986, p. 79.

[6] Cf. C. Martínez-Buján Pérez, *Derecho Penal Económico…*, *Parte Especial*, p. 622 ff.

[7] Cf. I. Ayala Gómez, *Los delitos contra la Hacienda Pública…*, p. 99 ff.

[8] Cf. C. Martínez-Buján Pérez, *Derecho Penal Económico y de la Empresa. Parte General*, 5th edition, Tirant lo Blanch, Valencia 2016, p. 322.

[9] Cf. F. Muñoz Conde, *El error en Derecho Penal*, Tirant lo Blanch, Valencia 1989, p. 103.

Tax massification causes that administrative control is troublesome and complicated. A self-assessment tax system is used but it requires that taxpayers have complex legal skills, which are not within the scope of knowledge of most members of the public, and results in incurring expenses on tax consulting services in order to fulfil tax obligations.

3. THE CONCEPT OF FRAUD

The causative act consists in fraudulent activity or omission that creates or increases risk and requires a financial and legal consequence which has impact on the indirect object of protection (the functioning of the State Treasury) by an attempt against the direct object of protection (the tax base). As it is rightly stated in the doctrine,[10] the condition for fraud results directly from the financial object of protection. If the state property is to be protected, the protection of the property should be thoroughly determined in order to avoid inadmissible imprisonment for debts. There is also another argument, which departs from the protection of the state property and interprets the concept of fraud for fiscal penal purposes and adopts new characteristics from the perspective of economic crimes.[11] Nevertheless, there are different approaches to the conditions for fraud: the assumption of fraud and the assumption of the breach of duty are most important. Regardless of the adopted standpoint, there is some unanimity concerning the statement that a mere failure to pay the due tax does not automatically mean the commission of tax fraud.[12] The following theories concerning the meaning of deception are presented in the doctrine:

(1) Deception that is explicitly like the offence of a confidence scheme. Many authors state that deception is a condition for the occurrence of the crime of tax fraud, i.e. artifice, a stratagem must take place; it is connected with a real *mise-en-scène*.[13] It is something more than just causing economic loss or failing

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[10] J. Bustos Ramírez, *Bien jurídico y tipificación de la reforma de los delitos contra la Hacienda Pública*, [in:] J. Boix Reig, J. Bustos Ramírez, *Los delitos contra la Hacienda Pública*, Madrid 1987, p. 32.

[11] For more on the object of protection, see: J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública…*, p. 109 ff; by the same author, *El bien jurídico protegido en los delitos tributarios*, Revista Penal No. 33, 2014.

[12] A. Castro Moreno, *Elusiones fiscales atípicas*, Barcelona 2008, p. 15. In the 1980s, an opinion was supported that the offences also included "civil disobedience", i.e. a perpetrator's intentional resistance to tax payment; thus C. Lamarca, *Observaciones sobre los nuevos delitos contra la Hacienda Pública*, Revista de Derecho Financiero y de Hacienda Pública, 1985, p. 773 ff. Nevertheless, in my opinion, such conduct cannot be prosecuted because it does not concern the object of protection, i.e. tax determination. The amount is known, which opens the way to execution with the use of administrative means.

[13] G. Rodríguez Mourullo, *El nuevo delito fiscal*, [in:] *Comentarios a la legislación penal*, Madrid 1983, p. 261; M. Bajo Fernández, *Manual de Derecho Penal, Parte Especial*, Vol. 2, Madrid 1987, p. 431; M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública…*, p. 48; J. Boix Reig and J. Mira Benavent, *Los delitos contra la Hacienda Pública y la Seguridad Social*, Tirant lo Blanch, Valencia 2000, p. 48; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública y la Seguridad Social*, [in:] J. Boix Reig (dir.), *Derecho Penal, Parte Especial*, Vol. 3, Iustel, Madrid 2012, p. 18 ff; F. Morales Prats, *De los delitos contra la Hacienda Pública…*,

to fulfil tax obligations. It requires an operation misleading the public administration, detriment to property and special deceptive intention. Therefore, the offence of a breach of duty is not included in this category because it does not contain deception. In this context, it would be difficult to include the offence of omission in this category. Some authors believe that crime is not committed in case of failure to submit a tax return if the Treasury's loss results from laziness or negligence of the tax administration controlling the payment of due taxes.[14] C. Martínez-Buján Pérez supports this approach, although his opinion is closer to the theory of the breach of duty. According to him, deception has features that do not exactly match the structure of a confidence trick but is more than just a breach of duty. Deception requires the kind of conduct that may have impact on the object of protection, "hiding a tax base or basic data, which may prevent or hamper calculation of due tax".[15]

(2) Breach of duty. It is believed that Article 305 para. 1 SCC does not require any specific deception but intentionally causing financial loss to the State Treasury with the breach of financial obligations resulting from the legal-tax relation.[16] Because of that, its scope is limited to the breach of financial obligations associated precisely with the breach of duty to pay. It is an offence with consequences that is materialised in property loss resulting from the breach of duty. It requires all kinds of conduct, activity or omission, provided that the breach of duty is connected with causing a classified consequence. In some cases one can notice a deceptive conduct. However, deception is not necessary because the offence consists in the breach of tax obligation that results in property loss. Deception, artifice or *mise-en-scène* is not required.[17] Supporters of this approach believe that the concept of fraud is not unambiguous because it adopts a different meaning depending on the context set by the object of protection. Thus, in order to speak about fraud, it is enough to breach the tax obligation and cause a loss, which is done by a perpetrator who manipulates data constituting the tax base and by one who knows about the obligation to submit a tax return and does not do this.

In other words, an offence of tax fraud is committed even in case the tax administration has not been deceived. It may take place, e.g. when the tax administration knew the amount of due tax. It does not matter and has no effect whether the owner of the object of protection knows about deception or lacks this knowledge.

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p. 1049, the author assumes that omission does not require a lie. Similarly, M. Acale Sánchez and G. González Agudelo, *Delitos contra la Hacienda Pública y la Seguridad Social*, [in:] J.M. Terradillos Basoco (coord.), *Lecciones y materiales para el estudio del Derecho Penal*, Vol. 4, 2nd edition, Madrid 2016, p. 203.

[14] M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública…*, p. 53.

[15] C. Martínez-Buján Pérez, *Derecho Penal Económico…*, *Parte Especial*, 5th edition, p. 624.

[16] This is what I used to state. I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude tributario*, Barcelona 1994, p. 49 ff. Others also claim so, inter alia, F. Pérez Royo, *Los delitos y las infracciones…*, p. 113; E. Gimbernat Ordeig, *Consideraciones sobre los nuevos delitos contra la propiedad intelectual*, Rev. Poder Judicial, No. especial IX 1989, p. 352.

[17] L. Gracia Martín, *La configuración del tipo objetivo del delito de evasión fiscal en el Derecho penal español: crítica de la regulación vigente y propuestas de reforma*, Civitas. Revista española de Derecho Financiero No. 58, 1988, p. 275 ff.

In my opinion, in the offence of tax fraud "to deceive" means "to hide". I believe that the requirement of deception means the breach of a formal duty, which is materialised in hiding or disfiguring of the tax base, which prevents determination of the amount of tax (lack of knowledge of its amount).[18] It consists in hiding the activity that is subject to taxation by concealment of the truth and, through action or omission, leading to the violation of the State Treasury's object of protection. Deception within the meaning of a confidence trick is not necessary, and there may be no will of deception.[19] This conclusion results from the fact that the Spanish legislator unfortunately used the term fraud. The imprecision results from erroneous assessment of the object of protection. The legislator aimed to protect the State Treasury with the use of property-related criteria, while it would be appropriate to use other criteria more adequate to the social and economic nature of this legal interest. Building the type on the basis of fraud, it seems that "the model of confidence trick" was adopted, which means that it is required that a perpetrator commit deception, have intention of deception and cause a change and a financial loss. It is a totally unusual confidence trick because the offence of confidence trick consists in deceptive conduct concerning somebody else's property. Tax fraud takes place within one's own property because a taxpayer's liability arises earlier and is contained in his own property.[20]

Conclusions are made in literature that the breach of duty is necessary but this element is not connected with financial obligations but with formal obligations, which ban hiding a tax base. In order to provide grounds for penal fiscal liability, the requirement of a breach of duty should not be applied automatically[21] and based on the lack of payment. This results in basic features of the content of the verb '"deceive" within the scope of fiscal penal law. That is why, I believe that failure to fulfil tax obligations does not mean fraud and requires more elements. This is connected with creating or increasing the risk that a consequence may occur, i.e. with the hiding of the tax base, which is next materialised via specified forms of conduct such as avoiding payment, groundless return of tax or unfounded use of tax exemptions. All that should result in an indefinite due tax amount.

Tax fraud is not connected directly with the features of a confidence trick; it has its own meaning and its own form in fiscal penal law. It is rightly assumed in the

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[18] On this point of view, see: F. Pérez Royo, *Delito fiscal y ocultación*, [in:] M. Bajo Fernández (dir.), *Política fiscal y delitos contra la Hacienda Pública*, Ramón Areces, Madrid 2007, p. 223 ff; I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 106; J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal: cuestiones y soluciones*, Bosch, Barcelona 2011, p. 94 ff; J.M. Martín Queralt et al., *Curso de Derecho Financiero y Tributario*, 25th edition, Madrid 2014, p. 597. There were similar opinions about fraud against Social Security: M. Bustos Rubio, *La regularización en el delito de defraudación a la Seguridad Social*, Tirant lo Blanch, Valencia 2016, p. 56. I believe that the opinion is not far from it (hide or distort the tax base): A. Nieto Martín, *Delitos contra la Hacienda Pública y la Seguridad Social. Delitos de contraband*, [in:] *Nociones fundamentales de Derecho Penal. Parte Especial*, 2nd edition, Tecnos, Madrid 2015, p 316.

[19] The author supporting the requirement of sufficient deception within the meaning applied to a confidence trick is J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal*…, p. 98. I. Ayala Gómez tries to place hiding close to deception, I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 115.

[20] J. Bustos Ramírez, *Bien jurídico y tipificación*…, p. 33.

[21] Thus, F. Pérez Royo, *Delito fiscal y ocultación*…, p. 223.

doctrine that deceptive conduct under Article 305 SCC is directly connected with the breach of the obligation to submit a tax return and information, which a fraud perpetrator owes, "a beam on which a building of tax imposition system rests".[22] If tax bases are not hidden or disfigured and operations are legal and reflected in bookkeeping, in the whole corporate documentation and in tax returns, and tax control does not show irregularities, one cannot speak about fraud because nothing is hidden. This means that:

– A simple failure to pay due tax is not sufficient to commit the offence of tax fraud.[23]
– Deception, artifice, *mise-en-scène* or omission are not required (attributing deceptive nature to omission of a tax return submission).[24]
– Subject-related elements such as intention are not required; it is necessary to take into account that the tax administration is not always able to control mass tax management. An entity's special will to act does not matter; it is enough to establish the intention to hide a tax base, regardless of any other aims that can be proved.
– Criminal law should not be applied in a situation when the tax administration knows about liabilities that have not been hidden by a taxpayer, his proxy or a person acting on his behalf[25] because the tax has not been established. To deceive means that the conduct of action or omission causes that the administration has no knowledge about a tax base. Thus, what are the conditions for speaking about the administration's lack of knowledge? If it is required to have potential knowledge, with the use of modern technologies and a possibility of exchanging data, the administration can potentially know about everything and make offences against the State Treasury impossible to commit. In the face of massification and millions of existing data, it is necessary to prove that the administration possesses real knowledge of a taxpayer's tax data in order to exclude fraud based on the taxpayer's own activities. For example, the fact of failing to pay taxes that are in the personal income "tax return draft", which revenue offices collect and which are at a taxpayer's disposal, is not a crime.[26] Hiding activities that are subject to taxation, even if the administration could check them, matches the features of tax fraud.[27]
– It is not required that the tax administration make an error that might be a prerequisite from the perspective of the theory of deception. In our system based on tax self-assessment, tax management to a large extent is a taxpayer's respon-

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[22] *Ibid*.

[23] I. Ayala Gómez, *Los delitos contra la Hacienda Pública…*, p. 108; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública…*, p. 19; E. Mestre Delgado, *Delitos contra la Hacienda Pública y contra la Seguridad Social*, [in:] C. Lamarca (coord.), *Delitos. La parte especial del Derecho Penal*, Madrid 2016, p. 553.

[24] A. Castro Moreno, *Elusiones fiscales atípicas…*, p. 57.

[25] F. Pérez Royo, *Delito fiscal y ocultación…*, p. 224; J.A. Choclán Montalvo, *Responsabilidad de auditores de cuentas y asesores fiscales*, Bosch, Barcelona 2003, p. 187; J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal…*, p. 108; E. Mestre Delgado, *Delitos contra la Hacienda Pública…*, p. 554.

[26] A. Nieto Martín, *Delitos contra la Hacienda Pública y la Seguridad Social…*, p. 317.

[27] C. Martínez-Buján Pérez, *Los delitos contra la Hacienda Pública y la Seguridad Social*, Tecnos, Madrid 1995, p. 45; I. Ayala Gómez, *Los delitos contra la Hacienda Pública…*, p. 117.

sibility, and the administration's task is to control, check and verify. That is why, hiding or simulating activities that are subject to taxation and its amount, and conduct posing a threat of causing a consequence, regardless of a potential error on the part of the aggrieved are banned.[28]

In my opinion, a failure to fulfil a formal obligation is critical to the essence of an offence and deception; if a tax return is proper and there is a lack of payment without hiding due amounts, the condition of fraud is not met.[29]

Deception does not take place, either, in case data are accurate and there are differences in calculations or operations connected with the calculation of tax, which can even be justified by a different legal assessment of the tax regulations applied. Obviously, difficulties with proper comprehension of tax regulations may lead to an error; nevertheless, also in this case there are no grounds for recognising deception. As it is rightly stated: "There are no secrets in arithmetic operations or the application of regulations. They are either correct or erroneous; in the latter case, they are corrected by an authorised entity, i.e. the tax administration with no need to apply to a judge to do that".[30]

As far as the object-related aspect is concerned, it is an offence the consequence of which consists in a failure to determine a tax base. Thus, it is necessary to check the criteria for objective attribution of the consequence.[31] As it is rightly noticed, the aim of protection is of transcendent importance. In other words, the objective laid down in Article 305 SCC is not the same as the aim of the offence of a confidence trick. It is highlighted that the provision aims to prevent "as a result of the breach of duty by a taxpayer, a competent tax administration body from being obliged to perform controlling activities and examining data, the provision of which is clearly laid down in statute and the lack of which in a tax return makes the body thoroughly calculate the due tax amount".[32]

4. AIDING AND ABETTING

Only someone who deceives the State Treasury, i.e. only someone who can legally and factually act this way, may be a perpetrator of a tax offence.[33] Namely, it concerns a tax debtor (a taxpayer or his representative) and other entities that are subject to taxation (Article 35 para. 2 TA). It is an individual offence,[34] which may only

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[28] I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 121 ff.

[29] E. Mestre Delgado, *Delitos contra la Hacienda Pública*…, p. 554.

[30] F. Pérez Royo, *Delito fiscal y ocultación*…, p. 227 ff.

[31] I. Ayala Gómez, *Los delitos contra la Hacienda Pública*…, p. 110. He is right to state that the limitation of conduct capable of violating the object of protection in case of this offence is part of the object-related aspect.

[32] C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 627.

[33] J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública*…, p. 177 ff.

[34] I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude tributario*…, p. 39; J. Bustos Ramírez, *Bien jurídico y tipificación*…, p. 33; C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 636; M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública*…, p. 81; F. Muñoz Conde, *Derecho Penal, Parte Especial*,

be committed by someone who has special features or conditions, in this case an obligatory financial legal-tax relation.[35]

Therefore, only persons enumerated in Article 35 and the following TA may be perpetrators of the offence. They include:

– A taxpayer, i.e. an entity who is involved in an activity consisting in taxation (Article 36 para. 2 TA). The main person obliged by the legal-tax relation is one who owes financial and formal duties laid down in tax law. A taxpayer is a person who owes a particular stipulated tax obligation. It is someone who obtains income or benefits in case of direct taxes (personal income tax – IRPF; corporate income tax – IS; non-residents' income tax – IRNR). An individual entity may be a perpetrator of the offence of tax fraud. In case of indirect taxes, namely VAT, the issue is more complicated. It is a tax on consumption. Nevertheless, a consumer is not a taxpayer. It is someone who provides goods or services, although the tax cost in covered by a consumer. According to the doctrine, the situation results from the taxation mechanism, which requires that taxpayers settle VAT in advance, before they collect the amount from consumers.[36] Thus, it concerns a taxpayer. However, it should be taken into account that the concepts of a taxpayer and the person subject to a tax obligation are normative in nature and are laid down in tax law with special regulations.[37]
– A taxpayer's substitute, i.e. a person who, in accordance with the provisions of statute and instead of a taxpayer is obliged to fulfil the main tax obligation (Article 36 para. 3 TA). A taxpayer must perform activities that are subject to taxation and is the first person obliged to directly fulfil his tax duties. A substitute appears in connection with special taxes within a more complex legal relation existing between three entities: the administration, a taxpayer (who is substituted) and his substitute. Two conditions are required: firstly, a taxpayer must perform an activity subject to taxation; and secondly, his substitute must be legally obliged to pay the tax directly to the State Treasury. His obligation to pay abrogates the taxpayer's obligation, provided it has been fulfilled. The institution of a substitute lets the administration enable or improve managing some types of taxes and collect them this way. The substitute must be distinguished

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21st edition, Tirant lo Blanch, Valencia 2017, p. 901; L. Morillas Cueva, *Delitos contra la Hacienda Pública y la Seguridad Social*, [in:] L. Morillas Cueva (coord.), *Sistema de Derecho Penal Español. Parte Especial*, 2nd edition, Dykinson, Madrid 2016, p. 805; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública…*, p. 18.

[35] A considerable part of the doctrine assumes that it is a common offence. See J. Boix Reig and J. Mira Benavent, *Los delitos contra la Hacienda Pública…*, p. 51; J.L. Serrano González de Murillo and E. Cortés Bechiarelli, *Delitos contra la Hacienda Pública*, Madrid 2002, p. 21.

[36] L.M. Alonso González, *Fraude y delito fiscal en el IVA: Fraude carrusel, truchas y otras tramas*, Marcial Pons, Madrid 2008, p. 112 ff.

[37] What can draw attention is the fact that in some cases the provisions change a taxpayer and thus result in errors concerning who may be liable for a tax offence. For example, this happens in case of the reverse of a taxpayer who is involved in trade in scrap metal, Article 84 para. 1(2) Act on VAT, in accordance with which generally a seller is a taxpayer; however, he does not pay tax but its payment is transferred onto the buyer. For more, see V.A. García Moreno, *Inversión del sujeto pasivo en el IVA y delito fiscal*, Carta Tributaria No. 24, 2017, p. 94 ff.

from the taxpayer because his obligation is independent of the person whom he charges the advance payment and independent of the main tax obligation.

– Other persons subject to tax obligations can also be perpetrators (Article 35 para. 2 TA). It concerns a taxpayer who is obliged to deduct and pay, e.g. advance personal income tax, IRPF, to the tax administration (Article 37 para. 1 TA, Article 98 Act on personal income tax, etc.).[38] His obligation is independent of a taxpayer or his substitute. Also successors (Article 39 TA) and beneficiaries in case of tax exemptions, returns or breaks who are not taxpayers, etc., may be perpetrators.

Legal and voluntary representatives (Articles 45 and 46 TA) may be perpetrators because they act on behalf of other persons (Article 31 SCC); this legal form places them directly in the position of a warrantor of a legally protected interest.[39] Parents who manage their children's property or a spouse managing the property of the other spouse may be direct perpetrators of tax fraud. Persons holding managerial positions acting on behalf of a company can be liable for this offence. Such a solution prevents them from being unpunished when a representative is used as "an intentionally unclassified tool".[40] Other solutions would lead to a lack of possibility of prosecuting all people involved in the offence. Due to the fact that it concerns an individual offence, Article 31 SCC is applied, provided the conditions are met, to persons who in general do not have special features. It is not an obligation *intuitu personae* and, that is why, it is also imposed on representatives, provided the conditions laid down in the General Tax Act (Articles 45 and 46) and in Criminal Code (Articles 31 and 305 para. 1) are met.

4.1. ISSUES CONCERNING PERPETRATION

As it has been indicated above, it is an individual offence[41] the perpetrators of which may be persons having a legal-tax relation with the tax administration, i.e. persons who have a tax obligation. Nevertheless, Article 31 SCC, based on the fact of acting on behalf of another person, allows attributing criminal liability to entities with no characteristic features if they act in a prohibited way. If a person having tax obligations appoints his tax advisor to represent him, the representative may be criminally liable pursuant to Article 31 SCC because the tax obligation and the guarantor's obligation have been transferred to him. The person originally obliged may also be liable as a co-perpetrator or an accomplice depending on his actual participation in the course of activities. It is assumed in the doctrine that indirect

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[38] The characteristic of a payer of advances as a substitute is a topic of debate in the tax doctrine. C. García Novoa, *Estudios de Derecho Tributario Penal y Sancionador*, Centro Mexicano de Estudios en lo Penal Tributario, Mexico 2016, p. 107 ff.

[39] J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública*…, p. 209 ff; C. Martínez-Buján Pérez, *Autoría y participación en el delito de defraudación tributaria*, [in:] M. Bajo Fernández (dir.), *Política fiscal y delitos contra la Hacienda Pública*, Ramón Areces, Madrid 2007, pp. 73, 77 ff.

[40] C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 637 ff.

[41] J. Bustos Ramírez, *Bien jurídico y tipificación*…, p. 33 ff.

tax fraud perpetration takes place when a person with specific characteristic features uses another person who is not subject to liability as a tool.[42]

There is a possibility of paying personal income tax based on the provisions regulating joint taxation of family members. In accordance with tax law, all family members shall "be subject to tax law jointly and based on the principle of solidarity with no detriment to the right to divide the tax between them based on their income share" (Article 84 para. 6 Act on personal income tax). Thus, it is necessary to take into consideration situations when persons signing a joint tax return concerning two or more sources of income create one legal-tax relation, their income is added and may exceed 120,000 euros, which may be subject to fraud regulations. In literature, based on the principle of individual liability, there is an opinion that, regardless of the joint tax return, the income should be attributed to individual members of the family in order to reach that amount in the same way as in case of individual tax returns. Obviously, it is possible to prosecute other members of the family as accomplices.[43]

In case individual shares reach an amount that is subject to prosecution of one or more family members, it is necessary to establish that each of them matches all conditions for the recognition of an offence (classified, unlawful and faulty conduct). In other words, if one family member acts on behalf of others, and most often a spouse acts on behalf of the other one, it is necessary to establish that each of them matches all subject- and object-related elements of an offence, especially the lack of an error concerning the tax obligation.

4.2. ISSUES CONCERNING PARTICIPATION

The feature of an individual offence does not exclude the possibility of adopting other forms of participation in this offence: abettors, necessary co-perpetrators and accomplices if they deliberately perform activities that are prohibited by law. It means, in accordance with the principle of limited accessoriness, that a perpetrator commits a classified and unlawful act. In accordance with Article 305 para. 6 SCC, "judges and tribunals can impose one or two levels lower penalties on the obliged taxpayer (…). The above is applicable to other participants of an offence, other than the obliged taxpayer or a perpetrator if he actively cooperates in obtaining evidence in order to identify or arrest other persons liable, in order to fully explain criminal acts, or in order to check the property of the taxpayer or other persons involved in the offence". On the other hand, Article 65 para. 3 SCC is applicable in such cases and it stipulates that "if an abettor or co-perpetrator does not have conditions, qualifications or personal relations that substantiate a perpetrator's guilt, judges or tribunals may impose a penalty one level lower than the statutory one for a given offence".

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[42] F. Muñoz Conde, *Problemas de autoría y participación en el derecho penal económico, o ¿cómo imputar a título de autores a las personas que, sin realizar acciones ejecutivas, deciden la realización de un delito en el ámbito de la delincuencia económica empresarial?*, Revista Penal No. 9, 2002, p. 95.

[43] P. Chico de la Cámara, *El delito de defraudación tributaria tras la reforma del Código Penal por LO 5/2010. Reflexiones críticas y propuestas de lege ferenda*, Aranzadi, Navarre 2012, p. 65; F.J. Torres Gella, *Autoría y otras formas de participación en el delito fiscal*, [in:] *El delito fiscal*, Valencia 2009, p. 134 ff.

4.3. ABETTING

Abetting consists in direct incitement to an offence, i.e. deliberate persuasion to perform an act that consists in classified, unlawful and deliberate activity; in this case to tax fraud.[44] It is possible to abet in an offence that is not committed by the abetted person because this is an individual offence. An abettor's liability is the same as a perpetrator's (Article 28 SCC).

4.4. NECESSARY CO-PERPETRATION VS. AIDING

As far as necessary co-perpetrators are concerned, their acts should have impact on consequences because their share in an offence commission is technical or intellectual in nature, however, they have no power over the act. A co-perpetrator must also implement subject-related elements.

Accomplices are persons whose share in an offence commission is smaller. Aiding is possible in case of acts leading to an effect. However, it is less important or determining a perpetrator's conduct. The borderline between the significance of a co-perpetrator's and an accomplice's act is unclear.

4.5. LEGAL COUNSELS, TAX ADVISORS OR ACCOUNTANTS

The situation of advisors in criminal law and social insurance is especially significant.[45] They perform activities necessary for most taxpayers: they use their specialist knowledge to establish and apply the best taxation options, they advise in the field of tax returns, bookkeeping, etc. In general, they cannot be treated as tax fraud perpetrators because it is an individual offence that is committed by a perpetrator being subject to a financial legal-tax relation. They can be liable as perpetrators only if they legally or voluntarily represent a taxpayer because only then the principle of acting on someone's behalf can be applied to them (Article 31 SCC).

Legal counsels or accountants may make a substantial technical contribution to the commission of an offence. If they cannot be treated as perpetrators, they can be recognised to be participants, most often co-perpetrators. Their activities can constitute a secondary attempt at a legally protected interest. The legislator took into account this secondary nature because they are not the guarantors of the object of protection, and stipulated considerably lower penalty because of the lack of "conditions, classification or personal relations substantiating a perpetrator's guilt" (Article 65 para. 3 SCC).

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[44] J.C. Ferré Olivé, *Tratado de los delitos contra la Hacienda Pública…*, p. 186 ff.
[45] *Ibid.*, p. 191 ff.

5. DEFRAUDED TAX AMOUNT

In accordance with Article 305 para. 1 SCC, the defrauded amount of unpaid advances on tax or undue tax returns or exemptions should exceed 120,000 euros.

Thus, it is necessary to explain the term "amount". There are different concepts of an amount. In Article 56 TA, there is a total amount resulting from the application of an appropriate tax rate of the amount that is subject to taxation and an amount to be paid that constitutes "the result of deductions of exemptions or other rates laid down in acts regulating each tax". On the other hand, Article 58 TA lays down a concept of a tax debt that "is composed of an amount subject to payment resulting from the main tax obligation or an obligation to pay an advance. (…) Moreover, a tax debt, in a given case, includes: (a) default interest, (b) an extra charge for failure to submit a return timely, (c) extra charges due at the time of execution, (d) legally required extra charges dependent on the tax base or amounts for the benefit of the State Treasury or other public entities".

Article 305 para. 1 SCC deals with a tax amount in its precise meaning (Article 56 TA).[46] Most additional charges laid down in Article 58 para. 2 TA do not compose a defrauded amount because of their compensating nature. Charges laid down in Article 58 para. 2(d) TA, i.e. "legally required extra charges for the benefit of the State Treasury or other public entities" are disputable. Some authors speak about "an amount of complex creation", including additional charges for the benefit of the State Treasury, which is the paid amount.[47] In my opinion, the representatives of the doctrine who assume that it is necessary to take into account a strict tax amount without extra charges and elements laid down in Article 58 para. 2 TA are correct.[48] The provision distinguishes periodical taxes or periodical tax returns. On the one hand, there are periodical taxes such as the personal income tax, corporate tax and real estate tax. They are usually calculated annually. They also include taxes calculated instantly but documented periodically, such as VAT, and they are classified within the amounts referred to in Article 305 para. 2(a) SCC.

Taxes instantly documented in a form of a return include a civil law transactions tax or an inheritance and donation tax, and they are referred to in Article 305 para. 2(b) SCC. In case of them, every act is independent and the defrauded amount should individually exceed 120,000 euros as laid down in Article 305 para. 1 SCC. In case of fraud committed a few times in the same tax year, which individually exceeds the above-mentioned amount, there is a concurrence of offences against the State Treasury.

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[46] J.M. Martín Queralt at al., *Curso de Derecho Financiero y Tributario*…, p. 602.

[47] C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 634.

[48] P. Chico de la Cámara, *El delito de defraudación*…, p. 62; I.J. Méndez Cortegano, *La cuantía defraudada*, [in:] *El delito fiscal*, Valencia 2009, p. 127; F. Morales Prats, *De los delitos contra la Hacienda Pública*…, p. 1053; J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública*…, p. 23.

5.1. ADMINISTRATIVE CALCULATION OF DUE AMOUNT AND ITS JUDICIAL DETERMINATION

Administrative tax calculation does not constitute a reason for initiating proceedings concerning tax fraud, although the calculation may be done by a tax inspection in accordance with the legal provision in force. Criminal law tribunals should determine the defrauded amount and decide whether it exceeds the amount laid down in statute.[49] The defrauded amount is determined based on tax legislation and always in accordance with the rules of evidence assessment typical of the criminal procedure.

This means that it is possible to use the assistance of tax administration inspectors and technicians as experts but they are experts of one party (prosecution) and not official experts. One cannot approve of an opinion that only tax interpretation and techniques criteria are applied.[50] If it were so, it would be necessary to apply the rules of direct tax determination, which may be one of many traces in criminal law. Articles 49 to 53 TA stipulate different methods of determining tax bases used to calculate tax (direct, objective and indirect determination). It is rightly stated in literature that tax regulations are evidence-related and not substantive and, that is why, they do not bind a criminal court judge who should take into account evidence-related criteria in criminal proceedings.[51]

In accordance with an act regulating each type of tax, direct or objective determination, which is also basic for the purpose of criminal proceedings, prevails. The method of indirect calculation (Article 53 TA) is subsidiary in nature and is applied "when tax administration does not have data necessary to establish a total tax base resulting from: (a) the lack of a tax return or submission of incomplete or inaccurate returns; (b) resistance, obstruction, excuses or refusal response to the activities of the inspection; (c) significant failure to fulfil bookkeeping or registering duties; (d) loss of or damage to accounting books and registers or documents confirming operations, even in case of force majeure". In such cases, applying the criteria of tax law and in the face of the lack of the obliged entity's cooperation, the due amount is determined in accordance with the criteria or presumptions that are taken into account when dealing with other entities in a similar situation. The guidelines for determining an amount resulting from Article 53 para. 2 TA are as follows: "The base of income shall be determined with the use of any of the measures or a few of them simultaneously: (a) the application of data and their available history; (b) the use of the elements that indirectly confirm the existence of property and income as well as receipts, sales, costs and efficiency that are typical of the given sector with the adjustment to the size of business or a family to be compared for the purpose of tax calculation; (c) the assessment of the size, indicators, modules or

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[49] E. Sola Reche, *Delitos contra la Hacienda Pública y contra la Seguridad Social*, [in:] C.M. Romeo Casabona, E. Sola Reche, M.Á. Boldova Pasamar (coord.), *Derecho Penal, Parte Especial*, Comares, Grenada 2016, p. 475; J.M. Martín Queralt et al., *Curso de Derecho Financiero y Tributario*…, p. 601.

[50] J. Zornoza Pérez, *Levantamiento del velo y determinación de la cuota en el delito de defraudación tributaria*, [in:] *Derecho Penal de la Empresa*, Universidad Pública de Navarra, Pamplona 2002, p. 224.

[51] J. Boix Reig and V. Grima Lizandra, *Delitos contra la Hacienda Pública*…, p. 25.

data occurring in the adequate tax obligations in accordance with the data or history of similar or analogous cases". Pursuant to those principles, it is determined what amount of tax is hidden from the State Treasury.

The criteria concerning tax fraud should be applied with maximum carefulness and in compliance with the rules of providing evidence in criminal proceedings.[52] Indirect determination may be taken into account in the context of a proceeding system based on circumstantial evidence, i.e. as indirect evidence; conclusions drawn by the tax administration may be challenged by the parties in the course of a trial.[53]

Circumstantial evidence cannot be solitary but should be diversified. The basic factual state should be completely substantiated with the use of direct evidence and cannot negate the rules based on logic, sciences and general experience.

The defrauded amount is significant for the recognition of an offence under Article 305 para. 1 SCC. It consists of the tax amount (Article 56 and 58 para. 1 TA) and does not include default interest and additional charges (Article 58 TA) or any other extra fines or civil liabilities.[54] Article 305 para. 2 SCC distinguishes periodical taxes, reported periodically and non-periodical taxes. Periodical taxes are those that are divided into parts based on tax periods, e.g. personal income tax. Taxes reported periodically are those that are instantly calculated, i.e. are not based on tax periods but become periodical because they are reported with the use of periodical tax returns, e.g. VAT. In case of taxes, fraud may occur in any tax period or concern a tax return. If periods are shorter than twelve months, the defrauded amount refers to a calendar year. In such a case, periodical taxes or returns are accumulated (VAT, personal income tax, etc.) and calculated for the whole year. However, Article 305 para. 2 SCC stipulates that accumulation is not admissible in case of: (1) various taxes in the same tax period; (2) the same tax in various tax periods; and (3) various taxes in various tax periods.

There are also taxes that are not periodical and not reported periodically, i.e. calculated instantly. The activity that is subject to taxation finishes the moment it is performed, e.g. in case of tax on property transfer or inheritance tax.[55] In such cases "the amount concerns each of the titles for tax calculation". In the same way as in case of periodical taxes or taxes reported periodically, they cannot be accumulated with other defrauded amounts concerning other tax bases.[56]

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[52] I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude*…, p. 103 ff. As F. Pérez Royo indicates, "substantive criteria for indirect determination laid down in General Tax Act and provisions resulting from it are not compatible with criminal procedure requirements"; F. Pérez Royo, *El delito fiscal tras veinte años de su implantación*, Civitas. Revista española de Derecho Financiero No. 100, 1998, p. 585. Also on this issue, see J.M. Martín Queralt et al., *Curso de Derecho Financiero y Tributario*…, p. 604 ff.

[53] I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Estimación indirecta y delito fiscal*, Anuario de Derecho Penal y Ciencias Penales, 1990, p. 793 ff; A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 128; C. Martínez-Buján Pérez, *Derecho Penal Económico*…, *Parte Especial*, 5th edition, p. 636.

[54] Thus, it is not correct to include the latter amounts, according to M. Acale Sánchez and G. González Agudelo, *Delitos contra la Hacienda Pública y la Seguridad Social*…, p. 203.

[55] F. Pérez Royo, *Los delitos y las infracciones*…, p. 137.

[56] *Ibid*., p. 140 ff.

5.2. ILLEGAL INCREMENT IN PROPERTY

The classification of income that has not been included in tax returns causes serious evidential problems. The inspection often finds property that does not match the amounts reported in tax returns, which means that there are clear signs of wealth that exceeds the reported level of income. It can result from illegal transactions that generated profits, the so-called "black money".[57] It can be property generated in periods that are subject to limitation or in periods that are still subject to administrative or criminal liability. In the latter case concerning periodical taxes, there is a problem how to attribute the increase in property to a particular tax period. If it is divided into separate periods, the amount required for criminal liability under Article 305 para. 1 SCC may not be reached, and if it is attributed to a particular period, it is more probable it will exceed the amount required. The process of comparing the increase in property and tax periods is a troublesome and difficult task. The concept of illegal increment in property was coined after the Civil War with the appearance of great fortunes generated from illegal transactions and prohibited activities such as the black market as well as wealth obtained from construction industry. The conception is defined as "the presumption of hidden income from some expenditures or elements of property and processing them in the tax system that is quasi-legitimising".[58]

In case of evident increase in property that raises tax debt and reaches the level that is subject to criminal liability, it is necessary to thoroughly analyse the mechanism determined in Article 39 para. 1 Act on income tax. In accordance with this provision, the increase is attributed to the tax period when the increase was detected, unless evidence for a different situation is provided. It is noticed in literature that the system is based on the following presumptions: (a) it is presumed that there is hidden income after the detection of undeclared property or property not corresponding to the declared one; (b) it is attributed to the period when it was detected.

In literature, there are two ways of interpreting the possibility of excluding this income from a defrauded amount.[59]

According to the first one, unfounded income must be included in a defrauded amount by virtue of law. The concept of income is determined in such a way that it is not possible to challenge it based on the criminal law. The supporters of this opinion believe that it is not incompatible with the presumption of innocence and it does not concern a presumption or legal fiction: it concerns "specific determination of a legal concept of income defined in the Act on taxation".[60]

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[57] F. Pérez Royo, *El delito fiscal tras veinte años de su implantación…*, p. 578.

[58] P. Herrera Molina and P. Chico de la Cámara, *Los incrementos no justificados de patrimonio: componente imponible presunto del Impuesto sobre la Renta*, Civitas. Revista española de Derecho Financiero No. 81, 1994, p. 16 ff.

[59] S. Bacigalupo Saggese, *Ganancias ilícitas y Derecho Penal*, Madrid 2002, p. 44 ff.

[60] V. Hernández Martín, *Problemas procesales del delito contra la Hacienda Pública*, Crónica Tributaria No. 60, 1989, p. 103; D. Marín-Barnuevo Fabo and J. Zornoza Pérez, *Los incrementos no justificados de patrimonio y el régimen sancionador tributario*, Crónica Tributaria No. 71, 1994, p. 85 ff.

According to the other opinion, there is the *iuris tantum* presumption, which should be of fundamental importance at the evidential stage. This relative presumption exempts the tax administration from looking for further evidence and reverses the burden of proof. It concerns a dual presumption because after successful substantiation that there is undeclared or unfounded income, e.g. detection of hidden income (basic act), it is presumed that the hidden income is subject to taxation (act – consequence) and the income is attributed to the tax year when it was detected (time presumption).[61] Due to the time presumption, if Article 39 para. 1 Act on personal income tax were applicable to the offence of tax fraud, all income would be attributed to the tax period when they were detected "unless a taxpayer sufficiently proves he had been the owner of property or rights before the date of the limitation period". The reversed burden of proof does not allow attribution of all revealed income to every tax period that is not time-barred. There are two situations:

– what has been revealed as belonging to time-barred periods cannot be attributed to an entity's income for the purposes of personal income tax or corporate income tax, but there may be property tax fraud;
– total attribution of non-time-barred amounts to a period when the property was revealed even when the income was obtained in various non-time-barred periods; it is attributed jointly to the tax period when it was detected.

Tax legislation created challengeable presumptions, e.g. in case of time-barred income, and non-challengeable ones, e.g. a uniform tax period for income attribution. In my opinion, none of the above presumptions can be approved of automatically because legal presumptions against the accused are not applicable. They cannot be extrapolated because they would be clearly against the constitutional guarantee of the presumption of innocence.[62] The attribution of all income to the same period is especially critical for the features of the offence of tax fraud. As it is rightly stated in literature: "The attribution or concentration of the total unfounded value in one period, having impact on the level of the defrauded amount in a determined period, takes place by virtue of law as a result of a construction that cannot be called differently than a legal presumption, which is inadmissible in criminal proceedings". Unfounded increase in property is a common evidentiary simplification the legislator gave the tax administration but it cannot be applied in any sanctioning proceedings.[63] In my opinion, unfounded increase in property might be treated as circumstantial evidence within other evidence but it is a prosecutor's task to prove what income and what increase concerns each tax period.

The issue was also the subject matter of the Constitutional Court judgement 87/2001 of 2 April. It stated that the application of those tax presumptions does not mean the reverse of the burden of proof and does not have impact on the presumption of innocence. The critical analysis of the judgement emphasizes "the ambiguity of its argumentation" and rightly states that: "The error is in the recognition of the legal nature of unfounded increase in property as insignificant. If it is assumed that

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[61] C. García Novoa, *Consecuencias penales de los incrementos no justificados de patrimonio*, [in:] A.C. Altamirano, R.M. Rubinska (coord.), *Derecho Penal Tributario*, Vol. 1, Buenos Aires 2008, p. 350. S. Bacigalupo Saggese, *Ganancias ilícitas*..., p. 53 ff.

[62] F. Morales Prats, *De los delitos contra la Hacienda Pública*…, p. 1059.

[63] F. Pérez Royo, *El delito fiscal tras veinte años de su implantación*…, p. 582 ff.

it constitutes a legal presumption of obtaining income and the criminal provision refers to the Act on taxation in order to determine the defrauded amount, it is obvious that it leads to the reverse of the burden of proof: it is a taxpayer who must prove the sources of financing of the elements of property and the moment when it happened in order to avoid taxation of income of unknown source attributed to the period when it was revealed".[64] It is assumed that it is necessary to prove the increase in property and its unfounded tax nature, but the determination of the amount of income and the period when it was obtained is subject to tax law; thus, the principle of the presumption of innocence is not applicable.[65]

I believe that in the face of the lack of other evidence in criminal proceedings, it is not possible to attribute all the money to a tax period when it was revealed based on the lack of a perpetrator's cooperation.

Recently, there has been a tendency for objective treatment of all types of liability (civil, commercial, administrative, tax and even criminal) in order to avoid difficult substantiation of subject-related elements. There are presumptions in a trial that should never be applied to criminal liability.[66] In the area of tax, in order to determine a due amount, indirect determination of a tax base and presumptions applicable to unfounded increase in property are used. Nevertheless, the transfer of the criteria automatically to criminal proceedings means the violation of the principle of the presumption of innocence and the reverse of the burden of proof. A dual presumption takes place and it changes into a dually intolerant one from the point of view of criminal proceedings. It can be assumed that the revealed capital is income that was not subject to taxation but the inclusion of that income in the tax year when it was revealed is, in my opinion, absolutely inadmissible. The principles resulting from the Criminal Code and the Act on criminal procedure should substitute for the criterion in order to decide in which tax period the revealed amounts should be included.[67] The criminal statute lays down its own criteria for placing the defrauded amount (Article 305 para. 2 SCC). The concept of blank penal statute is confused with a kind of "blank cheque" to make the penal one be freely supplemented with tax legislation. Such interpretation makes evidence dynamic but, absolutely, means abuse of citizens' interests if it has penal consequences. It constitutes the breach of penal guarantees typical of the rule of law against the passiveness of some judicial entities, which should be a subject matter of a substantial critical reflection.

Eventually, presumptions in tax regulations have the value of circumstantial evidence and should be assessed as this type of evidence.[68] It is inadmissible to adopt, regardless of the principles of carefulness, a rule laid down in Article 39 para. 1 Act on personal income tax that attributes income to the period when it was revealed even if the presumptions are unchallengeable. It is rightly stated in the doctrine that

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64 P. Herrera Molina, *STC 87/2001, de 2 de abril: incrementos patrimoniales no justificados y delito fiscal*, Crónica Tributaria No. 105, 2002, p. 168.

65 *Ibid*.

66 F. Morales Prats, *De los delitos contra la Hacienda Pública*…, p. 1061.

67 I. Berdugo Gómez de la Torre and J.C. Ferré Olivé, *Todo sobre el fraude*…, p. 89 ff.

68 M. Bajo Fernández and S. Bacigalupo Saggese, *Derecho penal económico*, Madrid 2010.

based on the presumption of innocence and the principle of accusatorial procedure, the administration should be required "not only to substantiate the property but also to prove the source of income and to place it in a particular tax year, to confirm that income is subject to taxation and that there is an intention to defraud if this conclusion can be drawn when there is concurrence of circumstantial evidence".[69] It is also rightly assumed that the mechanism of a legal presumption "does not have direct efficiency among judges and criminal tribunals because of the principle of the presumption of innocence and free assessment of evidence". A judge or a tribunal should apply standard conditions for conviction based on circumstantial evidence.[70]

The representatives of the doctrine warn that a tax presumption may be in favour of the accused because if the amounts exceed the limit every year, he is accused of single fraud instead of three or four offences, which might be attributed to him.[71] In my opinion, those tax-related evidential principles are not applicable in criminal law, regardless of whether they are in favour of the accused or not, because they are established in the context of tax norms and are not substantive but only procedural in nature.

5.3. ILLEGAL INCOME: PROPERTY OBTAINED FROM A CRIMINAL ACT

Criminal activity often takes the form of real business activity and therefore it generates income. As a result, there is an increase in property that can be recognised as income, i.e. it can be interpreted within the category of activities that are subject to taxation, for example, the purchase and sale of narcotic drugs. One can even consider the application of VAT to this activity. One can also reveal black money from corruption of officers or an offence of money laundering, which can constitute amounts exceeding the minimum limits laid down for tax fraud. A question is raised in all those cases whether illegal income obtained from crime should be subject to taxation. In case of a positive answer, it should be explained whether they might constitute tax fraud.[72]

In case of indirect tax, criminal activities are not subject to VAT or customs duty in any of the EU Member States because prohibited activities are not taxed.[73] The problem occurs in case of direct taxes, namely personal and corporate income tax (personal income tax, corporate income tax and non-resident income tax). The taxes are established in order to contribute to sustain public expenditures and absolutely cannot be used as sanctions. It is believed that: "The use of tax for sanctioning purposes may result from a hidden sanction. A hidden sanction is a kind of an atypical sanction, which, on the other hand, is classified as an abnormal sanction".[74]

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[69] C. García Novoa, *Estudios de Derecho Tributario*…, p. 129.

[70] P. Herrera Molina and P. Chico de la Cámara, *Los incrementos no justificados de patrimonio*…, p. 46.

[71] A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 129.

[72] C. García Novoa, *Estudios de Derecho Tributario*…, p. 309.

[73] P. Chico de la Cámara, *El delito de defraudación*…, p. 98; M.T. Soler Roch, *La tributación de las actividades ilícitas*, Civitas. Revista española de Derecho Financiero No. 85, 1995, p. 13.

[74] C. García Novoa, *Estudios de Derecho Tributario*…, p. 310.

5.3.1. ARGUMENTS FOR TAXATION AND CRIMINAL LIABILITY

It is assumed in literature that there is not tax liability and a failure to fulfil tax obligations may be prosecuted in accordance with tax law because there is nothing that can abolish taxes and the application of tax statutes.[75] If the substantive and quantity conditions are met, there is also criminal liability. A lack of response from criminal law would infringe many principles, even those constitutional, mainly the principle of equality and tax capacity.

It is believed that letting deception stay unpunished is in conflict with the principle of equality. The principle would be violated because an entity fulfilling its tax obligations honestly would be in a worse situation than a fraudster.[76] In the tax doctrine, it is assumed that the Spanish statute does not lay down regulations on this income tax clearly but, based on the principle of neutrality, which constitutes our system, this type of tax is not impossible. If it were so, people acting illegally would become privileged, which is in conflict with the principle of equality.[77] In the same spirit, the Supreme Court also decided that the fact that income originates from crime could not result in an advantage or benefit exempt from tax or immunity. Moreover, it would also violate the principle of tax capacity because a perpetrator efficiently increases his wealth and violates the obligation to pay tax on that wealth.[78]

It is necessary to assess other arguments for criminalisation of such conduct. Its criminalisation may infringe the right not to make self-incriminating statements (Article 24 para. 2 Spanish Constitution), however, in the doctrine, it is believed that "the constitutional imperative to contribute to sustain public expenditures in accordance with economic capacity supports the theory of taxation of illegal activities as advantageous. However, the evidence of the activity subject to taxation should be obtained with the use of other methods than explanation or information provided by a perpetrator".[79]

Those who are for this point of view add other arguments for the advantage of obligatory taxation and criminal liability in case of fraud. It is assumed that in such cases the *non bis in idem* principle is not violated because these are different acts and different objects of protection. To support this opinion, it is stated that there is an international tendency confirmed in the regulations of comparative law, because some countries lay down taxation of illegal income, with fewer or more limitations, which makes simultaneous tax and criminal liability evident in their

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[75] C. Galarza, *La tributación de los actos ilícitos*, Cizur Menor 2005, p. 260.

[76] C. García Novoa, *Estudios de Derecho Tributario*…, p. 317 ff. It is an argument used in the United States: M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 10.

[77] C. Galarza, *La tributación de los actos ilícitos*…, p. 261 ff. Some representatives of the doctrine expressed a contrary opinion, e.g. A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 134. Also differently, although recognising it as an attractive argument: A. Manjón Cabeza-Olmeda, *Ganancias criminales y ganancias no declaradas declaradas (el desbordamiento del delito fiscal y del blanqueo)*, [in:] *Libro homenaje al profesor Luis Rodríguez Ramos*, Tirant lo Blanch, Valencia 2013, p. 687.

[78] C. Galarza, *La tributación de los actos ilícitos*…, p. 261 ff; M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 19.

[79] M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 31.

territories. Anyway, even in those countries the issue is not free from considerable controversies.[80] In some systems, tax on illegal income requires that the product of original crime should not be lost or subject to forfeiture during the first trial. In a given case, criminal liability results from it.[81]

5.3.2. ARGUMENTS AGAINST PENALISATION

It is assumed that there is an exemption from the obligation to declare illegal income because the basic right not to self-incriminate would constitute the reason for justifying a failure to enforce law concerning tax obligations and thus avoiding criminal liability. In the doctrine, it is assumed that the obligation to declare illegal income is tantamount to the obligation to reveal a basic offence. Therefore, the use of data obtained as a result of tax inspection cannot be then referred to for sanctioning or penal purposes because it would breach the right to silence (Article 24 para. 2 Spanish Constitution).[82]

Other arguments concern ethical issues because collecting taxes would mean that the state acts as an accomplice and it would be immoral. It is believed that the state cannot accept benefits or profits from crime in the form of taxes because that would change it into a dealer in stolen property, a co-perpetrator or even a launderer of money obtained from crime.[83] If wealth originating from illegal sources were taxed, the amount after the tax deduction would become legal money in the hands of a criminal.[84] Moreover, there is no legal title. It is directly connected with the criterion of the unity of the legal system where there is no room for contradictions and where illegal acts do not generate legal consequences other than sanctions, in this case penal sanctions imposed on perpetrators.[85] From this point of view, a perpetrator has no right to dispose of his property obtained illegally because this benefit is not part of a criminal's property for the reason of an illegal way of acquiring property.[86] As a result, there is no obligation to tax an activity that cannot be subject to a contract.

It is indicated that there is an evident lack of legal-tax relation because this relation occurs only based on legal activities.[87] It is also stated that there is a lack of economic benefits. If there is a measure in the form of forfeiture or loss redress,

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[80] It is so, e.g. in Germany and Italy: M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 11 ff.

[81] On the situation in the United States, Germany and Italy, see S. Bacigalupo Saggese, *Ganancias ilícitas*…, p. 8 ff.

[82] *Ibid*., p. 25.

[83] *Ibid*., p. 22; M. Bajo Fernández and S. Bacigalupo Saggese, *Delitos contra la Hacienda Pública*…, p. 68 ff.

[84] R. Acquaroli, *La fiscalidad de los sobornos*, [in:] L.A. Arroyo Zapatero, A. Nieto Martín (coord.), *Fraude y corrupción en el Derecho penal económico europeo*, Cuenca 2006, p. 345.

[85] M.T. Soler Roch, *La tributación de las actividades ilícitas*…, p. 17.

[86] A. Castro Moreno, *Elusiones fiscales atípicas*…, p. 137 ff; A. Manjón-Cabeza Olmeda, *Ganancias criminales y ganancias no declaradas*…, p. 684.

[87] S. Bacigalupo Saggese, *Ganancias ilícitas*…, p. 29.

there is an exemption of tax subordination of profits from unlawful conduct and one cannot speak about criminal liability for tax fraud. However, if there are economic benefits and the loss is not redressed, there is fraud.[88]

5.3.3. AUTHOR'S OWN STANCE

There is a very important problem that has technical and practical connotations. At first sight, it seems the requirement that a drug dealer pay taxes on profits of income obtained from his criminal activity is an excessive penalty. Apart from this seemingly simple solution, there are other examples, which raise many doubts. Let us imagine a big scale real estate swindle that generates enormous economic profits. Can a company involved in dealing in illegal property avoid taxes? It is also necessary to consider operations that are only partially criminal, in which most activities are legal. In such a case, if the legal part of transactions does not exceed the amount laid down in Article 305 SCC, there is no offence against the State Treasury. But if the legal and illegal income is added, it turns out that the sum exceeds the amount. The condition for the offence against the State Treasury is the legal-tax relation, which results in substantive and formal tax obligations. There should be benefits that shape the tax base used to calculate due tax. Someone who accepts bribes or commits whatever property-related offence (theft, robbery, confidence trick) matches the features or basic elements of a legal-tax relation. Can this illegal property be subject to taxation? The answer would be positive if there were a provision clearly stipulating that illegal income must be taxed. But it is not the case.

In my opinion, it is necessary to negate the offence of tax fraud if the income in question originates from an illegal act.[89] A different solution would have impact on other fundamental rights, namely the right not to self-incriminate.[90] It is assumed that a penalty for an original offence should be imposed on the person who committed it and uses the profits obtained. As a result, the legislator joined the sufficient penalty and additional consequences of each offence causing a loss to the owner of property interests and possibly the State Treasury. Thus, imprisonment, a fine, civil liability and forfeiture imposed for the original offence are legal solutions, which are sufficient.[91] It is not necessary to require anything else but apply legal consequences concerning the commission of an original offence and recognise that those situations are not subject to tax obligations.

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[88] As far as unlawful, but not criminal or illegal, conduct is concerned, such as profits obtained from prostitution, there are tax obligations and one can speak about tax fraud. P. Chico de la Cámara, *El delito de defraudación*…, p. 99; J.A. Choclán Montalvo, *La aplicación práctica del delito fiscal*…, p. 314.

[89] There is a different opinion that the offence takes place when property originating from crime is hidden, F. Muñoz Conde, *Derecho Penal. Parte Especial*…, p. 902.

[90] A. Manjón-Cabeza Olmeda, *Ganancias criminales y ganancias no declaradas*…, p. 687.

[91] Cf. S. Bacigalupo, *Ganancias ilícitas*..., p. 23.

Nevertheless, I believe that tax fraud is possible in case of illegal activity that does not constitute crime, e.g. income obtained from adults' voluntary prostitution, which should be taxed.

6. CONCLUSIONS

Economic crimes in general, and especially those against the State Treasury, are used to adjust the concepts from the theory of crime to modern forms of economic and tax offences. Examining every condition for the offence of tax fraud, one can notice their complexity and the lack of uniform interpretation. The scientific and juridical discussions lead to significant conclusions and progress resulting in the construction of better law. The issues discussed in the article (the concepts of deception, perpetration, participation and the quantity element) are the smallest part of the existing problems. However, they accurately synthesise the conceptual ambiguity, which needs a lot of interpretational efforts to be eliminated.

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THE CRIME OF TAX FRAUD IN SPAIN

Summary

The paper analyses essential features of the crime of tax fraud laid down in Article 305 of the Spanish Criminal Code. The fraud consists in tax evasion or use of undue tax exemptions. The important element of liability for this crime is the legal-tax relation between the perpetrator and the tax administration. The author emphasizes that it is not necessary to deceive the tax administration; it is sufficient not to fulfil the formal duty, which materialises in hiding or disfiguring the tax base, making the determination of tax impossible. The analysis covers also perpetration, co-perpetration, necessary co-perpetration, aiding and abetting, defrauded tax amount, administrative calculation of the due amount and its judicial determination, illegal increment in property in the context of liability for tax fraud, illegal income, as well as the liability of legal counsels, tax advisors or accountants.

Keywords: tax advisors, tax fraud, fiscal penal law, perpetration and aiding

PRZESTĘPSTWO DEFRAUDACJI PODATKOWEJ W HISZPANII

Streszczenie

W artykule została przeprowadzona analiza znamion przestępstwa defraudacji podatkowej stypizowanego w art. 305 hiszpańskiego kodeksu karnego. Defraudacja polega na uchylaniu się m.in. od zapłaty podatków lub nieuprawnionym korzystaniu z ulg podatkowych. Istotną przesłanką odpowiedzialności za to przestępstwo jest pozostawanie sprawcy w stosunku prawnopodatkowym z administracją podatkową. Zdaniem autora dla bytu tego przestępstwa nie jest konieczne wprowadzenie w błąd administracji podatkowej, a wystarczające jest naruszenie obowiązku formalnego, który materializuje się w ukryciu lub defiguracji podstawy opodatkowania, co uniemożliwia określenie kwoty podatku. Przedmiotem analizy w zakresie tego przestępstwa są także sprawstwo, współsprawstwo, współsprawstwo konieczne, podżeganie, pomocnictwo, zdefraudowana kwota podatkowa, administracyjne wyliczenie kwoty i jej określenie sądowe, nieuzasadniony wzrost majątku w kontekście odpowiedzialności za defraudację podatkową, nielegalne dochody, a także odpowiedzialność doradców prawnych, podatkowych lub księgowych.

Słowa kluczowe: doradcy podatkowi, oszustwo podatkowe, prawo karne podatkowe, sprawstwo i pomocnictwo

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THE UNATTAINABLE NEUTRAL STATE

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1. A DEPICTION OF STATE NEUTRALITY

The definition of State neutrality is, at first glance, quite simple. A neutral State is one that deals impartially with its citizens and does not take sides on the issue of what sort of lives they should lead.[1] Applied to religion, neutrality prevents public powers from interfering in religious affairs, leaving citizens and communities free to act on that field, of course, within the legal framework.

Neutrality may be considered an independent principle of State action, or a characteristic of the State that conveys two other principles: equality and incompetence of the State on the issue at stake.[2] One way or another, the neutrality of the State entails, on the one hand, that under identical conditions, the State cannot grant a better or worse treatment to anybody because of his religious beliefs, or to religious communities because of their religious ethos. Then, religion cannot be considered a standard to decide in competitive situations. On the other hand, the State cannot get involved in internal issues of the religious communities.[3] It has no power to assess the pronouncements of these communities nor to appraise the religious doctrines, either individually or comparing them.

Neutrality, however, is not a goal in itself. It aims to protect religious freedom, which is a fundamental right. In Europe, this right is guaranteed both at the national and European level, in the latter case mainly through the European Convention on Human Rights (ECHR).[4] Neutrality does not enjoy such protection, as it is not

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1 Cf. P. Jones, *The Ideal of the Neutral State*, [in:] R. Goodin, A. Reeve (eds.), *Liberal Neutrality*, Routledge, London 1989, p. 9.

2 Cf. J. Martínez-Torrón, *Símbolos religiosos institucionales, neutralidad del Estado y protección de las minorías en Europa*, Ius Canonicum No. 54, 2014, p. 114 ff.

3 Cf. M. Barbier, *Esquisse d'une théorie de la laïcité*, Le Debat No. 77, November–December 1993, pp. 78–81.

4 Article 9: "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community

a human right but a means to better protect one of those rights.[5] It is not an essential characteristic of those states committed to fully protect human rights. The European Court of Human Rights (ECtHR) has repeatedly emphasized that no system of relations between State and religion can be excluded a priori if religious freedom is guaranteed. Those systems fall within the margin of appreciation: the states may decide which kind of relationship they will have with religions.[6]

Despite this statement, a neutral position of the State seems to be more appropriate to fully protect religious freedom.[7] Where individuals are free to choose, the State should not evaluate the options nor line up with any of them, because the result would be an imbalance among the choices. If citizens can choose, the State cannot.[8] In other words, religious freedom would be better safeguarded if the State does not opt in matters of religion.[9]

The European standards to label a State as neutral are far different than those from other parts of the world, namely the United States of America.[10] Some commitments of the European states aimed to support religion in general, or a specific religious denomination, would be regarded as a breach of the Establishment Clause of the First Amendment of the US Constitution ("Congress shall make no law respecting an establishment of religion").[11] That is the case of the special mention of the

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with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

[5] Cf. J. Martínez-Torrón, *Símbolos religiosos institucionales...*, p. 117.

[6] See *Lautsi and Others v. Italy*, [GC] Application no. 30814/06, ECtHR 2011, §60: "States have responsibility for ensuring, neutrally and impartially, the exercise of various religions, faiths and beliefs. Their role is to help maintain public order, religious harmony and tolerance in a democratic society, particularly between opposing groups. That concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs". *Leyla Şahin v. Turkey*, [GC], Application no. 44774/98, ECtHR 2005-XI, §107: "The Court has frequently emphasized the State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society. It also considers that the State's duty of neutrality and impartiality is incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed". See, as well, *Manoussakis and Others v. Greece*, judgement of 26 September 1996, *Reports* 1996-IV, p. 1365, §47; *Hasan and Chaush v. Bulgaria* [GC], Application no. 30985/96, §78, ECtHR 2000-XI; *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98, §91, ECtHR 2003-II.

[7] Some authors go as far as considering neutrality "the defining feature of liberalism: a liberal state is a state which imposes no conception of the good upon its citizens but which allows individuals to pursue their own good in their own way" (P. Jones, *The Ideal of the Neutral State…*, p. 11). See also, J. Madeley, *European liberal democracy and the principle of state religious neutrality*, West European Politics Vol. 26, No. 1, 2003, p. 6.

[8] Cf. L. Zucca, *A Secular Manifesto for Europe*, 5 March 2015, available at http://ssrn.com/abstract=2574165, p. 12.

[9] See, among others, S. Ferrari, S. Pastorelli (eds.), *Religion in Public Spaces. A European Perspective*, Ashgate, Surrey 2012.

[10] J. Madeley, *European liberal democracy…*, p. 15.

[11] See a brief introduction to this clause at http://www.uscourts.gov/educational-resources/educational-activities/first-amendment-and-religion.

Catholic Church in the Spanish Constitution, the funding of religious denominations in Belgium, or the funding of religious schools in Ireland, all of them countries that are self-defined as systems with a certain level of neutrality. As Justice Scalia from the US Supreme Court put it, "while Americans tend to believe strongly that religious values undergird government, and should be acknowledged to do so, they simultaneously believe that the government should play no role in controlling religion, either at the individual or institutional level. Europeans tend to invert these two positions, believing that politicians should keep their religious beliefs to themselves while (paradoxically) turning a blind eye to state/church institutional entanglement – hence, the Church of England and the Concordat between the Vatican and Italy favouring the Catholic Church".[12]

The principle of neutrality has a double edge. Public powers can neither benefit nor burden religion as a whole or any particular religion.[13] According to the first approach, religion should be treated like any other element that contributes to the common good, without privileges, but without disregard, either. Certainly, different political projects give varying importance to the elements that shape the society; some of them foster the cultural heritage extensively, others pursue the advancement of a specific social issue, or grant special weight to sports or any other purpose.[14] These preferences will have an impact on the distribution of public funds; after all, governments aim to build up a particular model of society, and governing entails choices, as resources are scarce and must be allocated in one or another place. This is the essence of political diversity: proposing different ways to find a balance among the elements that contribute to the common good. This balance, however, has limits in neutral states: an element cannot be obliterated, as it would imply a negative appraisal of its contribution to the society.

Regarding the second perspective, neutrality requires that the State do not favour or harm a specific religious denomination or community. Lawmakers, as any other public power, cannot enact laws or regulations that target a religious group. Nonetheless, neutral laws or government actions are bound to have non-neutral consequences at times, causing a harm on a certain religious group, insofar as free competition for adherents will almost always lead to some ways of life prevailing over others.[15] In this case, reconciling neutrality with religious freedom – that, as all fundamental rights, should be construed as broadly as possible – would require that the State prove that the regulation has been needed in a democratic society and the restriction has been proportionated to the aim of the regulation.[16]

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[12] A. Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived*, The Crown Publishing Group, 2018, pp. 31–32.

[13] Cf. L. Zucca, *A Secular Manifesto for Europe*…, p. 13; J. Madeley, *European liberal democracy*…, p. 8. The ECtHR declared that the State neutrality "concerns both relations between believers and non-believers and relations between the adherents of various religions, faiths and beliefs". See above, *Lautsi and Others v. Italy*, note 6.

[14] As an example, see A. Fornerod (ed.), *Funding Religious Heritage,* Ahsgate, Surrey 2015; it deals with the different approaches from European States to one of the elements of the common good, the heritage.

[15] J. Madeley, *European liberal democracy*…, p. 7.

[16] Cf. J. Martínez-Torrón, *Universalidad, diversidad y neutralidad en la protección de la libertad religiosa por la Jurisprudencia de Estrasburgo*, [in:] J. Martínez-Torrón, S. Meseguer Velasco,

2. SOME MISCONCEPTIONS ABOUT STATE NEUTRALITY

The implementation of the principle of neutrality depends on various factors, among others, the ideology of the political party in power. Certainly, there are some limits that cannot be trespassed, under risk of withdrawing this principle. But within those limits, there is a margin of discretion of the State to set up this principle.

Nevertheless, neutrality has been occasionally misunderstood, both in its scope or regarding its requirements and consequences. These mistakes bring about wrong approaches to this principle. I will deal with two of them.[17]

2.1. IDENTIFYING NEUTRAL STATE AND NEUTRAL SOCIETY

The first misconstruction that needs to be clarified is that a neutral State neither presupposes nor pursues a neutral society. At times, these two realities – the neutral State and neutral society – appear tightly linked, or even identified as the same political goal. However, this identification is not accurate and relies on an imprecise conception of the public space.

The public realm, as opposite to the private one, is the space open to everybody. We can still differentiate two spheres within the public realm: the public institutional and the public social ones. Both terms are conventional and admit diverse denominations (like political domain versus civil society, for example), but the distinction is essential because the neutrality has different consequences in each one.[18] The public institutional sphere comprises the State powers (the Parliament, Courts of Justice, City Councils, etc.) and the public administration at its different levels (national, regional, local). Religion should be out of that sphere in the neutral State. The interdiction of using religious reasoning and arguments in rulings and debates, the absence of religious symbols and the ban of expressions of faith in general manifest the non-commitment of the State to any religious beliefs. The public social sphere, on the contrary, is open to the participation of everybody. It is the sphere of the free development of ideas of any kind, including religious ones. It is also the specific field for the growth and spread of political parties, labour unions, associations, and so on. Nobody should be excluded from that sphere as far as they accept the constitutional limits of public order, and no one may impose their will

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R. Palomino Lozano, *Religión, Matrimonio y Derecho ante el siglo XXI*, Vol. 1, Iustel, Madrid 2013, p. 283.

17 This paper adopts mainly the perspective of the Southern European countries, that is those from a Catholic tradition. The Anglo-Saxon and Nordic perspectives are not considered here. There is a vast literature that copes with that viewpoint. Beside several books quoted in this paper, see the articles published within the *Religare* Project (https://cordis.europa.eu/project/rcn/94078_en.html).

18 Cf. V. Bader, *The 'Public-Private' Divide on Drift: What, if any, is its Importance for Analyzing Limits of Associational Religious Freedoms?*, [in:] S. Ferrari, S. Pastorelli (eds.), *Religion in Public Spaces. A European Perspective*, Ashgate, London 2012, p. 55 ff. This author recognises many internally diverse public arenas; see chart on page 56 of the aforementioned contribution. To our aim, this highly detailed distinction is not necessary.

by force to others. The public authorities must assure a fair play but should not interfere in that development. Using a visual comparison, in the public social field social agents are free to play like players in a football game. The State acts on that field like a referee: he must be sure that the rules of the game are respected; he himself must be neutral but players are not: each one, or each team, will seek their own interest, that do not coincide with that of the others'.[19]

Therefore, religion should not be pushed back to the private sphere in the neutral State. It must be out of the public institutional, but it can be present in the public social field. The neutral State must not suppress the different options on religion in the society. It must only guarantee that they are developed according to the rules of the game: within the legal framework of each country.[20]

The intent of expelling religion not only from the public institutional sphere, but also from the society, has been a target of political regimes of different sign. However, the impossibility of wiping out religion from the social sphere has been repeatedly demonstrated. Therefore, an attitude of tolerance, understood as coming to terms with a harm that cannot be kept away, is currently more frequent than a real will of erasing religion in European societies. Nonetheless, this approach is not neutral, either.

The consequence of the attitude of mere tolerance of religion is that atheistic convictions enjoy a more advantageous position than the religious beliefs.[21] The State would not be neutral in this case because that position implies a certain stance – a negative one – on religion, to the extent that religion is simply accepted as something unavoidable. This idea has been articulated rewording a famous expression: religion is not deemed the opium of the people anymore, and therefore it is not persecuted; instead, it is considered the *tobacco of the people*, and is treated as that: you have to avoid it as much as possible because it is harmful, use it without bothering anybody, and of course, out of any public space.[22] The religious factor, then, would lose all prominence in public life. From the juridical point of view, the regulation of the religious element, when necessary, would be redirected to other sectors of the law – the cultural sphere, social services, non-governmental organisations, etc. – without any recognition of its own specificity.

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[19] Cf. R. Palomino, *Neutralidad del Estado y espacio público,* Thomson Reuters–Aranzadi, Navarra 2014, p. 162.

[20] According to the European Court of Human Rights, the State neutrality "cannot be conceived as being likely to diminish the role of a faith or a Church with which the population of a specific country has historically and culturally been associated" (ECtHR/Council of Europe, Guide to Article 9, published in 2015, no. 170; available at http://www.echr.coe.int (Case-law – Case-law analysis – Case-law guide).

[21] Cf. J. Martínez-Torrón, *Símbolos religiosos institucionales...*, p. 120. See similarly, J. Madeley: "Arrangements based on Enlightenment liberal assumptions actually offend against the principle of governmental religious neutrality because they privilege secular beliefs over religious ones and consign religion to the margins of social life. This means that in areas such as the provision of education, health care and other social services, where churches have traditionally maintained a strong interest, they receive little or no encouragement from the state, which instead provides secular alternatives out of the public purse". J. Madeley, *European liberal democracy…*, p. 8.

[22] The idea comes from A. Ollero, *La engañosa neutralidad del laicismo*, [in:] J. Prades, M. Oriol (eds.), *Los retos del multiculturalismo*, Encuentro, Madrid 2009, p. 2.

In accordance with this attitude of tolerance of religion, the advancement towards a neutral society is usually accomplished not directly, but through indirect means. Social neutrality is not presented as a goal in itself, but as an outcome of other compelling actions. For example, the absence of religious elements in the public space is occasionally rendered as a necessary guarantee of the social peace. Religion is depicted as a potential element of conflict; the difficulties in solving issues that involve religion are emphasized. As a consequence, the message sent by the public powers is that only by eliminating that source of controversy, can a peaceful development of society be achieved.[23] The ECtHR has often underlined that public authorities cannot guarantee the social peace removing the religious element from the public square. "The role of the authorities in such circumstances – affirms the Court – is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".[24] The State must promote respect and getting along among citizens; expelling religion from society to avoid social strain is an excessive and disproportionate measure.[25]

Another way to strive for a neutral society is searching for a consensus on moral issues depriving them of any religious connotation, at the same time that they are incorporated into the content of fundamental rights that everybody must respect. It happened in the United States with the substantive due process and the marital privacy or in Spain with the fundamental right to the free development of personality, protected by Article 10 of the Constitution.[26] This way, public powers impose a moral common to all citizens, stripped of any religious element, giving way to a kind of secular establishment in which only those secular beliefs would be acceptable. Furthermore, this attitude implies that the civil powers become arbiters of what is and what is not religious, thus undermining the bases of state neutrality.[27]

The imposition of this secular moral to everybody, however, is not acceptable in liberal democratic states. Public powers cannot attempt to achieve a consensus on values other than those stated in the Constitution. This consensus must not be pursued as it entails a denial of personal freedom to choose one's religious and moral set of values. Besides, that pretension would contravene the equality, because

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[23] Cf. B.L. Berger, R. Moon, *Introduction*, [in:] *Religion and the Exercise of Public Authority,* Hart Publishing, Oxford–Portland 2016, pp. 4–5.

[24] *Leyla Şahin v. Turkey*, §107. See also, *Serif v. Greece*, Application no. 38178/97, §53, ECHR 1999-IX.

[25] See J. Martínez-Torrón, *Universalidad, diversidad y neutralidad en la protección de la libertad religiosa...*, p. 299.

[26] In the United States, the right to *marital privacy* was recognised in *Griswold v. Connecticcut* (381 U.S. 479, 1965). Since then, the Supreme Court widened the scope of this right through the doctrine of the substantive due process, including a number of rights with moral content in its aim: adults' right to use contraceptives (*Eisenstadt v. Baird*, 405 U.S. 438,1972), and minors' right as well (*Carey v. Population Services Intl.*, 431 U.S. 678, 1977); women's right to abortion (*Roe v. Wade,* 410 U.S. 113, 1973), the right to homosexual relationships without punishment (*Lawrence v. Texas*, 539 U.S. 558, 2003). On this Supreme Court application of substantive due process, see H.M. Alvaré, *Putting Children's Interests First in U.S. Family Law and Policy,* Cambridge University Press 2018, p. 18 ff.

[27] Cf. B.L. Berger, R. Moon, *Introduction,* [in:] *Religion and the Exercise of Public Authority…*, p. 5.

while religious people must be tolerant of some behaviour they find hard to accept, secularists would refuse to display the same tolerance when it comes to religious behaviour which does not comply with that civic moral.[28]

Consensus in the religious or moral sphere cannot be claimed by the State, the same way that no consensus is sought in political or ideological matters. The opposite would be a manifestation of totalitarianism. The consensus should be pursued in those cases in which the individuals are not free to choose, for example, if it is a matter of sanctioning some behaviour or imposing a civic obligation. On the contrary, in areas where citizens are free to choose, the State must guarantee the conditions to achieve the maximum freedom to make the choice, not the greater uniformity in decisions. And it cannot shrink the scope of that area of freedom, either.

The game, as it is currently conceived, is diversity and coexistence in dissent, or, as is more commonly said, pluralism.[29] The rules of the game are established by the constitutional principles and the standards stipulated in the bills of rights, and these rules are broad enough and yet specific enough to include everybody without requiring any agreement on other background values.[30] In other words, the State neutrality is inclusive, not exclusive. It must not seek the exclusion of religion from public life, but the inclusion of all religious groups, without any preference, but also without reluctance or prejudice regarding religious or denominational values.[31]

2.2. RELIGIOUS INFLUENCE AND BALANCED SOCIETY

Another wrong way to understand neutrality is considering that the neutral State must avoid any kind of religious influence in law and politics. The neutrality does not accept the direct influence that comes from an entanglement between Church and State. However, there is also another influence that comes out as a consequence of the existence of a religious majority in a country. That majority may have an impact in the juridical or political field. The wrong approach to neutrality would consist in the conviction that if a religious denomination is prevalent in the society, the public powers should try to "neutralise" its potential influence. To this aim, they foster religious plurality, that is regarded as the only possible background of a true neutrality.

This kind of State intervention, however, is not neutral itself. Religious denominations and communities enjoy collective religious liberty that must be free

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[28] See P. Berger, G. Davie, E. Fokas, *Religious America, Secular Europe? A Theme and Variations*, Burlington, VT. 2008, pp. 103–104.

[29] On this issue, see S. Ferrari, *Introduction to European Church and State Discourses*, [in:] L. Christoffersen, K.Å. Modéer, S. Andersen (eds.), *Law & Religion in the 21st Century: Nordic Perspectives*, Djøf Publishing, Copenhagen 2010, p. 23 ff.

[30] See generally, L. Zucca, *The crisis of the secular state – A reply to Professor Sajó*, International Journal of Constitutional Law Vol. 7, 2009, Section Two, pp. 494, 498.

[31] I develop this reasoning related to the educational field in Spain in *Education in the secular state: Whose right is it?*, International Journal of the Jurisprudence of the Family Vol. 2, 2011, pp. 77–106.

from any State interference; their development, that is, their growth or decline, their success or failure, will be determined by the individuals' free choices. The more plural or more homogeneous configuration of a society will depend on multiple factors, but it must not be achieved through a political intervention. Public powers cannot neutralise or lessen a religious denomination (or several ones), promoting an artificial balance among them in order to counterweight their influence in the society and getting a zero-sum game.

Undoubtedly, a religious community with more members or a wider capacity for action will have a greater sway in the society. However, that cannot be understood as a negative result that must be repressed; it is an inescapable consequence of freedom. It would be a contradiction recognising the freedom of expression and religion, and at the same time considering the influence of religion in society illegitimate, as the Stasi Report did years ago.[32] "How is it possible, wonders a former president of the Italian Senate, to regard *free expression* of religious beliefs as legitimate, but their *influence* as illegitimate? Is it not precisely the goal of free expression to influence public debate and political decisions? By what (secular) miracle is it possible for religious expression to be free yet have no influence?". And the author himself answers the question: "Only one, the miracle by which secularism has been transmuted into a religion".[33]

Religious groups can spread their ideas and try to gain followers or to influence society as long as they do so while respecting the law. The legitimacy of this action, known with the reviled term of proselytism – which often evokes in an equivocal way a coercion or violation of religious or thought freedom – has been affirmed by the European Court of Human Rights.[34]

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[32] See, among others, M. Akan, *Laïcitè and multiculturalism: the Stasi Report in context*, The British Journal of Sociology Vol. 60, issue 2, 2009, p. 237. The author considers Will Kymlicka the strongest defender of multiculturalism as a liberal democratic project. His argument is that cultural context is one of the primary definers of the content of one's choice without which the idea of choice becomes meaningless. See p. 251.

[33] Cf. M. Pera, *Why we Should Call Ourselves Christians: The Religious Roots of Free Societies*, Encounter Books, New York 2008, p. 32.

[34] Cf. *Kokkinakis v. Greece*, Application no. 14307/88, A/260-A, 25 May, 1993, §31: "As enshrined in Article 9 (art. 9), freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions. According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9 (art. 9), would be likely to remain a dead letter". Obviously, the ECtHR does not protect any kind of improper proselytism, such as the offering of material or social advantage or the application of improper pressure with a view to gaining new members for a Church; see *Larissis and Others v. Greece*, Applications nos. 140/1996/759/958–960, ECtHR, 24 February 1998, §45.

The possibility that religious beliefs may influence political decisions – like secular ideological ones may, too – does not diminish the neutrality of the State. It does not affect the separation of Church and State, either, although it may have an impact on a greater or lesser secularisation of society. For example, when a large number of citizens profess a faith that opposes the death penalty or the consumption of alcohol, they might get to influence the law or the political decisions in this direction, if they manage to change them through the majority principle that applies in democratic systems. Surely, their defenders will have to use secular reasonings to this aim, without relying on religious reasons, which must remain in the internal sphere of the individual. In the aforementioned examples, they could claim the defence of human dignity or public health reasons.[35] Actually, if the number of members of a religious group is big enough to achieve a change in the legal system, that religious group will have a real influence in society,[36] but the State would not be confessional, not even in a covert manner. It would be confessional if the reasons for the legal change were, expressly or tacitly, to adjust its laws and statutes to the tenets of a religious denomination, but not if it is the result of a process of citizen participation.[37] And we can assert it even when a religious element is at the origin of the citizens' decision. Nobody can demand or expect that citizens make their choices in a neutral way from the religious, ideological or any other point of view. Neutrality refers to the political or the juridical systems, not to the process of forming people's ideas.

In the search of the counterbalance among religious denominations, some states implement measures of positive discrimination. In the field of religion, the positive discrimination, or affirmative action, as it is better known in some juridical systems, entails a favourable treatment of one or several minority religious groups to

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[35] Cf. S. Ferrari, *Diritto e religione nello Stato laico: islam e laicità*, [in:] G.E. Rusconi (ed.), *Lo Stato secolarizzato nell'età post-secolare*, il Mulino, Bologna 2008, p. 318.

[36] This is a theoretical approach, in the sense that it would be very difficult to measure the actual influence of certain religious beliefs on a political decision based on fully secular arguments. On the one hand, because the different factors that determine the decision of a citizen cannot be divided, he will often adopt a certain position based not only on his religious convictions, but also on other ideological or political preferences. On the other hand, individuals who have forged their opinion on the basis of religious convictions come together in the processes of citizen participation with other people who have not taken into account any beliefs to make a decision and with whom they can agree supporting a specific legislative or political measure. It is almost impossible to determine, within the group of citizens who support a law or other political action, the percentage of those who have taken into account a religious doctrine to make a decision.

[37] J. Ratzinger refers to this issue from the perspective of politicians who profess religious beliefs. "The Catholic does not want, and cannot, passing through the legislation, impose hierarchies of values that only in faith can be recognised and realised. He can claim only what belongs to the bases of humanity accessible to the reason and that is essential for the construction of a good legal system". M. Pera, J. Ratzinger, *Sin Raíces. Europa, Relativismo, Cristianismo, Islam*, Península Ediciones, Barcelona 2006, p. 124. However, he recognises the difficulties that stem from trying to find a common background both for believers and non-believers on certain issues: "Here arises this question spontaneously: what is the moral minimum accessible to reason common to all men? Is it what all men understand? Would it then be possible to draw statistically these common rational bases of an authentic right? Here we are faced squarely with the dilemma of the human conscience. If rationality should be equated with the average conscience, in the end there would be little reason".

compensate for a historical situation of inequality. This special protection is acceptable if it is referred to the point of departure, that is, whenever it aims at procuring that all religious groups enjoy a legal status that allows their development in society. It does not apply, however, to the point of arrival, that is to say, to the situation resulting from that development. All religious groups must have identical opportunities, but the fact that minority groups effectively achieve a degree of acceptance or success equal or similar to that of other groups operating in the same territory cannot be a target of the public authorities; it depends exclusively on each group. The State must ensure that the necessary conditions are met – correcting past errors in the legal regulation, if necessary – so that all groups can perform their functions in the society, but it cannot impose a result; it must leave the religious groups to act in full freedom, whatever the consequences of such actions.[38] In other words, pluralism cannot prevent the success of any religious group.[39] Fostering the advance of the less developed religious denominations is a means to achieve a greater pluralism, but it would constitute an entanglement between State and religion incompliant with the required State neutrality. The European Court of Human Rights has frequently underlined the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs, emphasizing that this role is conducive to public order, religious harmony and tolerance in a democratic society.[40]

Positive discrimination, therefore, is contrary to neutrality because the State does not act impartially with respect to religious groups. Besides, this attitude exceeds the competences attributed to the State: in order to adopt measures that involve positive discrimination, it is necessary to make a prior value judgement to determine which is the ideal achievable situation; that is, stating the degree of implementation each of the religious groups should have to consider that an adequate social composition has been accomplished.[41] When the State cooperates with religious denominations, it must protect and foster the development of the religious freedom, both individual and collective, not the particular development of certain religious denominations to fulfill a goal of a wider pluralism in society or a balance of faiths.[42] As some authors put it, the neutral State is not legitimated to intervene in the free market of ideas and beliefs.[43]

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[38] Cf. M. Barbier, *Esquisse d'une théorie de la laïcité*..., p. 81.

[39] Cf. I.C. Ibán, L. Prieto, A. Motilla, *Manual de Derecho Eclesiástico*, Trotta, Madrid 2004, p. 38.

[40] ECtHR/Council of Europe, Guide to Article 9, published in 2015, no. 169, available at http://www.echr.coe.int (Case-law – Case-law analysis – Case-law guide).

[41] J. Martínez-Torrón, *Separatismo y cooperación en los acuerdos del Estado con las confesiones religiosas*, Comares, Granada 1994, pp. 52–53.

[42] This misconception of neutrality is more likely to occur in societies, such as the Spanish one, that have a religious majority. I dealt with this issue in *The Ministerial Exception. European Balancing in the Spanish Context*, Oxford Journal of Law and Religion Vol. 4, issue 2, 2015, pp. 260–277.

[43] See R. Palomino, Á. López-Sidro, *¿Cabe la discriminación positiva en relación con el factor religioso?*, [in:] J. Martínez-Torrón, S. Meseguer Velasco, R. Palomino Lozano (eds.), *Religión, Matrimonio y Derecho ante el Siglo XXI, Estudios en homenaje al Profesor Rafael Navarro-Valls*, Vol. 1, Iustel, Madrid 2013, pp. 580–581.

3. CHALLENGES TO STATE NEUTRALITY

What has been said so far does not prevent recognising that the principle of State neutrality finds a main obstacle. From a theoretical point of view, the effort of defining neutrality, stating its demands and consequences, can offer accomplished results. Besides, this principle can generate adhesion from different political and ideological spectrums. Neutrality, understood as the position of the State which does not impose a specific conception of good or evil, but allows citizens to pursue their own good in the way they want, is undoubtedly broad enough to be endorsed by many different ideologies.[44] However, it poses a fundamental difficulty: want it or not, the State must make value judgements; it has to decide what is good and what is not to repress such behaviour and impose a penalty,[45] or to select the activities or social factors that will be promoted by the public authorities.[46] In other words, establishing the limits of neutrality is not a neutral issue.[47] Since there is such an assessment, there is no longer absolute neutrality. This statement is particularly true with regard to some fields that do not admit a neutral approach, for example, education. An education system deprived of any moral content is an option itself, a relativistic one; and therefore, non-neutral.

Where is the limit of freedom of choice? If the State decides that something is better – a certain healthy life style – and decides to promote it, it is not neutral with regard to that issue. Nonetheless, it does not appear to be better to remain neutral in an issue that may enhance the citizens' life. Should it extend the possibilities of choice, or should it be non-neutral on some issues? Which ones?

Hence, doubt remains about the principle of neutrality, as necessary as complex: are we facing a myth or a challenge? Can the State really fulfill its mission as an arbitrator in religious matters, or is it inescapable that in certain situations it also intervenes in the game? There may not be a single answer, but rather each state must take into account its circumstances and the legal instruments available to achieve a neutral action by all the State powers.[48]

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[44] See R. McCrea, *Religion and the Public Order of the European Union*, Oxford 2010, p. 36.

[45] "It is undeniable that the state is not ethically neutral from the moment that, for example, it establishes a criminal code"; R. Palomino, *Religion and neutrality: Myth, principle and meaning*, BYU Law Review Issue 3, 2011, p. 669.

[46] "A State which is truly neutral between different religious-ethical systems is a practical impossibility. The existence of political community is predicated upon the widespread acceptance of *political* values which determine where the line is to be drawn between matters of public concern and matters of private concern and how disagreements about matters of public concern are to be resolved"; D. Jensen, *Classifying church-state arrangements. Beyond religious versus secular*, [in:] N. Hosen, R. Mohr (eds.), *Law and Religion in Public Life. The Contemporary Debate*, Routledge, London–New York 2011, p. 19.

[47] See F. Requejo, *Religions and liberal democracies*, [in:] F. Requejo, C. Ungureanu (eds.), *Democracy, Law and Religious Pluralism in Europe: Secularism and Post-Secularism*, Routledge, London–New York 2014, p. 211.

[48] On this issue, see the chapter *Las dificultades prácticas de la neutralidad*, [in:] R. Palomino, *Neutralidad del Estado y espacio público...*, p. 172 ff.

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THE UNATTAINABLE NEUTRAL STATE

Summary

State neutrality in relation to religion is a principle of the juridical system and the political activity that aim to protect religious freedom. It conveys two main elements: equality and incompetence of the State in religious matters. Religious neutrality is entailed in a number of European Constitutions, although its scope varies from one country to another. At times, neutrality has been misunderstood. The article deals with two of the wrong approaches to this principle that are not uncommon in the contemporary society.

Keywords: law and religion, secularity, neutrality

NIEOSIĄGALNY MODEL NEUTRALNOŚCI ŚWIATOPOGLĄDOWEJ PAŃSTWA

Streszczenie

Neutralność państwa w stosunku do religii jest podstawą systemu prawnego i działań politycznych, mających na celu wolność religijną. Wyraża ona dwa główne elementy: równość i niekompetencję państwa w kwestiach religijnych. Neutralność religijna jest ustanowiona w wielu konstytucjach europejskich, chociaż jej zakres różni się w zależności od kraju. Niekiedy neutralność była źle rozumiana. Artykuł dotyczy dwóch niewłaściwych podejść do tej zasady, które nie są rzadkością we współczesnym społeczeństwie.

Słowa kluczowe: prawo i religia, laickość, neutralność

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ISSUE OF "DANGEROUS" PERPETRATORS IN RESEARCH AND CASE LAW

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The issue of individuals dangerous to the public is extremely complex because of its multi-dimensional context and the variation of the thematic background. It has not always been perceived this way, which can be traced in the history of the *maisons de correction*, i.e. borstals, which were established in Europe at the early 19th century.[1] Then, the phenomenon of dangerous conduct was understood in a simple way and without nuances, which was expressed, inter alia, in the same treatment of people whose conduct infringed the binding social norms, regardless of the type of dysfunction and the type of offence. Everyone was treated in the same way: tramps, people mentally sick, madmen, deviants and criminals. Each group was classified as one breaking the social order and interned in the same *maisons*, treating them with the use of the same "therapeutic" means. The most flagrant example of this historical association is the way of treating minor perpetrators of misdemeanours.[2] The first borstals in France (*Petite Roquette*), opened in Paris in 1836 (similarly to the *colonies agricoles* first established in the period of the July Monarchy), were more like youth prisons than correctional and educational centres for minors with regimes identical to those applicable to adult criminals.[3] The system of dealing with minors did not change throughout the 19th century and the early 20th century, although there were attempts to reform it. The Act of 5 August 1850 *sur l'éducation de la patronage des jeunes détenus* stipulated the increase in the number of penitentiary

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1 C. Montandou, *La dangerosité. Revue de la litérature anglo-saxonne*, Déviance et Société Vol. 3, No. 1, 1979, p. 92.

2 In France, the Act of 1791 included persons under the age of 16 in this category; the Criminal Code of 1810 stipulated the same.

3 One of the well-known colonies was situated in Mettray near Tours. A clerk and philanthropist, Frédéric-August Demetz was its founder. It was mainly aimed at dealing with children involved in vagrancy. Such conduct was recognised in France as crime until 1935.

colonies for minors and the promotion of the system of social philanthropy aimed at implementing those initiatives. It was the basis for the establishment of the most famous institution of this kind in Belle-l'Île-en Mer (1880). In numerous descriptions of the place, the dominating picture does not raise doubts concerning the fact that the institution was a dark prison with an extremely strict discipline, thoroughly barred and surrounded by a tall wall.[4] The issue of this and other youth prisons was broadly discussed in the French press.[5] In each publication on the issue, the cruelty of such places was emphasized,[6] and at the end of the book *Les enfants de Caïn*,[7] its author, a famous journalist L. Roubaud, wrote: "The walls of all those institutions should be pulled down; it is the only response" ("Il faut raser les murs de toutes ces institutions, c'est la seule réponse"). The opinions had influence on legislative initiatives; however, they did not improve the situation until the late 1930s.[8] In the first half of the 19th century, facilities similar to the *maisons de correction* were founded throughout Europe. In case of colonial states, a removal of socially undesired individuals from the mother country was an alternative way of dealing with them. Both systems were based on the simplest principle of perceiving people infringing set standards by identifying any diversity with danger and adopting the same methods of dealing with them.

The above introduction aims to show that the historic connotation of some people's "dangerousness" had an impact on the ways of identifying the phenomenon, concurrently focusing on various research areas: sociological, psychiatric and psychological, and legal ones. This multi-contextual aspect is expressed, inter alia, in the fact that the phenomenon has semantic counterparts in western languages: *dangerosité* (French) and *dangerousness* (English), emphasizing its semantic autonomy. In Polish, however, there is no equivalent noun.

Lawyers' professional interest in dangerous (incorrigible) offenders started in the 19th century and was connected with the development of criminal law schools: classical, anthropological and sociological ones,[9] but intensive and complex growth of research into the issue of "dangerousness" of some individuals started after World War II. The United States dominates it but valuable scientific studies were also conducted in many Western European countries. This shows the complexity of the phenomenon. Focusing on the task of defining the notion of "dangerousness"

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[4] G. Tomel, H. Rollet, *Les enfants en prison: études anecdotiques sur l'enfance criminelle*, Paris 1892, pp. 41–42.

[5] Le Petit Journal of 23 August 1908.

[6] J. Bourquin, *Une maison de correction*, Revue d'histoire de l'enfance "irrégulière", Hors-série 2007, pp. 259–265.

[7] L. Roubaud, *Les enfants de Caïn*, Paris 1925, p. 214.

[8] Inter alia, the Decree of 31 December 1927 *sur maisons d'éducation surveillée*, in which "houses of monitored education" (*maisons d'éducation surveillée*) substituted for the former *colonies pénitentiares et correctionnelles*. Next, the Decree of 31 October 1935 abolished the penalisation of minors' vagrancy and left the issue to civil legislation. The educational houses in Saint-Maurice and in Saint-Hilaire were reformed in 1936 and 1937, respectively. The adoption of the Ordinance of 2 February 1945 that has been in force up to now was the crowning achievement of legislative activities concerning minors. The proclamation of educational means instead of the former system of minors' detention and internment was its most important provision.

[9] L. Gardocki, *Prawo karne*, Warsaw 1999, p. 19 ff with the literature referred to therein.

resulted in the creation of a series of concepts, mainly in the field of social sciences.[10] The developed theories were criticised and the main argument was that the definition of "dangerousness" was excessively relative as a result of its content dependence on the legal system and the current social structure. Based on that principle, some individuals, e.g. people mentally sick or suffering from other mental disorders or dysfunctions, are recognised to be dangerous, while people or groups also objectively posing serious threats to society are classified in a more liberal way, e.g. drink drivers.[11] The question about unequal treatment of individuals from the perspective of social threats caused by their conduct may concern many different situations but in each case the answer does not result from cultural, legal and social conditions. According to an outstanding researcher into the issue, S.A. Shah, western societies identify dangerous acts with an individual rather than collective threat.[12]

In the research into the phenomenon of "dangerousness", also a psychological method was used. It focused on a person classified as dangerous and on looking for their character or personality features that would make it possible to treat them as dangerous.[13] P.D. Scott presented a still different theory emphasizing a practical dimension of the issue of threats posed by some persons, focusing on physical damage and ignoring psychical damage, which remains in the interest of the psychological and psycho-sociological methods.[14] It is worth quoting the stand of the Supreme Court of New Jersey, according to which dangerous conduct does not mean criminal conduct, i.e. it results not only from the infringement of social norms imposed by penal sanctions, but also from individuals' physical and psychical damage that is not classified in penal terms.[15] The broad research into the phenomenon of "dangerousness" conducted in the 1970s was a response to the World Health Organisation's call for international research into the issue.[16] Then, a belief dominated that psychiatrists in particular are predestined to do this. However, examining the relation between such categories of concepts as "dangerousness", criminality, psychical disorder and other mental dysfunctions made many specialists take action.[17] From the legal point of view, the most interesting association concerns a mental illness and other disorders, and indicators of crimes committed in those mental states. Such research was conducted in many countries on a large scale in the post-war period. Only in the period between 1942 and 1962, the literature on this issue

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[10] C. Montandou, *La dangerosité…*, pp. 89–90.

[11] S.A. Shah, *Dangerousness and civil commitment of the mentally ill: some public policy considerations*, American Journal of Psychiatry Vol. 132, No. 5, 1975, pp. 501–505.

[12] S.A. Shah, *Dangerousness: a paradigm for exploring some issues in law and psychology*, American Psychologist Vol. 33, No. 3, 1978, pp. 224–238.

[13] W. Mischel, *Personality and Assessment*, John Wiley, New York 1968; C. Debuyst, *Le concept de dangerosité et un de ses elements constitutifs: la personnalité (criminelle)*, Déviance et Société Vol. 1, No. 4, 1977, pp. 363–387.

[14] P.D. Scott, *Assessing dangerousness in criminals*, British Journal of Psychiatry Vol. 131, 1977, pp. 127–142.

[15] Quotation after C. Montandou, *La dangerosité…*, p. 91.

[16] T.W. Harding, *Assessment of Dangerousness in Forensic and Administrative Psychiatry*, Project 01/02/02, WHO Geneva, 1977.

[17] C. Montandou, *La dangerosité…*, p. 91.

accounts for ca. 1,500 works.[18] Their common conclusion is that persons suffering from mental illnesses do not form the most dangerous social group. Regardless of the popular belief that there is a direct relationship between a mental illness and criminality, the data collected then do not confirm the increased influence of a mental illness on crime statistics.[19] In the 1970s, research was conducted simultaneously in the United Kingdom (Gunn), Germany (Göppinger and Böker), Italy (Traverso) and the United States (Guze). In spite of the time flow, there is no unambiguous definition of some individuals' "dangerousness" and no stance at least relatively agreed upon. None of the methods of doing research into the phenomenon provides unambiguous and ultimate solutions. Components of "dangerousness" are different in medicine and in law. Nevertheless, on the basis of the two disciplines, the multi-dimensional nature of the phenomenon is emphasized; in the former it is described as something different from colour blindness and deafness,[20] and in the latter with an argument that most depends on emphasis placed in defining dangerous offenders. And all this occurs in the conditions of the growing importance and size of the phenomenon and, at the same time, in the presence of a humanistic belief that offenders can be re-socialised.

There are just a few states where the category of offenders' "dangerousness" was statutorily determined. These are, e.g. England and Wales thanks to the regulation of Chapter 5: Dangerous offenders of the Criminal Justice Act 2003 (Articles 224 to 236). In accordance with Articles 224 and 225, dangerous offences include acts committed with the use of violence and specified sexual offences[21] for which a person aged 18 or over may be sentenced for life imprisonment or imprisonment for the period of ten years or more,[22] where the court considers that there is a significant risk of the commission by him of further specified offences. Article 225 Criminal Justice Act 2003 refers directly to the preventive objective of the solutions, indicating the need to protect members of the public against the perpetrators of such acts. The provisions of the Crime (Sentences) Act 1997 (Part II, Chapter II) are applicable to dangerous offenders sentenced for life imprisonment. In accordance with them, such persons having served a specified part of the sentence, may be conditionally released. The criterion for determining this part of the sentence is one-half of the fixed term for which an offender might have been hypothetically sentenced for the

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[18] F. Ferracuti et al., [in:] *Bibliografia sui delinquenti anormali psichici*, Centro nazionale di prevenzione e difesa sociale, sezione criminologica, Roma 1967.

[19] C. Montandou, *La dangerosité…*, p. 93.

[20] *Ibid*., p. 91.

[21] In the English law, there are four major types of sexual acts: rape, assault by penetration, sexual assault and making another person succumb to sexual assault.

[22] Article 224: "Meaning of 'specified offence' etc. (1) An offence is a 'specified offence' for the purposes of this Chapter if it is a specified violent offence or a specified sexual offence. (2) An offence is a 'serious offence' for the purposes of this Chapter if and only if – (a) it is a specified offence, and (b) it is, apart from section 225, punishable in the case of a person aged 18 or over by – (i) imprisonment for life, or (ii) imprisonment for a determinate period of ten years or more; (3) In this Chapter – 'serious harm' means death or serious personal injury, whether physical or psychological; 'specified violent offence' means an offence specified in Part 1 of Schedule 15; 'specified sexual offence' means an offence specified in Part 2 of that Schedule".

act committed. The provisions concerning parole are optional, which means that a dangerous offender, in accordance with English law, may remain in prison for life.

It should be added that a legal definition of a dangerous offender was also adopted in Canada, where this category includes the perpetrators of violent and sexual acts (Articles 271 to 273 Criminal Code) who pose a threat to the life or safety of other people (Criminal Code: Part XXIV, Article 275 and the following).[23] An offender classified as such may be detained in a penitentiary for an indeterminate period. Canada has a longer legal tradition of dealing with dangerous offenders than other states. It goes back to the late 19th century.[24] The next legal Act of 1947 concerning offenders of the so-called increased risk amended the Criminal Code and gave the court the right to treat an offender who committed specified three or more acts as a habitual offender and impose on him a penalty of imprisonment for an indeterminate period. A category of "dangerous sexual offenders" was specified in the Criminal Code in 1948, and it was possible to deprive them of liberty for an indeterminate period. In 1977, the Parliament repealed the provisions concerning habitual offences and dangerous sexual offenders and substituted the regulation of Part XXIV on dangerous offenders for them. In 1997, a new category called the offenders subject to monitoring (*délinquant à controler*, *DC*) was introduced, which extended the category of dangerous offenders (*DD*). The Act of 2 July 2008 introduced important changes, namely the rule stipulating that a person recognised to be guilty of committing a sexual offence carrying a penalty of deprivation of liberty for two years or more for the third time must be treated as dangerous. In case of other specified offences, the courts, at a prosecutor's request, may decide to give an offender such a status. Article 753 Criminal Code regulates the criteria for offenders' dangerousness. The status of a dangerous offender means that the court may impose a penalty of deprivation of liberty for indeterminate period with no right to parole for seven years, or the penalty of imprisonment and long-term monitoring for up to ten years after the penalty is served. Failure to meet the conditions of monitoring may result in imprisonment for indeterminate period.[25]

In France, the latest regulation concerning dangerous offenders is laid down in the Act of 27 March 2012 *de programmation relative à l'exécution des peines*.[26] It extends the concept of dangerous offenders adopted in the Act of 2008 where the category originally included sexual and habitual offenders, and then perpetrators of acts against minors, and finally, according to Ch. Lazerges (Président du Club Droits,

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[23] The information comes from http://www.asrsq.ca/fr/pdf/dossiers-thematiques/delinquants-dangereux.pdf.

[24] In 1892, the ordinance on good conduct (*ordonnance de bonne conduite*) and obligation to keep peace (*engagement de garder la paix*) were issued. In the 1990s three new supplementary ordinances were issued. In accordance with them, law enforcement agencies may file a motion to a court to impose some obligations on an offender. The law is applicable to offenders operating in organised groups committing terrorist acts, sexual offences against persons under the age of 16 or consisting in ill-mannered treatment of a person.

[25] The status of a dangerous offender is relatively rarely attributed in Canada. Since 1978, 579 persons have had it. Around 75% of them were sexual offenders. On the other hand, 486 persons were actively monitored in 2012.

[26] Journal officiel de la République française No. 0075 of 28 March 2012.

Justice et Sécurités, DJS),[27] all other offenders. Its adoption met with legal circles' criticism, which mainly concerned the seeming nature of its aims, its demagogy and declarative nature. The main critical arguments against the act were imprecise criteria for evaluation of offenders' dangerousness and a too elaborate scope of the category, and the state of "a penalty after a penalty" (*peine après la peine*), which resulted from it but did not meet any standards.

In Germany, the instrument of preventive detention applicable to dangerous offenders was introduced in 1933 and at present, according to Ch. Lazerges, a school called "Criminal Law of the Enemy" (*le droit pénal de l'ennemi*) is developing there. It assumes that there are two types of subjects to criminal code, i.e. less dangerous offenders whose procedural rights must be absolutely respected and those dangerous ones who are enemies, i.e. terrorists or sexual offenders who should be deprived of those rights.[28]

In fact, in most European states, there are no legal definitions of the concept of a dangerous offender or they are not precise enough. In Italy, the term is habitually applied to mafia members and terrorists. In Belgium, starting from the famous case of M. Dutroux, the category covers sexual offenders.

In Poland, there is no legal definition of a dangerous offender, although our present legal system has some clear indications for the adoption of some assumptions. In order to identify the phenomenon, it is necessary to decode the term "dangerous offender" in our legal system, and the presented reasoning is aimed at delineating general regularities. As a result, the concept of some individuals' "dangerousness" is identified in criminal law mainly with all perpetrators of violent crimes and sexual offences. The statement that the history of crime is as old as the world[29] also concerns, in an adequate proportion, the population of offenders who are especially dangerous for the public. It is expressed in the rich language used in the past to describe such people: a hooligan, a bandit, a gangster, a scoundrel, a degenerate, a bully, a villain, etc. A historic reconstruction of the phenomenon goes beyond the scope of this publication, however, this has already been partially done.[30]

It is almost certain that each epoch has its Hannibal Lecters described in the famous novels by Th. Harris and suggestively shown in films. In many countries, there are negative characters with disgusting criminal biography, forcing lawmakers to take drastic steps or introduce experimental legal solutions in order to protect the public. The history of legal solutions on the Polish lands at the beginning of the 19th century shows that dangerous offenders were classified in a special way in the Kingdom of Poland and, thus, they were treated in a more severe way than other offenders. In the Criminal Code of 1932 (henceforth: CC), there was a term "hardened criminal" (a "habitual", repeat, chronic, professional offender) who

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[27] http://www.liberation.fr/politiques/2012/02/20/avec-cette-loi-tout-condamne-devient-un-homme-dangereux_797352.

[28] *Ibid*.

[29] B. Hołyst, *Kryminologia*, Warsaw 1999, p. 9.

[30] J.K. Gierowski, K. Krajewski, [in:] L.K. Paprzycki (ed.), *System Prawa Karnego*, Vol. 7: *Środki zabezpieczające*, Warsaw 2012, p. 23 ff; P. Góralski, *Środki zabezpieczajace w polskim prawie karnym*, Warsaw 2015.

could not be subject to non-medical isolationist measures (Article 84 CC). Although Criminal Code of 1969 did not envisage a similar category, it allowed the use of a post-penal measure of placing a repeat offender in a centre for socialisation. The Act of 23 February 1990 amending the Criminal Code and some other acts repealed the provision on this possibility.[31]

At present, the application of preventive measures to a considerable extent is focused on dangerous offenders who, on the one hand, are indicated in Article 93c(4) CC in the wording of the amendment introduced by the Act of 20 February 2015 amending the Act: Criminal Code and some other acts[32] and, on the other hand, in the Act of 22 November 2013 on the procedure concerning people with mental disorders who pose a threat to other people's life, health or sexual freedom[33]. Statutory classification of dangerous offenders covers people sentenced to a penalty of deprivation of liberty without suspension of its execution, imposed for an intentional offence specified in Chapters XIX, XXIII, XXV or XXVI, committed in connection with personality disturbance or intensity of such nature that there is at least high probability of committing a prohibited act with the use of violence or a threat of using it.[34] The justification for the Act of 22 November 2013 unambiguously covers the most dangerous (including serial) offenders who benefited from a moratorium on execution and later also imposition of capital punishment in the period before the introduction of a penalty of life imprisonment based on the Act of 12 July 1995 amending the Criminal Code, Penalty Execution Code and on increasing the minimum and maximum of fines and compensation in criminal law.[35]

It can be assumed that with the latest amendments to the Criminal Code and the Act of 22 November 2013, the concept of a dangerous offender was specified in our law. Normative standardisation of this class of offenders closes a period of legal uncertainty the extreme examples of which were Article 8 para. 1 of the Decree of 21 December 1955 on organisation and the scope of Militia operations[36] and §2(7) and (8) of the Regulation of the Minister of the Interior of 21 December 1955 on determining cases in which Militia officers can use firearms and the mode of using firearms,[37] which entitled Militia officers to take decisions to recognise an offender to be dangerous and to use legal measures against him, including firearms, at their discretion.

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31 Journal of Laws [Dz.U.] of 1990, No. 14, item 84.

32 Journal of Laws [Dz.U.], item 396.

33 Journal of Laws [Dz.U.] of 2014, item 24.

34 J. Długosz, *Obligatoryjna potspenalna izolacja sprawcy przestępstwa*, Prokuratura i Prawo No. 7–8, 2013, p. 237; M. Królikowski, A. Sakowicz, *Granice legalności postpenalnej detencji sprawców niebezpiecznych*, Forum Prawnicze No. 5, 2013, p. 17.

35 Journal of Laws [Dz.U.] of 1995, No. 95, item 475.

36 Journal of Laws [Dz.U.] of 1955, No. 46, item 311. In accordance with the provision, the Militia had the right to use firearms as the last resort admissible only in case other coercive measures were insufficient and only in specified circumstances in order to prevent the commission of a serious crime or in order to overpower a dangerous offender or to prevent him from escaping.

37 Journal of Laws [Dz.U.] of 1955, No. 46, item 313. In accordance with §2 Regulation, an officer was authorised to use firearms only in the following situations: "(…) (7) during a dangerous offender, terrorist, spy, saboteur, murderer, arsonist and robber chase; (8) in case a dangerous offender was convoyed and undoubtedly tried to escape".

In the period preceding the introduction of the Act of 22 November 2013 and the Act of 20 February 2015, the provisions of the Penalty Execution Code (henceforth: PEC) constituted the main normative environment of dangerousness of some individuals committing offences. Executive aspects were also almost the only context of doctrinal research into the issue.[38] The term "dangerous" offender meant, first of all, a "dangerous" convict, although the law should distinguish between the two terms.[39] In accordance with the PEC terminology, dangerous prisoners are those who pose serious social threat or serious threat to prison security (Article 88 §3 PEC),[40] and a more detailed description of those states is laid down in Article 88a §2 PEC. In accordance with this provision, the regulation of the dangerous person's status is applicable to a convict whose features, personal conditions, motivation, conduct during the commission of crime, type and size of negative consequences of crime, conduct in prison or level of demoralisation pose a serious social threat and a threat to prison security, and who:

(1) committed an offence, especially:
   (a) of an attempt on
      – the independence or integrity of the Republic of Poland,
      – the constitutional system of the state or constitutional authorities of the Republic of Poland,
      – the life of the President of the Republic of Poland,
      – a unit of the Armed Forces of the Republic of Poland;
   (b) with special cruelty;
   (c) of taking and keeping hostage or in connection with taking hostage;
   (d) of maritime or aircraft hijacking;
   (e) with the use of firearms, explosives or highly inflammable materials;
(2) during the former or present imprisonment, posed threat to a penitentiary or remand prison security by:
   (a) organising or actively participating in a riot in a penitentiary or a remand prison,
   (b) attacking a public officer or another employee of a penitentiary or a remand prison,
   (c) committing a rape or causing serious health damage or abusing a convict, the punished or temporarily arrested person,
   (d) self-freeing or trying to self-free from a penitentiary or a remand prison, or when being under escort outside prison.

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[38] Inter alia, S. Przybyliński, *Więźniowie „niebezpieczni". Ukryty świat penitencjarny*, Oficyna Wydawnicza Impuls 2012; A. Kwieciński (ed.), *Postępowanie z wybranymi grupami skazanych w polskim systemie penitencjarnym. Aspekty prawne*, Warsaw 2013; D. Gajdus, B. Gronowska, *Europejskie standardy traktowania więźniów*, Toruń 1998; B. Gronowska, *Więźniowie niebezpieczni w polskich zakładach karnych*, Prokuratura i Prawo, No. 7–8, 2013, p. 7; Z. Lasocik, *Funkcjonowanie oddziałów dla tzw. „więźniów niebezpiecznych" w Polsce*, Archiwum Kryminologii Vol. 31, 2009, p. 299; T. Bulenda, R. Musidłowski, *O więźniach niebezpiecznych w kontekście ochrony praw człowieka*, Przegląd Więziennictwa Polskiego No. 60, 2008, p. 27; M. Płatek, *Europejskie Reguły Więzienne*, Państwo i Prawo No. 2, 2008, p. 3.

[39] S. Przybyliński, *Więźniowie „niebezpieczni"...*, p. 17 ff.

[40] T. Bulenda, R. Musidłowski, *O więźniach niebezpiecznych...*, p. 27.

The issue of "dangerous" convicts is discussed in abundant and valuable literature and is documented by empirical research. Thus, it is not discussed in this article. It was also thoroughly examined by the European Court of Human Rights.[41] It is only worth mentioning the judgement of the District Court in Świdnica of 12 September 2013, II Ca 545/13,[42] which dismissed a convict's claim against the State Treasury, the Penitentiary in K., for compensation for the Penitentiary director's refusal to give him permission to have an acoustic guitar in the cell. The refusal resulted, inter alia, from the fact that the convict was classified as one referred to in Article 88 §3 PEC. In accordance with the judgement, such a person should be imprisoned in conditions guaranteeing extended protection and security of a penitentiary.

On the other hand, the issue of "dangerous" offenders is currently becoming a separate research subject matter. The abundant amount of statutory criteria for using the term is an argument for developing a paper dealing with the issue more thoroughly than it is possible in this publication. At the same time, the thematic context of the scientific conference organised by the Department of Criminology and Criminal Policy of the Institute for Social Prevention and Resocialisation together with the Research and Development Committee of the Warsaw Bar Association justifies the limitation of the issue to a special category of crime, namely paedophilia or more precisely a sexual offence of abusing a minor (Article 200 CC). The statute (apart from an offence under Article 197 CC), regardless of the statutory classification (Article 93c §4 CC), undoubtedly defines the level of threat to man's sexual liberty.[43] In accordance with Article 200 §1 CC, "Whoever has a sexual intercourse with a minor under the age of 15 or is involved in another sexual activity with such a person or makes him or her succumb to such an activity or perform them shall be subject to a penalty of deprivation of liberty for a period from two to twelve years". Thus, in compliance with the title of the article, the analysis covers case law resulting from this regulation. Its role is of key importance for decoding the content of this offence in the light of imprecise semantic meaning of some concepts used. Thanks to the judicature, the concepts of "sexual intercourse" and "another sexual activity" have been given a relatively uniform meaning. There is no need to emphasize the importance of the uniform case law. Undoubtedly, it is an indispensable condition for the certainty of law and a key component of the rule of law, especially because of the principle of equal justice under law. Casuistic case law dominates cases concerning offences violating a person's sexual autonomy and thanks to that many issues have been thoroughly explained. This method of interpretation is very useful in defining the features of an act but can also be helpful in general examination of the issue of "dangerous offenders". It must be highlighted that the case law output developed on the basis of the classification of sexual offences against minors in the Criminal Code of 1969 is partially still binding. In general, case law referring to the term "sexual intercourse" had been developed before the current Criminal Code entered into force and is reflected in the more recent judicial decisions. For example,

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41 See footnote no. 34.

42 https://www.saos.org.pl/judgments/22209.

43 J. Mierzwińska-Lorencka, *Karnoprawna ochrona dziecka przed wykorzystaniem seksualnym*, Warsaw 2012, p. 46.

the Supreme Court Military Chamber judgement of 30 July 1986, Rw 530/86,[44] contains an opinion that "the concept of 'sexual intercourse' (…) does not mean only such a sex act of which *immissio penis* is an indispensable element. (…) Due to that, treating the concept of 'sexual intercourse' only as a normal and successful sex act would be totally unjustified". This stand was repeated in many successive judgements.[45]

In the resolution of the Supreme Court of 19 May 1999, I KZP 17/99,[46] "sexual intercourse" was associated with broadly understood human sexual life consisting in a perpetrator's bodily contact with the aggrieved or at least in a bodily and sexual in nature involvement of the aggrieved, which was also reflected in later judgements (inter alia, in the Supreme Court judgement of 21 May 2008, V KK 139/08).

The above-mentioned Supreme Court resolution of 19 May 1999 contained the first broad explanation of the term "another sexual activity". In accordance with its key thesis, "another sexual activity means such conduct that is included in the concept of sexual intercourse and is connected with broadly understood human sexual life, and consists in a perpetrator's bodily contact with the aggrieved or at least in bodily and sexual in nature involvement of the aggrieved". At the same time, it was stated that "another sexual activity" does not apply to indecent exposure or masturbation in the presence of another person, which is confirmed in a number of judicial decisions.[47] In the judgement of 21 May 2008, V KK 139/08,[48] the Supreme Court repeated the main thought of its resolution I KZP 17/99 and added that "another sexual activity", in the meaning of Article 200 §1 CC (and also in the meaning of Article 197 §2 CC and Articles 198 and 199 CC), is conduct that goes beyond the term "sexual intercourse", which means broadly understood human sexual life consisting in a perpetrator's bodily contact with the aggrieved or at least in bodily and sexual in nature involvement of the aggrieved, which includes situations where a perpetrator, in order to stimulate arousal and satisfy sex drive, does not only touch sex organs of the aggrieved (even through underwear or clothes) but undertakes other activities in contact with his or her body (e.g. caressing, kissing, etc.). Undoubtedly, touching a victim's breasts is included in the semantic scope of the term.

The Supreme Court, in its judgement of 10 October 2007, III K 116/07, indicated that if the abuse of a minor is not aimed at sexual satisfaction but is committed for fun, revenge or to obtain financial gains, nevertheless, a perpetrator's conduct matches the features of an offence under Article 200 §1 CC.

In the judgement of 19 February 2009, V KK 409/08,[49] the Supreme Court states that: "(…) In the second group of offences, including the offence under Article 200

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[44] Krakowskie Zeszyty Sądowe 1996, No. 1, item 58.

[45] Inter alia, in the judgement of the Appellate Court in Katowice of 15 November 2006, II AK 328/2006, Krakowskie Zeszyty Sądowe 2007, No. 5, item 64.

[46] OSNKW 1999, No. 7–8, item 37 with a gloss of approval by J. Warylewski, OSP 1999, No. 12, item 224.

[47] Inter alia, the judgement of the Supreme Court of 5 April 2005, III KK 187/04, LEX No. 148234.

[48] Prokuratura i Prawo-wkł. 2008, No. 12, item 8.

[49] OSPriPr 2009, No. 9, item 9.

§1 CC, the application of means that influence a victim's decision-making process is the moment when an attempt starts. Within the so-called 'offence progression', this is the final stage before an offence commission". Recital 3 states: "Unlike regulations binding in case of other offences against sexual autonomy, the features of an offence under Article 200 §1 CC do not describe the modes of action the application of which results in penalisation of a perpetrator's conduct, which gives grounds for drawing a conclusion that every type of conduct directly leading to the features matching is subject to punishment".

It is also necessary to quote the Supreme Court ruling of 16 January 2007, V KK 387/2006,[50] which states as follows: "In order to establish a proper borderline between non-punishable preparation to an offence under Article 200 §1 CC in the form of making a minor under the age of 15 succumb to sexual activities or perform them and an attempt to commit such an offence, the elements of a perpetrator's conduct that will be significant include: entering into direct contact with a minor, specifying the aim of action determining a sexual nature of activities to which a minor is to succumb, and the application of means that are to influence a minor's volition. The occurrence of all the above-mentioned circumstances makes it possible to properly recognise the intention of the analysed conduct as well as the assessment whether the activities performed by a perpetrator are the last activities preceding the offence commission".

In its judgement of 9 March 2006, V KK 271/05, the Supreme Court assumed that even several months' periods between successive activities of a perpetrator of a continual act could be treated in some circumstances as "short intervals" in the meaning of Article 12 CC.

In the light of, inter alia, the provision of Article 200 §1 CC, the Supreme Court assumed in its judgement of 29 September 2009, III KK 105/09,[51] that: "The time of the commission of a continual act is the period from the first occurrence of the conduct constituting the act to the end of the last of them. However, in case a perpetrator of a prohibited act that is not laid down in Article 10 §2 CC performed part of the conduct constituting a prohibited continual act as a minor and the rest of it as a 17 year-old, he is criminally liable for his conduct after the moment of reaching the age of 17".

The examples of judicial decisions resulting from the interpretation of Article 200 §1 CC may be an argument in the research into the issue of "dangerousness" of this offence. The detailed description of conduct typical of this type of offence as well as the features that do not match this classification make it possible to examine the phenomenon through the prism of its fractional elements. However, it is only a fragment of a complex, in the light of the provision of Article 93c(4) CC and the Act of 22 November 2013 on the procedure concerning persons with mental disorders who pose a threat to other people's life, health or sexual freedom, issue of "dangerous" offenders, for the research into which case law may prove to be extremely useful. The issue has not been exposed before, which can be explained

[50] Biuletyn Prawa Karnego No. 2, 2007.
[51] Prokuratura i Prawo – wkł. 2010, No. 3, item 1.

by the absence of this concept category in criminal law. Today, there are more legal arguments for such research in order to fill in the gap in the substantive legal aspects of "dangerousness" of the perpetrators of some offences. It must be noted that the category is not uniform nor is it treated narrowly in regulations. The classification of "dangerous" offences adopted in our law covers different punishable acts; however, they are classified as dangerous (Chapters XIX, XXIII, XXV, XXVI CC). This argument constitutes *iunctim* in the analysis of the issue and justification for the introduction of the concept of a "dangerous" offence to the doctrine, and based on that also a concept of a "dangerous" offender.

Analyses of the phenomenon conducted in penitentiaries are based on other features of offenders and different benchmarks, which are not sufficient to present it fully and completely. In criminology, the dominating view is through the prism of convicts' personality, their personal features and conduct in isolation, with respect to penitentiary criteria for classifying convicts posing a serious social threat or a threat to prison security (Articles 88 §3 and 88a §2 PEC). In criminal law doctrine at present, conditions are created to do research into the phenomenon of "dangerousness" as a separate juridical category, which may be a creative and interesting scientific challenge.

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ISSUE OF "DANGEROUS" PERPETRATORS IN RESEARCH AND CASE LAW

Summary

The article discusses the issue of dangerous offenders from the point of view of the past and present description of the phenomenon. The comparative approach to legislation and case law constitutes a benchmark for the contemporary analysis. The issue of dangerousness of offenders is mainly presented in the context of perpetrators of sexual offences and exemplified by selected judicial decisions. The conclusion contains an assumption that conditions are created in criminal law doctrine to conduct research into the phenomenon of "dangerousness" as a separate juridical category.

Keywords: dangerous offender, sexual offence, dangerousness criteria, "dangerousness" in case law, "dangerousness" in the doctrine

PROBLEMATYKA SPRAWCÓW „NIEBEZPIECZNYCH" W BADANIACH I ORZECZNICTWIE

Streszczenie

Artykuł podejmuje problematykę sprawców niebezpiecznych z perspektywy opisu zjawiska w ujęciu historycznym i współczesnym. Punktem odniesienia dla rozważań współczesnych jest ustawodawstwo prawne w ujęciu komparatystycznym oraz orzecznictwo sądowe. Problem niebezpieczności sprawców został ukazany przede wszystkim w kontekście sprawców przestępstw seksualnych na przykładzie wybranych judykatów. Konkluzja tekstu zakłada, że w nauce prawa karnego obecnie powstają warunki do badania zjawiska „niebezpieczności" jako osobnej kategorii jurydycznej.

Słowa kluczowe: sprawca niebezpieczny, przestępstwo seksualne, kryteria niebezpieczności, „niebezpieczność" w orzecznictwie sądowym, „niebezpieczność" w doktrynie

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ALLOWING A MINOR TO STAY IN CIRCUMSTANCES DANGEROUS FOR HEALTH (ARTICLE 106 MC)

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1. INTRODUCTION

The article aims to analyse the issue of a misdemeanour of allowing a minor under the age of seven or another person unable to recognise or defend him/herself against a threat to stay in circumstances dangerous for human health, classified in Article 106 Misdemeanour Code.[1] The regulation strengthens legal protection of minors and other persons who are helpless when faced with the conduct of persons obliged to take care of them.

The subject matter is seldom discussed in literature. It mainly constitutes a topic for legal writers interested in the Misdemeanour Code and is sometimes mentioned on the margin of other main considerations.[2] What provides inspiration for discussing the issue is its theoretical complexity, including e.g. the object of protection within this misdemeanour, which is not treated in the doctrine in a uniform way. It is also

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1 The discussed misdemeanour was unknown to the misdemeanour law of 1932 (Regulation of the President of the Republic of Poland of 11 July 1932: Law on misdemeanours, Journal of Laws [Dz.U.], No. 60, item 572). It was introduced by the Act of 20 May 1971: Misdemeanour Code (Journal of Laws [Dz.U.] of 1971, No. 12, item 114, hereinafter: MC). Pursuant to Article 106 MC, "Whoever, being obliged to take care of or supervise a minor under the age of seven or another person incapable of recognising or protecting him/herself against danger, allows him or her to stay in circumstances dangerous for human health is subject to a penalty of a fine or a reprimand".

2 See, e.g., V. Konarska-Wrzosek, *Ochrona dziecka w polskim prawie karnym*, Toruń 1999; O. Sitarz, *Ochrona praw dziecka w polskim prawie karnym na tle postanowień Konwencji o prawach dziecka*, Katowice 2004; A. Kilińska-Pękacz, *Ochrona dzieci w kodeksie wykroczeń*, Studia z Zakresu Prawa, Administracji i Zarządzania Uniwersytetu Kaziemierza Wielkiego w Bydgoszczy Vol. 1, 2012, pp. 205–218.

striking there is a common opinion that the misdemeanour is formal in nature and that it is classified as an abstract exposure to danger.

In order to fully characterise this type of misdemeanour, a classical pattern based on the traditional division of statutory features of a prohibited act is adopted. Moreover, such issues as potential penalty and concurrence of provisions are discussed.

2. OBJECT OF PROTECTION

A few interests constituting the object of protection under Article 106 MC are mentioned in literature. What is indicated first of all includes: a child's safety,[3] the health of persons incapable of recognising or protecting themselves against danger to their health,[4] health and development of minors under the age of seven and other helpless people,[5] or their interest in general, which can be in danger in case they are in dangerous circumstances[6]. There is also an opinion that the object of protection may concern compliance with the obligation to take care consisting in ensuring personal safety and protection against physical and psychical consequences of situations that are dangerous to a person under care. On the other hand, a secondary object of protection may consist in safety and health of minors or helpless persons in the face of danger occurring in case of the lack of care or supervision by persons obliged to provide it.[7]

Due to the placement of Article 106 MC in the chapter concerning misdemeanours against a person, the interest of children under the age of seven and other persons incapable of recognising or protecting themselves against danger should be treated as the main object of protection. Article 106 MC penalises allowing the specified category of people to be "in circumstances dangerous for human health". Thus, it should be assumed that the provision mainly protects the interest in the form of human health against danger in case of inappropriate fulfilment of the obligation to take care of or supervise them. It seems that the interest in the form of appropriate care and supervision of minors and other helpless people can be treated as the secondary object of protection. Allowing them to be in danger is obviously in conflict with basic functions of a perpetrator's obligations referred to in Article 106 MC.

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3 R.A. Stefański, *Wykroczenia drogowe. Komentarz*, Warsaw 2011, p. 379.

4 P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń. Komentarz*, Legalis 2016, comment no. 1 on Article 106 MC.

5 Thus, M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń. Komentarz*, WK 2015, thesis 2 to Article 106 MC.

6 Thus, B. Kurzępa, *Kodeks wykroczeń. Komentarz*, LexisNexis 2008, recital 2 to Article 106 MC, thesis 2; also see M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń. Komentarz*, LEX/el. 2009, thesis 1 to Article 106 MC.

7 M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń. Komentarz*, LEX/el. 2013, thesis 1 to Article 106 MC. Also, according to M. Dudzik, life and health of persons referred to in this provision are secondary objects of protection under Article 106 MC, see M. Dudzik, *Prawo karne wobec narażenia życia i zdrowia ludzkiego na niebezpieczeństwo*, Warsaw 2014, p. 215.

The regulation stipulated in Article 106 MC aims to serve the provision of legal protection of health of minors under the age of seven and other people incapable of recognising and protecting themselves against danger. As it is rightly noted in literature, the wording of Article 106 MC suggests that a minor under the age of seven does not constitute an entity different from persons incapable of recognising and protecting themselves against danger. The clear exposition of seven-year-olds in the group of helpless people is significant in case of charging someone with a misdemeanour under Article 106 MC. While in case of other persons it is necessary to prove they were incapable of recognising and protecting themselves against danger, in case of minors under the age of seven this incapability is determined in statute and does not have to be proved.[8]

The term "minor" does not raise any doubts. This is a term used mainly in civil law. In the light of Article 10 Civil Code, a minor is a person who is under the age of 18 (see Article 10 §1 Civil Code) and has not obtained the status of an adult as a result of getting married (Article 10 §2 Civil Code). Article 106 MC narrows the group of minors introducing the limitation to the age of seven. Thus, it concerns a minor who, at the moment a perpetrator commits an act, is under the age of seven. A similar limitation is laid down in Article 89 MC, which classifies allowing a minor to be on a public road or rail track against the obligation of taking care of or supervise him or her. By comparison, in case of the offence of abandonment (Article 210 Criminal Code, henceforth: CC), regardless of its essence and nature, a minor under the age of 15 is an object of a causative activity. The limitation of age to seven laid down in Article 106 MC should be assessed critically because it results in the weakening of legal protection of minors. The interest of a minor who is seven years old is protected under the discussed regulation only in case it is proved that he or she was *in concreto* incapable of recognising or protecting him/herself against danger. As a result, it is worth considering a call for raising the age limit referred to in Article 106 MC to the age of ten[9] and providing protection to older children, regardless of their individual capability to recognise or protect themselves against danger.

The concept of another person incapable of recognising and protecting him/herself against danger raises more interpretational doubts. It is indicated in literature that it is a person different from a seven-year-old minor who for some reasons (physical, psychical, internal or external ones) is permanently or temporarily deprived of the ability to identify danger, or eliminate it or escape it.[10] It is also emphasized that a person incapable of defending him/herself against danger is one who due to his or her physical disabilities (e.g. paralysis, blindness, deafness) is not able to prevent danger. Inability to protect oneself may also result from the state (e.g. being tied) or a situation (e.g. being locked in a room).[11] In accordance with Article 106 CC, it may in particular concern persons who are mentally sick,

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[8] P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 2 on Article 106 MC.

[9] Thus, rightly, O. Sitarz, *Ochrona praw dziecka*…, p. 92.

[10] P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 2 on Article 106 MC.

[11] M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 5 to Article 106 MC; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń*…, thesis 3 to Article 106 MC.

intellectually disabled, emotionally disturbed, psychically healthy but immobilised by a serious illness, physically disabled, under the influence of alcohol or narcotic drugs, physically and mentally healthy but incapable of doing anything because of being tied.[12]

It is rightly indicated in the doctrine that linking inability to recognise and incapability to defend oneself against danger with the alternative conjunction "or" means that the concept discussed applies to: a person incapable of recognising danger as well as defending him/herself against it; a person capable of recognising danger but incapable of defending him/herself against it; a person incapable of recognising danger, although being able to defend him/herself against it when it occurs.[13]

3. OBJECT OF THE MISDEMEANOUR

Only a person obliged to take care of or supervise a minor under the age of seven or another person incapable of recognising danger or defend him/herself against it may be the perpetrator of a misdemeanour classified in Article 106 MC. Thus, it is a typical individual misdemeanour. However, the legislator does not determine the nature and sources of the obligations.

In the criminal law system, the legislator often uses the concept of "obligation to take care or supervise" or the like. Apart from Article 106 MC, it is used in other regulations contained in the Misdemeanour Code, e.g. in Article 89 MC ("obligation to take care and supervise"), in Article 70 §1 MC ("obligation to supervise"), and in the Criminal Code, e.g. in Article 160 §2 CC ("obligation to take care of a person in danger") or Article 210 §1 CC ("obligation to take care of a minor under the age of 15 or a helpless person"). It is characteristic that pursuant to Article 106 MC, apart from the concept of "care", there is also the concept of "supervision" applied. Similarly, supervision (in the context of a person entitled to supervise) occurs beside care in Article 211 CC but it does not in Article 160 §2 CC. The lack of the legislator's consistency in the use of terms "obligation to take care of", "obligation to look after", "obligation to take care and supervise" in the Criminal Code and the Misdemeanour Code raises justified doubts whether it is the legislator's oversight or probably intended effect.[14]

In civil law, the concept of care means concern for a person who needs help, including a minor. The so broadly interpreted care covers social welfare, actual guardianship and legal guardianship. Social welfare is the system of social assistance to people who cannot meet their needs. Actual guardianship means

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[12] See, inter alia, Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 2 on Article 106 MC; B. Kurzępa, *Kodeks wykroczeń*…, thesis 3 to Article 106 MC.

[13] Thus, P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 2 on Article 106 MC.

[14] O. Sitarz rightly draws attention to it, see O. Sitarz, *Ochrona praw dziecka*…, p. 91. In the author's opinion, the diversity of similar terms used in the Criminal Code and the Misdemeanour Code results from the legislator's oversight and should be eliminated.

taking factual (real) care of somebody who cannot act on his or her own; and the assistance is provided with no legal title obliging to provide this assistance. Finally, legal guardianship means supervising a helpless person based on a legal title.[15] It is indicated in literature that the term "care" is treated in the broadest and least formalised way in criminal law.[16] It seems that also with reference to Article 106 MC it should be assumed that the obligation to take care has a broad meaning. It applies not only to care laid down in the provisions of family law but also to other situations which directly or indirectly result in such an obligation. Thus, the obligation to take care consists in the necessity to make effort, take care of various categories of interests of people who, due to their age, physical or mental disability or because of an extraordinary situation, cannot take care of themselves on their own.[17]

On the other hand, the taking care consists in concern for another person, which should be demonstrated in all areas where the interest of a person authorised to take care should be involved.[18] The essence of this obligation is to make effort to ensure security, health and proper development of persons who because of their age or disability cannot care for their own vital interests.[19] In the doctrine, the relation between the concepts of "obligation to take care" and "obligation to care for" is not treated in a uniform way. There is an opinion that the obligation to care for a given person may be isolated or one of obligations within a broader duty to take care of a given person.[20] According to some authors, "the concept of care should be given a more formalised nature expressed in some legal frameworks".[21] According to others, the terms "obligation to take care" and "obligation to care for" are synonymous.[22] To support this stand, it is stated that they also have the same meaning in the colloquial language.[23] Also the dictionary definition of care supports

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[15] I. Ignatowicz, *Prawo rodzinne. Zarys wykładu*, Warsaw 1998, pp. 324–325; also see T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warsaw 2003, p. 268 ff.

[16] A. Ratajczak, [in]: I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego. O przestępstwach w szczególności*, Vol. 4, part 2, Wrocław–Warsaw–Kraków–Gdańsk–Łódź 1989, p. 254.

[17] V. Konarska-Wrzosek, *Uwagi o przestępstwie pozostawienia człowieka w położeniu grożącym niebezpieczeństwem*, Państwo i Prawo No. 3, 1997, p. 80; similarly, O. Sitarz, *Ochrona praw dziecka…*, p. 78.

[18] V. Konarska-Wrzosek, *Ochrona dziecka…*, p. 127.

[19] J. Śliwowski, *Prawo karne*, Warsaw 1979, p. 414.

[20] Thus, rightly, V. Konarska-Wrzosek, [in:] J. Warylewski (ed.), *System prawa karnego. Przestępstwa przeciwko dobrom indywidualnym*, Vol. 10, Warsaw 2012, p. 976.

[21] A belief was expressed that the use of the term "taking care" following Article 210 CC (and not the term "obligation to take care or supervise" as used in the Criminal Code of 1932) is to support the legislator's intention to cover a larger number of cases and provide broader protection of persons referred to in it, see J. Jodłowski, M. Szewczyk, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. 2, part 1: *Komentarz do art. 117–211a*, WKP 2017, thesis 5a to Article 210 CC.

[22] Thus, R. Kokot, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2018, thesis 35 to Article 160 CC; also see B. Michalski, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz do art. 117–221*, Warsaw 2010, p. 460; K. Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu. Rozdział XIX Kodeksu karnego. Komentarz*, Warsaw 2000, pp. 392–393.

[23] Thus, also B. Michalski, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz do art. 117–221*, Warsaw 2006, p. 407.

the approach because it provides the meaning: "showing concern, looking after somebody, nursing, watching somebody or something, guarding, supervision".[24]

Article 106 MC also stipulates the obligation of supervision. It is indicated in the doctrine that the concept of care is not tantamount to supervision. According to A. Ratajczak, they differ in how intensive their function is. Care does not only mean wakefulness and control but also direct performance of a series of activities. On the other hand, supervision is limited to control within the meaning of permitting or prohibiting specific conduct of a person under care.[25]

The borderlines between the concepts of "care" and "supervision" are delimited by the sources of those obligations.[26] Much place is devoted in literature to the interpretation of the concept "is obliged to care" which is found in Article 160 §2 CC laying down the aggravated type of the offence of exposing a man to direct danger of losing life or serious damage to health. In most authors' opinion, the characteristic relation between a perpetrator and an aggrieved party expressed in the obligation to care should be interpreted within the meaning of Article 2 CC. Only a person who has a special legal obligation to prevent direct danger to life or health of the aggrieved may be the subject of the prohibited act referred to in Article 160 §2 CC.[27] At the same time, different sources of the obligation to care are indicated in literature. The categories of sources that do not raise doubts include: the provisions of law, case law and contracts (sometimes authors use a category of voluntary commitment).[28] In addition, the following sources are mentioned: a post held or function performed by the perpetrator,[29] taking up a certain duty,[30] a custom applied in specified situations,[31] an actual situation,[32] as well as a situation resulting from a perpetrator's former activity[33]. Sometimes the sources overlap. For example, the basis for an obligation to take care in the form of an actual situation is not interpreted in a uniform way in the doctrine. In case of taking care of somebody's child temporarily (e.g. taking somebody's child for a walk and taking up a duty to take care of him or her in the course of actual activity or taking somebody's child on

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[24] M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 2, Warsaw 1979, p. 526.

[25] A. Ratajczak, *Przestępstwa przeciwko rodzinie, opiece i młodzieży w systemie polskiego prawa karnego*, Warsaw 1980, p. 225.

[26] Compare O. Sitarz, *Ochrona prawa dziecka*…, p. 78.

[27] A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*. *Komentarz*, Vol. 2: *Komentarz do art. 117–277 k.k.*, Kraków 2006, p. 378; similarly, R. Kokot, [in:] R.A. Stefański, *Kodeks karny*…, p. 982; also see M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks karny. Praktyczny komentarz*, Kraków 2006, p. 314; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, WK 2016, thesis 3 to Article 160 CC.

[28] See, inter alia: A. Marek, *Kodeks karny. Komentarz*, Warsaw 2007, p. 335; R. Kokot, [in:] R.A. Stefański, *Kodeks karny*…, p. 982; K. Daszkiewicz, *Przestępstwa przeciwko życiu*…, p. 393; V. Konarska-Wrzosek, *Ochrona dziecka*…, pp. 37–38.

[29] B. Michalski, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna*…, p. 407.

[30] W. Gutekunst, [in:] O. Gubiński, W. Gutekunst, W. Świda, *Prawo karne. Część szczególna*, Warsaw 1980, p. 181.

[31] *Ibid*.

[32] R. Kokot, [in:] R.A. Stefański, *Kodeks karny*…, p. 982; A. Marek, *Kodeks karny*…, p. 335; O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny. Komentarz*, Vol. 3 (art. 117–363), 1999, pp. 107–108; J. Wojciechowski, *Kodeks karny. Komentarz. Orzecznictwo*, Warsaw 1997, p. 277.

[33] B. Michalski, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna*…, p. 407.

an excursion on one's own initiative), there is an opinion that the source of special and legal obligation to take care is the actual situation,[34] but according to others it is a voluntary commitment[35].

The approval of the stance that only a warrantor is the subject of the offence under Article 160 §2 CC in case of both action and omission results in the establishment of the sources of the obligation to take care referred to in this provision. One should consistently apply the rules under Article 2 CC, in accordance with which the warrantor's obligation to prevent a consequence should be legal and special in nature. Most representatives of the doctrine, however, treat it in a much broader way. The issue of the sources of a warrantor's obligation is absolutely beyond the scope of the present article. Moreover, the issue is thoroughly discussed in literature and in case law. That is why, its treatment is limited to a few detailed comments that are important for the analysed issues.

Firstly, the legal nature of the warrantor's obligation means that it should originate from an act that is legally significant.[36] It may be a general or abstract norm[37] imposing on its addressees an obligation to act or another act that is legally significant as a source of a legal norm that is general and physical in nature (a contract, a certificate of appointment or calling into service).[38] In this context, it does not seem convincing to assume that the obligation to take care may also result from an actual situation or a situation resulting from a perpetrator's former activity. The occurrence of a given situational pattern cannot be recognised to be the source of a warranty obligation referred to in Article 160 CC. The warranty obligation must be based on specified legal norms and a pattern of events cannot be treated as such,

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[34] Thus, R. Kokot, [in:] R.A. Stefański, *Kodeks karny*…, p. 982; A. Marek, *Kodeks karny*…, p. 335.

[35] Thus, V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny*…, thesis 3 to Article 160 CC. In the author's opinion, the source of the obligation to take care referred to in Article 160 §2 CC may be a provision of law, a court ruling, e.g. determining the adoption relations and a contract, namely a voluntary commitment resulting in the fact that particular persons undertake an obligation to care for other people.

[36] In the justification for the bill of the Criminal Code that is in force now, it is indicated that: "the new code does not precisely determine the sources of the legal special obligation. However, the drafted provision suggests that a warrantor's obligation to prevent the consequence must be legal in nature, i.e. result directly from a legal norm or an act that has legal significance (a contract, an appointment). The obligation must be also special in nature, i.e. must be addressed to a specified group of persons"; see I. Fredrich-Michalska, B. Stachurska-Marcińczak et al. (ed.), *Nowe kodeksy karne – z 1997 r. z uzasadnieniami*, Warsaw 1997, p. 119.

[37] What raises doubts in the doctrine is, inter alia, the issue whether a sub-statutory act may also be the source of legal special obligation to prevent a consequence. One can find extremely different opinions in the criminal law doctrine, from ones that unconditionally admit such a possibility to absolute negation of imposing an obligation to take action with the use of an act that has a lower status than a statute. The most convincing stance is based on the assumption that in accordance with statutory exclusiveness, the imposition of a legal special obligation must be laid down in a statute. However, its specification may take place in a legal act of a lower rank (thus, rightly, A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna*, Vol. 1: *Komentarz do art. 1–52*, Warsaw 2016, p. 94). Still, the formulation of a warrantor's obligation in a statute cannot be too brief. Due to warranty reasons, the legislator should be expected to be sufficiently thorough in this area.

[38] A. Zoll, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część ogólna*…, p. 95.

unless it is an event bearing legal consequences.[39] It is also necessary to challenge the grounds for recognising "a perpetrator's former conduct creating threat to a legal interest" derived in particular from Article 439 Civil Code, the principles of carefulness or general legal principles to be the source of a warrantor's obligation.[40]

The solidity of arguments for identifying the obligation to take care referred to in Article 160 §2 CC with the obligation to act, which can constitute grounds for the warrantor's liability for an offence with legal consequences committed by omission (Article 2 CC), raises doubts.[41] They are intensified by the fact that an aggravated offence under Article 160 §2 CC may be committed both in action and by omission. Approving of the assumption that the offence of exposing a person to direct danger of losing life or incurring serious damage to health is one with legal consequences, it is necessary to recognise that in case the features are matched by omission, only the warrantor may be the perpetrator referred to in Article 2 CC. However, it should be considered that even then the scope of the concept of "obligation to take care" is narrower than the concept of "a warrantor's obligation to prevent a consequence", which is also important for the establishment of the catalogue of sources of this obligation (to take care). On the other hand, with regard to the offence under Article 160 §2 CC in the form of action, there is no indication what the legal nature of this obligation and its sources are.

Referring the above considerations to the obligation to take care stipulated in Article 160 §2 CC, it should be recognised that the provision does not thoroughly determine the type of care. Thus, it seems that it applies to any form of care, i.e. care within a broad meaning. The term should be treated as a synonym of "the duty to care for" under Article 210 CC.[42] For comparison, in Article 211 CC a phrase

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[39] See T. Sroka, *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*, Warsaw 2013, p. 164.

[40] Recognition that the quoted provision constitutes the source of a warrantor's obligation eliminates a practical need to distinguish causing danger to a legal interest as a separate source. The obligation of this type would undoubtedly have a legal nature then as one resulting from a statute. There is also an opinion that reference to Article 439 Civil Code constitutes a flagrant strain on the construction of civil law for the benefit of criminal law (thus, A. Wąsek, [in:] O. Górniok et al., *Kodeks karny. Komentarz*, Gdańsk 2002/2003, p. 43). What is also important is the argument that the same act cannot be simultaneously criminalised as action and omission. In a situation when the source of danger to a legal interest leading to a particular consequence is a perpetrator's action, it is not possible to analyse his or her conduct from the point of view of an obligation to preserve a legal interest (see, thus T. Sroka, *Odpowiedzialność karna*…, p. 154 and the literature referred to therein).

[41] Compare V. Konarska-Wrzosek, *Ochrona dziecka*…, p. 42.

[42] The isolated obligation to take care of a given person is dealt with under Article 210 CC classifying the offence of abandonment. Only a person who is obliged to take care of a person under the age of 15 or a helpless person because of his or her psychical or physical state may be a perpetrator of such offence. As far as the sources of the obligation to take care are concerned, one can find two basic ways of approaching this issue. In the opinion of some representatives of the doctrine, the obligation may result only from a statute, a court ruling or a contract (thus, M. Szewczyk, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 117–277 k.k.*, Kraków 1999, p. 631), possibly also a commitment (A. Marek, *Kodeks karny*…, p. 407; V. Konarska-Wrzosek, *Ochrona dziecka*…, pp. 37–38, 127). Other authors are for a broader specification of sources of the obligation to take care and include the principles of social co-existence (R.A. Stefański, *Przestępstwo porzucenia (art. 187 k.k.)*, Prokuratura i Prawo No. 5, 1997, pp. 49–53; thus, also

"against the will of a person appointed to take care of or supervise" is used.[43] Because of the edition of Article 211 CC where "a person appointed to take care or supervise" is referred to, the entitlement to take care or supervise must be legal in nature and cannot only result from an occurring situation.[44] The essence of the legal interest protected by Article 211 CC, i.e. the institution of care and supervision, suggests[45] that it covers only those cases in which the norms of public or private law constitute the sources of care and supervision; moreover, where the source is legal in nature. This is because only in such a case the presumption of appropriate care

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J. Kosonoga, [in:] R.A. Stefański, *Kodeks karny. Komentarz*, Warsaw 2017, p. 1328), or factual circumstances (O. Górniok, [in] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny…*, p. 203; J. Wojciechowski, *Kodeks karny…*, p. 373; J. Jodłowski, M. Szewczyk, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna…*, thesis 5a to Article 210 CC; Z. Siwik, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, WK 2016, thesis 7 to Article 210 CC; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, WK 2015, thesis 5 to Article 210 CC; A. Ratajczak, *Przestępstwa przeciwko rodzinie…*, pp. 213–214). In the last case, the obligation to take care originates from the factual state consisting in taking care *per facta*, and not based on a legal title, e.g. taking somebody else's children playing on a bench to the forest and this way spontaneously taking over the obligation without the knowledge of a person taking care of or supervising them (A. Wąsek, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna…*, pp. 1113–1114). It is emphasized in the doctrine that it may also concern a temporary custody of persons referred to in the provision taken up voluntarily or even imposed (e.g. watching a person injured in an accident until the arrival of another person, taking a lost child to his or her house) (O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny…*, p. 203). The argument for the adoption of a broad approach to the sources of the obligation to take care referred to in Article 210 CC is the lack of clear statutory reservation that it must be a legal special obligation in the same way as in the wording of Article 2 CC (thus, also A. Wąsek, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna…*, p. 1114; A. Muszyńska, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, LEX/el. 2014, thesis 7 to Article 210 CC). The broad concept of approach to the sources of the obligation to take care is undoubtedly more advantageous from the point of view of the protection of a minor's interests.

[43] The clear polarisation of opinions whether the sources of care or supervision in the meaning of Article 211 CC may constitute a factual state (*per facta*) can be found in literature. According to some representatives of the doctrine, appointment to take care or supervise may result from a statute, a court's or another state authority's ruling, a contract, based on which a specified person takes care of a person under the age of 15 or a helpless person, but also from an actual situation (see S. Hypś, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 1065; *idem*, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część szczególna*, Vol. 1: *Komentarz do art. 117–221*, Leglis 2017, comment no. 23 on Article 211 CC). The supporters of this broad conception argue that the requirement of a legal title for the appointment to take care or supervise would considerably limit a perpetrator's liability, especially when it is necessary to take an urgent decision concerning prosecution.

[44] Thus, also A. Wąsek, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna…*, p. 1129; R.A. Stefański, *Przestępstwo uprowadzenia małoletniego (art. 211 k.k.)*, Prokuratura i Prawo No. 9, 1999, p. 62.

[45] The doctrine is dominated by the opinion that the institution of care and supervision is the object of protection in case of Article 211 CC, thus: R.A. Stefański, *Przestępstwo uprowadzenia…*, pp. 58–59; A. Wąsek, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna…*, p. 1124; A. Dobrzyński, *Przestępstwa przeciwko rodzinie*, Warsaw 1974, p. 71; A. Ratajczak, *Przestępstwa przeciwko rodzinie...*, pp. 223–224; M. Szewczyk, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna…*, p. 636; M. Mozgawa, [in:] Mozgawa (ed.), *Kodeks karny. Komentarz…*, thesis 1 to Article 211 CC. Also in the opinion of the Supreme Court, the object of legal protection under Article 211 "is not the liberty of a kidnapped or detained person; nor is the object of this protection the content of court rulings concerning taking care of or supervising a person; it is the institution of care and supervision" (Supreme Court ruling of 18 December 1992, I KZP 40/92, Legalis No. 27920).

that constitutes the basis for exercising care and supervision is justified.[46] Therefore, it is necessary to approve of the opinion that actual care is not covered by the scope of Article 211 CC, since this provision applies to a person appointed to take care or supervise. As a result, there must be something constituting the source for appointing a person to take care or supervise, and there must be an authority and procedure responsible for appointing to perform those functions. This excludes a possibility of exercising care and supervision only based on a specified factual relation.[47]

Unlike in case of Article 211 CC, the scope of Article 160 §2 CC covers not only legal but also actual care. Due to a broad approach to the obligation to take care, it should be assumed that it may result from: a provision of law (e.g. Article 95 Family and Guardianship Code, henceforth: FGC, determining parental duties towards underage children); court rulings (e.g. determining the relationship, establishing guardianship for minors, and establishing care for legally incapacitated persons); contracts (e.g. an employment contract, a physician's contract with a healthcare institution, a teacher's contract with a school or a preschool institution, a nanny's contract with a child's parents) as well as a factual situation. It may be a permanent obligation, extended in time, or only temporary and transient. On the other hand, it seems that there is no need to select such sources of obligations as a profession, a business activity or a function performed because they can lead to one of the above-mentioned sources.[48]

The above establishment of facts concerning the nature and a broad approach to the sources of obligation to take care and supervise should be also applied to Article 106 MC. The analysed norm covers all situations from which the duty to take care or supervise results directly or indirectly. The wording of the provision, especially the legislator's use of the phrase "being obliged to take care and supervise", does not allow excluding persons who have undertaken to take care or supervise based on a factual state and not a legal title. In the meaning of Article 106 MC, not only a person legally entitled to fulfil the duty but also a person who (even temporarily) exercises care or supervision is obliged to take care and supervise. This interpretation is also supported by the recognition of minors' and other helpless persons' health to be the main object of protection provided by the discussed regulation. There is no justification for the limitation of the protection under Article 106 MC to situations in which the obligation to take care or supervise is legal in nature.

Therefore, it should be consistently assumed that care or supervision may result from: (1) family and guardianship relations (e.g. parental duties towards children under Article 95 FGC); (2) the provision of law or a ruling issued based on this provision (e.g. closed healthcare institution personnel's obligation to supervise; a ruling to place a child in a foster family); (3) a contract (e.g. duties of a nurse,

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[46] J. Jodłowski, M. Szewczyk, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna*…, thesis 10f to Article 211 CC.

[47] M. Nawrocki, *Kindapping*, Prokuratura i Prawo No. 10, 2016, p. 98.

[48] See V. Konarska-Wrzosek, *Ochrona dziecka*…, p. 39.

a teacher, a tutor on a youth camp or in a dormitory); (4) factual relationship (e.g. the duty of a person who has taken somebody's child for a walk; entrusting care for a child to an acquaintance for the time the mother needs to do the shopping).[49]

4. MISDEMEANOUR AS AN ACT

4.1. CAUSATIVE ACT

Failure to fulfil the obligation to take care of or supervise a minor or another person incapable of recognising or protecting him/herself against danger occurs when the person is allowed to stay in circumstances dangerous for human health (e.g. close to an area of water, on a construction site, etc.). A causative act consists in "allowing to stay". According to a dictionary entry, "to allow something" means "to make it possible for something to happen, not to prevent something, to let or permit somebody do/to do something".[50]

The opinion prevailing in the doctrine, according to which a causative act may only take the form of omission, should be recognised as erroneous.[51] P. Daniluk is right to state that allowing one to stay in circumstances dangerous for human health may take the form of both omission and action.[52] From the linguistic point of view, allowing something is not only failure to prevent the stay of persons referred to in Article 106 MC in conditions dangerous for health but also giving permission or consent to stay in such conditions. It seems that limitation of liability based on Article 106 MC only to omission would be in conflict with the aim of the provision. Thus, it should be assumed that omission might be reflected, e.g. in refraining from taking a helpless person away from a dangerous place, from establishing his or her place of stay or verifying whether he or she is endangered. On the other hand, action may consist in giving permission or clear consent to be in dangerous circumstances. It may also happen that a perpetrator's conduct is reflected in encouraging or inducing someone to stay in circumstances dangerous for human health, e.g. persuading a minor under the age of seven to swim in a river at night.[53]

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[49] Thus, M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 3 to Article 106 MC; B. Kurzępa, *Kodeks wykroczeń*…, thesis 4 to Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 6 to Article 106 MVC; compare M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń*…, thesis 4 to Article 106 MC. Differently, P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, thesis 7 to Article 106 MC; pursuant to Article 89 CC, M. Leciak, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, thesis 6 to Article 106 MC; R.A. Stefański, *Wykroczenia drogowe*…, p. 383.

[50] M. Szymczak (ed.), *Słownik języka polskiego*, Vol. 1, Warsaw 1978, p. 431.

[51] Thus is the opinion presented, inter alia, by: M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń*…, thesis 3 to Article 106 MC; B. Kurzępa, *Kodeks wykroczeń*…, thesis 6 to Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 7 to Article 106 MC; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 3 to Article 106 MC; T. Bojarski, *Polskie prawo wykroczeń. Zarys wykładu*, Warsaw 2003, p. 189.

[52] P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 4 on Article 106 MC.

[53] Thus, *ibid*.

Moreover, there must be a cause-and-effect relationship between a perpetrator's particular conduct (action or omission) and a minor's or a helpless person's stay in dangerous circumstances. Such conduct is aimed at making persons referred to in Article 106 MC stay (find themselves or remain) in such circumstances.[54]

4.2. CIRCUMSTANCES DANGEROUS FOR HUMAN HEALTH

"Dangerous circumstances" in the meaning of Article 106 MC are those that can incur damage to legal interest in the form of human health. It is rightly indicated in literature that staying in "circumstances dangerous for health" means staying in places or conditions that create a real danger of damage to health[55] (e.g. in freezing conditions not wearing appropriate clothes, close to a deep pit, on a scaffold).[56] Thus, it does not only concern a hypothetical threat that may take place in the future.[57]

Pursuant to Article 106 MC, a danger of negative consequences occurrence does not have to be direct.[58] Thus, some authors' suppositions that it concerns circumstances constituting direct danger for individuals' health should be recognised as unjustified.[59] However, it is commonly assumed that circumstances dangerous for human health should be assessed following objective criteria.[60]

The source of danger is not important for the occurrence of the discussed type of misdemeanour.[61] In particular, a man's conduct, an animal's behaviour or natural forces may constitute one.[62] Moreover, due to the lack of precise specification of the scope of damage endangering human life in Article 106 MC, it should be assumed that it concerns not only a danger of incurring extremely serious and great

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[54] Thus, also R.A. Stefański in relation to the feature of "allow staying" on a public road or a rail track, see R.A. Stefański, *Wykroczenia drogowe*…, p. 380.

[55] See W. Radecki, *Wykroczenia narażenia życia i zdrowia człowieka na niebezpieczeństwo*, Zagadnienia Wykroczeń No. 1, 1976, p. 45; V. Konarska-Wrzosek, *Ochrona dziecka*…, p. 44.

[56] A. Marek, *Prawo wykroczeń (materialne i procesowe)*, Warsaw 2004, pp. 131–132.

[57] Thus, rightly, M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 8 to Article 106 MC; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 5 to Article 106 MC; G. Kasicki, A. Wiśniewski, *Kodeks wykroczeń z komentarzem*, Warsaw 2002, p. 297.

[58] A. Marek, *Polskie prawo wykroczeń*, Warsaw 1981, p. 177; V. Konarska-Wrzosek, *Ochrona dziecka*…, p. 44; P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 5 on Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 8 to Article 106 MC.

[59] See B. Kurzępa, *Kodeks wykroczeń*…, thesis 5 to Article 106 MC; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń*…, thesis 3 to Article 106 MC; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 5 to Article 106 MC.

[60] See M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 5 to Article 106 MC; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń*…, thesis 3 to Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 8 to Article 106 MC; P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 5 on Article 106 MC.

[61] Thus, rightly, M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 5 to Article 106 MC; P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 5 on Article 106 MC.

[62] Thus, rightly, P. Daniluk, [in]: P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 5 on Article 106 MC.

consequences,[63] but also causing any negative consequences to health. Moreover, these may involve various aspects of human health, i.e. not only physical but also psychical one.[64]

4.3. MISDEMEANOUR OF EXPOSING TO DANGER

The discussed type of misdemeanour is unanimously classified in literature as a type of misdemeanour of exposing to danger. However, there is a lack of uniform opinions whether it is an abstract misdemeanour[65] or perhaps an actual exposure to danger[66]. A large number of legal writers do not express their opinion on the classification of the discussed misdemeanour directly but they assume that for a perpetrator's liability it is enough to recognise the existence of real danger to a minor under the age of seven or a helpless person,[67] which seems to prejudice the physical nature of a threat. The supporters of the former opinion do not justify it thoroughly. On the other hand, the supporters of the opposite stance state that the discussed misdemeanour constitutes a type of a physical exposure to danger because the conduct in a dangerous situation is penalised in it[68] and, as a result, the phenomenon belongs to the features of a prohibited act[69]. The opinion deserves approval. To recognise the commission of this misdemeanour, a minor or a helpless person must find themselves in circumstances dangerous for human health. In order to attribute liability under Article 106 MC, it is necessary to establish that in the given factual state there have been circumstances creating real danger of incurring damage to health. However, danger to human health does not have to be direct.

4.4. PHYSICAL NATURE OF THE MISDEMEANOUR

Formal (i.e. not incurring consequences) nature of the discussed misdemeanour is indicated in literature.[70] The opinion seems to be erroneous. It is necessary to agree that for the occurrence of the misdemeanour under Article 106 MC it does

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63 V. Konarska-Wrzosek, *Ochrona dziecka…*, p. 44.

64 Thus, rightly, P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń…*, comment no. 5 on Article 106 MC.

65 Thus, e.g. O. Sitarz, *Ochrona praw dziecka…*, p. 89; W. Kotowski, *Kodeks wykroczeń. Komentarz*, Warsaw 2009, p. 609.

66 Thus, unambiguously, W. Radecki, *Wykroczenia narażenia życia…*, p. 45 ff; M. Dudzik, *Prawo karne wobec narażenia życia…*, p. 216.

67 See M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń…*, thesis 3 to Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń…*, thesis 8 to Article 106 MC.

68 W. Radecki, *Wykroczenia narażenia życia…*, p. 46.

69 M. Dudzik, *Prawo karne wobec narażenia życia…*, p. 216.

70 See B. Kurzępa, *Kodeks wykroczeń…*, thesis 6 to Article 106 MC; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń…*, thesis 3 to Article 106 MC; T. Bojarski, *Polskie prawo wykroczeń…*, p. 189; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń…*, thesis 7 to Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń…*, thesis 7 to Article 106 MC.

not matter whether the consequence in the form of damage to health has actually taken place.[71] The occurrence of the state of direct danger to human health is not necessary, either.[72] Nevertheless, it seems that this misdemeanour is physical in nature and the occurrence of circumstances in which there is a real possibility of negative consequences to a minor's or a helpless person's health constitutes the consequence. However, this does not concern causing a direct danger to health but a prior situation characterised by a lower level of intensity.

5. PERPETRATOR OF THE MISDEMEANOUR

Due to the rule under Article 5 MC, the discussed misdemeanour can be committed intentionally and unintentionally. This stance dominates in literature.[73] The opinion assuming limitation of the subjective party involved in the misdemeanour under Article 106 MC to intentional perpetrators should be recognised as isolated and groundless.[74]

6. PENALTY

The discussed misdemeanour carries an alternative penalty of a fine or a reprimand. The fine may be imposed in the amount from PLN 20 to 5,000 (Article 24 §1 MC). On the other hand, the penalty of a reprimand may be ruled when, due to the nature and circumstances of the act or the personal features and conditions of the perpetrator, it should be assumed that the imposition of this penalty is sufficient to make him or her comply with the law and principles of social coexistence (Article 36 §1 MC). The pronouncement of the penalty of a reprimand is possible in case a perpetrator is charged with a misdemeanour typical of hooliganism (Article 36 §2 MC), the circumstances of which are specified in Article 47 §5 MC.

By the way, it should be highlighted that in accordance with Article 33 §4(8) MC, the incriminating circumstances important for the imposition of a penalty include "the commission of a misdemeanour to the detriment of a helpless person or a person for whom a perpetrator should show special respect". At the same time, it is rightly indicated in literature that a circumstance of acting to the detriment of

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[71] Thus, also M. Bojarski, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń. Komentarz*, Warsaw 2000, p. 479; M. Bojarski, [in:] Z. Siwik (ed.), *Prawo o wykroczeniach*, Wrocław 1980, p. 166.

[72] Thus, rightly, P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń…*, comment no. 6 on Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń…*, thesis 7 to Article 106 MC; A. Marek, *Prawo wykroczeń…*, p. 132.

[73] M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń…*, thesis 9 to Article 106 MC; B. Kurzępa, *Kodeks wykroczeń…*, thesis 6 to Article 106 MC; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń…*, thesis 5 to Article 106 MC; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń…*, thesis 7 to Article 106 MC; P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń…*, comment no. 8 on Article 106 MC; Bojarski, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń…*, p. 480.

[74] Thus, however, T. Bojarski, *Polskie prawo wykroczeń…*, p. 189.

such people belongs to the essence of a misdemeanour under Article 106 MC and if so, it cannot be treated as an incriminating circumstance at the stage of a penalty imposition for this misdemeanour.[75] The above-mentioned circumstance may be regarded as incriminating only when it does not constitute a statutory feature of a given type of a prohibited act.

7. CONCURRENCE OF STATUTORY PROVISIONS

The issue whether the provision of Article 106 MC may be in typical concurrence with Article 89 MC is not unanimously interpreted. Some authors assume that allowing a minor under the age of seven to be on a public road or on a rail track constitutes a misdemeanour laid down in Article 89 MC, which as *lex specialis* excludes the application of the provision of Article 106 MC in accordance with *lex specialis derogat legi generali* principle.[76] According to the opposite viewpoint, the real typical concurrence of those provisions is possible if the situation on the road endangers a minor's health. Due to the fact that both provisions carry the same penalty, it is necessary to apply the one that better reflects the essence of a perpetrator's act.[77]

The other opinion deserves approval. Undoubtedly, the above-mentioned types of misdemeanours are separate, independent ones;[78] however, they are not in a special relation. The typical concurrence of the provisions of Articles 89 and 106 MC should not be excluded *a priori*, either. M. Budyn-Kulik is right to state that a minor's stay in places laid down in Article 89 MC does not have to be *ex definitione* connected with a situation of danger to his or her health. If we assumed that it is an immanent feature of a minor's stay in those places, the provision of Article 89 MC would always be absorbed by Article 106 MC.[79] However, for a perpetrator's liability under Article 89 MC, it is sufficient to leave a minor under the age of seven unattended on a public road or rail track. To commit this misdemeanour, endangering a minor's health or life or posing a real threat to the security of traffic or the possibility of its occurrence is not necessary.[80] Thus, it should be assumed that in case the place referred to in Article 89 is additionally typical of real danger to

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[75] See P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 12 on Article 106 MC.

[76] Thus, M. Bojarski, [in:] M. Bojarski, W. Radecki, *Kodeks wykroczeń*…, p. 480; P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 9 on Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń*…, thesis 11 to Article 106 MC; I. Śmietanka, [in:] J. Bafia, D. Egierska, I. Śmietanka, *Kodeks wykroczeń. Komentarz*, Warsaw 1980, p. 249; also R.A. Stefański assumes that there is a seeming concurrence of the provisions; see R.A. Stefański, *Wykroczenia drogowe*…, p. 384.

[77] M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 10 to Article 89 MC; M. Leciak, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 14 on Article 89 MC.

[78] For more on the issue of whether the misdemeanour under Article 86 MC constitutes the aggravated type of the misdemeanour under Article 106 MC, see A. Gubiński, *Niektóre zagadnienia typizacji wykroczeń*, Studia Iuridica No. 10, 1982, pp. 35–36.

[79] M. Budyn-Kulik, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń*…, thesis 10 to Article 89 MC; M. Leciak, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 14 on Article 89 MC.

[80] Thus, M. Leciak, [in:] P. Daniluk (ed.), *Kodeks wykroczeń*…, comment no. 10 on Article 89 MC.

a minor's health, there is a typical concurrence of provisions that should be judged pursuant to Article 9 §1 MC.

The issue of the relation between Articles 106 and 160 §2 CC seems to be less controversial. The concurrence of those provisions is possible in case a helpless person is left (by a person who is obliged to take care of him/her) in a situation in which there is a danger of losing life or incurring serious damage to health. It is rightly highlighted in literature that if the danger reaches the level of intensity adequate to the concept of directness and it carries serious consequences, i.e. death or serious damage to health, the conduct matches the features under Article 160 §2 CC.[81] However, this will be an untypical (insignificant) concurrence. Matching the features determined in Article 160 §2 CC involves the fulfilment of the feature under Article 106 MC.[82]

The issue of an area adjacent to a misdemeanour under Article 106 MC and an offence under Article 210 CC is also interesting.[83] The causative act of an offence under Article 210 CC consists in abandonment. Abandonment is most often interpreted as a form of leaving a minor or a helpless person (most often by physically moving away from them) to their fate, i.e. without providing care to them.[84] For the occurrence of the offence, it is not important whether an abandoned person has incurred any damage or found him/herself in the state of a direct danger to life or health.[85] It is rightly indicated in case law that in case of "abandonment", unlike in "leaving", there is also a subject-related factor expressed in the lack of interest in the fate of the person left without care.[86] Abandonment may also take place in circumstances dangerous for health. It must be agreed that in case the conduct matching the features of abandonment is also connected with direct danger of losing life or incurring serious damage to health, a cumulative classification under Article 210 §1 and Article 160 §2 or §3 CC will be applied.[87] On the other hand, as far

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[81] See M. Dudzik, *Prawo karne wobec narażenia życia…*, p. 220. It is unanimously indicated in literature that such an act constitutes an aggravated offence exclusively under Article 160 §2 CC (see, e.g.: P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń…*, comment no. 10 on Article 106 MC; M. Szwarczyk, [in:] T. Bojarski (ed.), *Kodeks wykroczeń…*, thesis 7 to Article 106 MC; M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks wykroczeń…*, thesis 6 to Article 106 MC; M. Zbrojewska, [in:] T. Grzegorczyk (ed.), *Kodeks wykroczeń…*, thesis 12 to Article 106 MC).

[82] Inter alia, M. Dudzik refers to the rule of absorption, M. Dudzik, *Prawo karne wobec narażenia życia…*, p. 220; P. Daniluk, [in:] P. Daniluk (ed.), *Kodeks wykroczeń…*, comment no. 10 on Article 106 MC.

[83] For more on the issue, see M. Dudzik, *Prawo karne wobec narażenia życia…*, pp. 214–220.

[84] J. Jodłowski, M. Szewczyk, [in:] W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna…*, thesis 5b to Article 210 CC; also see J. Kosonoga, [in:] R.A. Stefański, *Kodeks karny…*, p. 1326 ff and the literature referred to therein.

[85] See A. Marek, *Kodeks karny…*, p. 408; R.A. Stefański, *Przestępstwo porzucenia…*, pp. 47–49.

[86] The Supreme Court judgement of 4 June 2001, V KKN 94/99, Prokuratura i Prawo No. 11, 2001, item 3.

[87] Thus, inter alia, V. Konarska-Wrzosek, [in:] J. Warylewski (ed.), *System prawa karnego…*, p. 983; J. Jodłowski, M. Szewczyk, [in]: W. Wróbel, A. Zoll (ed.), *Kodeks karny. Część szczególna…*, thesis 26b to Article 210 CC; A. Marek, *Kodeks karny…*, p. 408. There is also an opposite opinion presented in literature, in accordance with which in such a situation a perpetrator of abandonment is liable only pursuant to Article 160 §2 CC (thus, inter alia, O. Górniok, [in:] O. Górniok, S. Hoc, S.M. Przyjemski, *Kodeks karny…*, p. 204; Z. Siwik, [in:] M. Filar (ed.), *Kodeks karny…*, thesis 5 to Article 210 CC).

as the relation between Article 210 CC and Article 106 MC is concerned, there is an opinion expressed in the doctrine that Article 106 MC covers cases when a ward is not totally deprived of care. It is believed that the provision classifying the discussed misdemeanour should not be applied when care is not provided, but when it is not provided properly, which results in circumstances that are dangerous for a ward's health.[88] It seems that the concurrence of the analysed provisions cannot be excluded in a situation when the conduct matching the features of abandonment is connected with leaving a ward in circumstances dangerous for his or her health but the threat has not reached the level of directness. Then, Article 10 §1 MC will be applicable.

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ALLOWING A MINOR TO STAY IN CIRCUMSTANCES DANGEROUS FOR HEALTH (ARTICLE 106 MC)

Summary

The article presents the issue of a misdemeanour of allowing a minor under the age of seven or another person incapable of recognising or defending him/herself against danger to stay in circumstances dangerous for human health classified in Article 106 MC. In order to provide full characteristics of the discussed type of misdemeanour, a classical pattern based on the traditional division of statutory features of the type of prohibited act has been adopted. The author discusses such issues as statutory penalties for this misdemeanour and concurrence of provisions. The article also draws special attention to issues raising doctrinal controversies, including inter alia: approach to the object of protection, the consequential nature of this misdemeanour type, the scope and sources of the obligation to take care and supervise or the issue of the area in which the misdemeanour under Article 106 MC is concurrent with selected types of misdemeanours and offences.

Keywords: allowing to stay in dangerous circumstances, obligation to take care, obligation to supervise, minor under the age of seven, another person unable to recognise or defend him/herself against danger, circumstances dangerous for human health

DOPUSZCZENIE DO PRZEBYWANIA MAŁOLETNIEGO W OKOLICZNOŚCIACH NIEBEZPIECZNYCH DLA ZDROWIA (ART. 106 K.W.)

Streszczenie

Przedmiotem artykułu jest problematyka stypizowanego w art. 106 k.w. wykroczenia dopuszczenia do przebywania w okolicznościach niebezpiecznych dla zdrowia człowieka osoby małoletniej do lat siedmiu albo innej osoby niezdolnej rozpoznać lub obronić się przed takim niebezpieczeństwem. Dla pełnej charakterystyki omawianego typu wykroczenia przyjęto klasyczny układ oparty na tradycyjnym podziale ustawowych znamion typu czynu zabronionego. Odniesiono się do takich zagadnień, jak zagrożenie karne oraz zbieg przepisów. W opracowaniu zwrócono szczególną uwagę na kwestie wywołujące rozbieżności doktrynalne,

w tym m.in.: ujęcie przedmiotu ochrony, skutkowy charakter omawianego typu wykroczenia, zakres i źródła obowiązku opieki lub nadzoru czy zagadnienie obszaru stycznego wykroczenia z art. 106 k.w. z wybranymi typami wykroczeń oraz przestępstw.

Słowa kluczowe: dopuszczenie do przebywania w niebezpieczeństwie, obowiązek opieki, obowiązek nadzoru, małoletni do lat siedmiu, inna osoba niezdolna rozpoznać lub obronić się przed niebezpieczeństwem, okoliczności niebezpieczne dla zdrowia człowieka

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DEFENDANT'S RIGHT TO REFUSE TO TESTIFY AS A WITNESS IN CIVIL AND ADMINISTRATIVE PROCEEDINGS: OBSERVATIONS IN VIEW OF ARTICLE 182 §3 CPC

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The discussed problem of the witness's right to refuse to testify pursuant to Article 182 §3 of the Criminal Procedure Code (hereinafter: CPC) emerged in view of a specific case investigated by the Verification Commission for reprivatisation of Warsaw's real estate (hereinafter referred to as the Commission).[1] The actual case that occurred has not been resolved to date in judicial decisions issued by administrative courts.[2] The facts briefly described below, which are a point of departure for further analysis, are at the same time quite interesting in terms of theoretical considerations. This is because we are dealing with a situation which is not particularly rare when a witness who has been charged in criminal proceedings must now testify in civil or administrative proceedings to provide evidence that may be of relevance to his or her possible criminal liability. However, the extent of procedural guarantees vested in such a witness on the grounds of the latter two procedures is narrower than in the case of criminal proceedings. Accordingly, the problem in question, in addition to its theoretical aspect, is also strongly correlated with the everyday practice of the application of law.

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1 The Commission was set up pursuant to Article 3 para. 1 of the Act of 9 March 2017 on special rules for elimination of legal consequences of reprivatisation decisions issued in violation of law and concerning Warsaw's real estate (Journal of Laws [Dz.U.] of 2017, item 718), and the Commission's name was finally derived from the amendment to the act, which came into force on 14 March 2018 (Journal of Laws [Dz.U.] of 2018, item 431).

2 There are no relevant decisions of civil law courts, either, which would be helpful here in view of similar grounds for the witness's right to refuse to testify.

The defendant in criminal proceedings was summoned to testify before the Commission in a case the substantive scope of which, in the defendant's assessment, was identical or at least highly similar to the object of the criminal proceedings conducted against the defendant. The information that the Commission wanted to obtain from the defendant was important for finding whether the defendant was responsible in criminal proceedings.[3]

The defendant appeared before the Commission and did not leave the hearing before its end. At the hearing, the defendant appearing before the Commission as a witness stated her position by indicating that she had been presented with a charge in criminal proceedings and the nature of the presented charge and the object of the proceedings prevent her, in her opinion, from testifying before the Commission as her testimony could just be tantamount to providing information connected with the object of the criminal proceedings where she, as a defendant, took advantage of the right to refuse to provide explanations. Although, then, the witness in the proceedings in which she was to testify could not fear that she would be presented with charges (which obviously follows from the nature of those proceedings), what must be nevertheless stressed is that she had already been accused based on the facts which were, in her opinion, identical to or essentially identical to those of the case pending before the Commission. Therefore, what was meant was not a fear of being presented with a charge in the future but enforcement of the right to defence against a charge already presented.

The difference between these two situations was also noticed by the Constitutional Tribunal. This is because it recognised that the right to refuse to reply specific questions is vested in a witness, or a person to whom no charge of committing a crime has been presented. The Tribunal also emphasized the fact that the aforementioned procedural regulation does not mean that a person testifying in a trial as a witness is vested with the same scope of rights, rooted in the constitutional right to defence to which a defendant is entitled. Considering the above, not all the rights vested in a suspect because of the right to defence which is due to him or her should be vested on the same conditions in a person testifying in a trial as a witness, who may have committed a crime but one outside the scope of the pending proceedings.[4]

It should be stressed that the thesis presented by the Tribunal is correct, provided that the key issue is rightly emphasized: different scopes of proceedings in cases where the person testifies as a witness and those where he or she is presented with charges as a defendant. In the case which is the basis of further considerations, in the suspect's assessment, the factual findings made before the authority in the administrative proceedings were of key importance to her criminal liability assessed in the proceedings where as a suspect she took advantage of the right to silence. The substantive scope of both proceedings, defined by the factual findings made, was therefore congruent. It is irrelevant here whether the factual findings made are later used as the grounds for considering various types of legal, not only criminal,

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[3] Case R 1/17 conducted by the Commission.

[4] The judgement of the Constitutional Tribunal of 21 December 2007, Ts 62/07, Z.U. 2008/2B/69.

consequences. When a witness testifies in such a situation, this would give the authority conducting criminal proceedings against him or her knowledge of the facts about his or her participation in the criminal proceedings. It is irrelevant, either, that testimony reports could not be used as evidence in the criminal proceedings, if the authority conducting the criminal proceedings could easily familiarise itself with their content and thus obtain information needed to continue the proceedings against the suspect, which would be further verified by other evidence in the case.

As a result of the situation that occurred, the witness declared that she wanted to take advantage of the right vested in her pursuant to Article 182 §3 CPC and she refused to testify before the Commission.

The aforementioned regulation grants a witness the right to refuse to testify if he or she is accused of participation in a crime covered by proceedings in another pending case. Clearly, the indicated regulation is applicable only within criminal procedures and there is no corresponding regulation in civil law or administrative procedures. Also, the Act which established the Commission, in Article 38 para. 1, states that in cases not regulated by the Act, relevant provisions of the Code of Administrative Procedure (hereinafter: CAP) should be applicable. For the sake of completeness, it should be added that the CAP, in Article 83 §1 provides that no party may refuse to give evidence as a witness, except for the party's spouse, ascendants, descendants and siblings and the party's first-degree relatives, as well as persons remaining with the party in the relationship of adoption, custody or guardianship. The right to refuse to testify continues also after the termination of marriage, adoption, custody or guardianship. It is not, therefore, to any extent an equivalent of Article 182 §3 CPC but Article 182 §1 CPC, which allows the defendant's next of kin to refuse to testify in criminal proceedings; pursuant to Article 115 §11 of the Criminal Code (henceforth: CC), one's next of kin is defined as one's spouse, ascendant, descendant, sibling, relative in the same line or degree, a person remaining in the relationship of adoption as well as his or her spouse or a person living in actual co-habitation.[5]

On the other hand, Article 83 §2 CAP, which allows a witness to refuse to answer questions if an answer could expose him/her or his/her next of kin to criminal liability, disgrace or direct property loss or cause violation of the obligation to maintain in confidence a legally protected professional secret, corresponds both to Article 183 §1 CPC and, with regard to the obligation to maintain in confidence a legally protected secret, to Article 180 CPC. Obviously, the norms juxtaposed as above are not identically worded but are sufficiently similar in terms of content and adopted solutions to allow their comparison. But in the administrative (or civil law) proceedings, there is no provision corresponding to Article 182 §3 CPC.

The rights conferred on a witness in criminal proceedings pursuant to Articles 183 §1 CPC and 182 §3 CPC are essentially different and it is not accidental that the lawmaker put the two of them in two separate editorial units, wording them in a completely different manner. These are not, in any case, similar rights and the

[5] By the Resolution of 25 February 2016, I KZP 20/15, the Supreme Court specified in detail the list of persons classified as next of kin pursuant to Article 115 §11 CC.

rights under Article 182 §3 CPC, which are wider in scope and more advantageous for the accused, cannot effectively replace the rights granted on the basis of Article 183 §1 CPC.

Article 182 §3, introduced to the Criminal Procedure Code, grants a witness who has found him/herself in a special situation in a trial a far-reaching right having the nature and ensuring the enforcement of the actual right to defence. The right to refuse to testify is then granted also to a witness who is accused of complicity in a crime covered by proceedings in another pending case.

In the doctrine and jurisprudence, the commented norm has not been interpreted in detail, though the opinions expressed so far should be an important instruction for interpreting Article 182 §3 CPC.

W. Kręcisz points out that the lawmaker intended to include in the scope of the norm also situations identical to that regulated in Article 182 §3 CPC that may arise on the grounds of other regulations which are part of the criminal law system where the Criminal Procedure Code is applied directly or indirectly. The author continues to argue, correctly, that the provision of Article 182 §3 CPC functions as a kind of special guarantee which aims, as a manifestation of the constitutional right to defence, to spell out clearly the absence of any obligation on the part of anyone to provide evidence against oneself. Therefore, as indicated by W. Kręcisz, it is neither justified nor possible to restrict interpretation of Article 182 §3 CPC only to the linguistic interpretation, without taking into account or seeking another context – a systemic, functional one – for the interpreted rule of law, even though it is to be expected that such context should be established, all the more so since that would be in keeping with the principles of interpretation of the law. This is because it is not disputed that at present the principle of judicial independence cannot reduce courts (judges) to the role of "mouths of statutes", which would, to simplify greatly, limit their role in the process of law application to making findings concerning only the linguistic context of the interpreted rule of law.[6]

In the doctrine, the right opinion is also invoked that Article 182 §3 CPC should be considered not only in the linguistic context but also in the systemic and functional contexts. If this is so, then the right to refuse to testify should be also granted to a witness who is actually, strictly speaking, not accused from the point of view of the Criminal Procedure Code but because of his or her young age appears in a case conducted before a family court under the Act on procedure in juvenile cases (henceforth: Juvenile Act). There are no reasonable arguments to differentiate the situation of two accomplices testifying in the trial. If the interpretation is limited to the literal wording of the provision, then a juvenile accomplice who is to testify before a criminal court would be deprived of the right to refuse to testify, while his or her adult partner, testifying before a family court, would be instructed about his or her right to refuse to testify under the procedure of Article 191 §2 CPC in connection with Article 20 Juvenile Act.[7]

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[6] W. Kręcisz, *O wykładni ustaw w sposób zgodny z Konstytucją na tle stosowania art. 182 §3 k.p.k.*, Prokuratura i Prawo No. 4, 2000, pp. 7–27.

[7] See P.K. Sowiński, *Prawo świadka do odmowy zeznań w procesie karnym*, Warsaw 2004, p. 75, and the opinions referred to therein.

On the other hand, K. Łojewski classified the right to refuse to testify vested in a witness as an institution of evidence prohibitions, which include any rules of criminal proceedings that forbid taking evidence for a certain circumstance or with the use of particular pieces of evidence. Evidence prohibitions, however, do not represent rights that are in conflict with the interest of judicial authorities but only rights whose protection exerts an adverse influence on the principle of aiming to find the objective truth in criminal proceedings. The prohibitions actually make it difficult or impossible to find the truth but the fact that they have such effects, which is correctly emphasized by the author, is completely consistent with the intentions of judicial authorities. The interest of the judicial authority and the principle of the objective truth are not unambiguous concepts and the protection of one does not necessarily mean the protection of the other.[8]

In the jurisprudence, although individual, a view has been presented that on the basis of Article 182 §3 CPC, the essence of which is to prevent an accused person from actually having to testify against him/herself as a result of a change in his or her procedural situation (under the threat of criminal liability for giving false evidence), the statutory concept of participation in a criminal offence should be understood more broadly and should include, in addition to complicity, aiding and abetting, cases which are similar, where the factual connection between the acts in question is also strong and where their perpetrators, if the connection is found, face similar criminal consequences.[9]

The judgement of the Appellate Court in Katowice referred to above has been criticised in a gloss, where the presented argument was claimed to be fallacious in that assuming that Article 182 §3 CPC is an exception from the duty to testify following from Article 177 §1 CPC, then such an exception cannot be given an extended interpretation, therefore complicity in a criminal offence for the purposes of the discussed provision should be understood exclusively as the forms of complicity described in Article 18 §1–3 CC.[10]

The argument advanced by M. Siwek is isolated, not supported in the doctrine or in the jurisprudence. The view is based on a certain misunderstanding because the author seems to oppose the prohibition against extended interpretation of Article 182 §3 CPC to the guarantee role of the provision; both these values, though, are possible to reconcile and certainly neither of them excludes the other.

The aim of the regulation of Article 182 §3 CPC is undoubtedly to guarantee a suspect the right to fair treatment in given criminal proceedings. As Polish law grants such a person the right to silence and to refuse to provide explanations, then it is necessary to ensure that the procedural authorities respect the right effectively. The point then is to make it impossible to exclude cases identical with regard to the substance or to initiate such proceedings apart from already pending ones, where a suspect as a witness would be made to testify, and even in a situation where

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[8] K. Łojewski, *Instytucja odmowy zeznań w polskim procesie karnym*, Warsaw 1970, pp. 14–15.

[9] Judgement of the Appellate Court in Katowice of 28 November 2002, II AKa 398/02, OSAKiSO 2003, No. 1.

[10] M. Siwek, *A gloss to the judgement of the Appellate Court in Katowice of 28 November 2002, II Aka 398/02*, Palestra No. 11–12 2005, p. 280.

he or she would give false testimony to defend him/herself, he or she would be exposed to criminal liability by imprisonment up to five years (Article 233 §1a CC). Exactly, in the light of the new regulation of Article 233 §1a CC, the interpretation of Article 182 §3 CPC in terms of guarantee takes on importance. What is interesting, in the justification of the bill amending the CPC, stipulating criminal liability for a witness who gives false testimony in fear of threatening criminal liability, it was emphasized that the Polish criminal procedure provides for sufficient guarantees of the right to defence referred to in Article 6 of the European Convention on Human Rights and Article 42 para. 2 of the Constitution of the Republic of Poland. In particular, as indicated in the justification for the bill, the guarantee is provided by, among others, just the right to refuse to testify and the right to refuse to answer a question referred to in Articles 182 and 183 CPC.[11] Therefore, the right defined in Article 182 §3 CPC is undoubtedly important as it fulfils the role of a guarantee.

The functional and pro-guarantee rather than only literal interpretation of Article 182 §3 CPC does not lead at all to an extension of the subjective and objective scope of Article 182 §3 CPC. This is because it is not challenged that the right to refuse to testify on the grounds of Article 182 §3 CPC is granted only to a witness "accused of complicity in a criminal offence coved by the proceedings". The point is, however, that while decoding the objective scope of the term "criminal offence" one cannot restrict or narrow down the interpretation of the possibility of taking advantage of the right resulting from Article 182 §3 CPC only to such situations where in proceedings a witness is to testify, the subjective and objective configuration is an ideally symmetrical reflection of the factual circumstances in the proceedings, where the witness is presented with charges, and the only exceptions from such an ideal similarity are provided by Article 18 §1–3 CC. What is of fundamental importance then is the objective scope of the proceedings in which the witness is to testify. If the scope is essentially similar to the proceedings where the witness is presented with charges, then he or she has the right to refuse to testify.

It should be emphasized that such an interpretation of Article 182 §3 CPC is supported by the judgement of the Supreme Court of 28 November 2003, IV KK 14/03, where it was clearly stressed that to assess the possibility of taking advantage of the right following from Article 182 §3 CPC, the nature of the action covered by the given proceedings must be considered. This follows from the fact that the Supreme Court assumed that the provision of Article 182 §3 CPC establishes an exception to the obligation to testify in a case. The right to refuse to testify is then granted to a witness who is accused of complicity in a crime covered by proceedings in another pending case, and the court must instruct the witness about his or her right to refuse to testify. Comparing, on the grounds of the same system of law, the terms of "accused" and "juvenile" leads to the conclusion that they refer to persons against whom proceedings have been initiated and are conducted to determine the legal liability for a committed offence.

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[11] Justification for the bill, the Sejm print no. 207, p. 19 – Sejm of the 8th term. Even though the nature and the aim of the regulation found in the provision of Article 182 §3 CPC is described correctly, Article 233 §1a CC remains nevertheless in conflict with the function of Article 182 §3 CPC.

Pursuant to Article 189(3) CPC, a witness is not obligated to make a vow if he or she is suspected of an offence which is the object of the proceedings or remains in a close connection with an action being the object of the proceedings or when he or she has been sentenced for the offence. The lawmaker uses here a different description of the relationship between the content of the witness's testimony and the object of criminal proceedings in which he or she is accused. The expression used, after all, is a "close connection" rather than "complicity" as in Article 182 §3 CPC. However, referring to the wording of Article 189(3) CPC does not solve the problem, either. A witness indicated in Article 189(3) CPC may be only a suspected person, therefore a person against whom no charges of committing an offence have been brought, but it is a court on its own that decides whether a witness is to be identified as a "suspected person" based on the evidence held in the case.[12] Therefore, Articles 182 §3 and 189(3) CPC refer to different subjects, so it is unfortunate to compare the two where a witness who is at the same time a "suspect" rather than merely a "suspected person" is forced to defend him/herself against criminal charges already presented to him or her, due to which the accusation is actual and not only hypothetical. By the same token, it is Article 182 §3 CPC to which the pro-guarantee and functional interpretation of the provision applies.

It would be possible, though unfortunate, to invoke the right granted to any witness based on Article 183 §1 CPC, therefore the right granted even to a witness against whom no criminal charges have been brought. It is beyond any doubt that the scope of guarantee in Article 183 §1 CPC is much narrower than that provided for in Article 182 §3 CPC. As already indicated, the right to silence, guaranteed in Article 182 §3 CPC is a different thing from the necessity to indicate to the interrogator where a witness sees the possibility of being exposed to criminal liability (Article 183 §1 CPC), which by itself is an important piece of information for the authority conducting the proceedings and is not consistent in any way with guaranteeing the right to silence to a suspect. If a witness, having been presented with criminal charges, is interrogated, having no choice in the matter, in other proceedings as a witness but about circumstances identical to those presented to him or her in the criminal charge, then the procedural authorities are obligated to behave in a loyal manner to the witness and respect the right to silence vested in him or her. M. Cieślak, then, rightly assumed that if a witness invokes the right to refuse to answer questions, this is some kind of admission of guilt on the part of the witness. Therefore, invoking the right requires of the witness a great moral courage and perhaps, in the author's opinion, not only moral courage.[13]

Moving on, on the other hand, to the possibility of refusing to testify on the part of a witness in circumstances described in Article 182 §3 CPC but giving evidence in different proceedings from criminal ones (not conducted pursuant to the Code of Criminal Procedure), it should be recognised that objecting to such a right may

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[12] See: D. Gruszecka, *Komentarz do art. 189 k.p.k.*, [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, Legalis, 2017; and D. Świecki (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2013, p. 616.

[13] M. Cieślak, *Przesłuchanie osoby podejrzanej o udział w przestępstwie, która nie występuje w charakterze oskarżonego*, Państwo i Prawo No. 5–6, 1964, p. 865.

violate the standard defined in Article 42 para. 2 first sentence of the Constitution. This is because anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. The views that the Constitution guarantees the right to defence, among others, in a material sense, are correct and this entails the possibility of using any measures aimed at defence that are acceptable in criminal proceedings. This guarantee subsumes the right to shape and influence the conducted evidence proceedings and the procedural activities taken during the proceedings by, among others, providing explanations (or refusing to provide them), access to the files, and submission of motions concerning evidence. The right to defence construed in this way entails imposing on the procedural authorities obligations to create conditions allowing the entitlements following from the right to become actual.[14] On the other hand, other authors think that an inherent part of the right to defence, in constitutional terms, is the right to freedom of expression, where a special element may be distinguished, namely the right to provide explanations and possibly the right to refuse to testify (the right to silence). In addition, no adverse consequences can be drawn from the fact of the individual's taking advantage of the right to silence. The above follows, as it is stressed, from the principle of *nemo se ipsum accusare tenetur*, which is applicable in the Polish legal order.[15]

An extremely complex problem, however – which I am fully aware of – is the possibility of appealing to the right to refuse to testify in such circumstances of the case as described in Article 182 §3 CPC, in spite of there being no positive statutory standard in the given (civil law, administrative procedure) regulating such a right.

Recently, the problem of the "dispersed constitutional review" has been discussed broadly and, it must be admitted, correctly. Specifically, it is pointed out in the doctrine that an individual is entitled to claim a right to be justified when it is rooted in the Constitution. Common courts, then, are authorised to analyse law against constitutional rules in various cases and different factual circumstances, which extends significantly the scope of constitutionality. A mixed model of constitutionality of law emphasizes the role and function of courts whose basic task is to issue fair and just decisions in compliance with axiological principles and constitutional values to resolve individual cases. A court has the right to refuse to apply a rule of law in a specific case when the rule is clearly inconsistent with the Constitution but a court has the right to apply the Constitution only in that scope. A court's refusal to apply the rule of law inconsistent with the Constitution in a specific case does not relieve the court from seeking other grounds for its decision. In some cases, such grounds may be provided simply by the provisions of the Constitution, applied directly and independently. In individual acts of applying laws, courts may treat the Constitution as the grounds for protecting personal rights and freedoms, not as the grounds for limiting them.[16]

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[14] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 278, and the references contained therein.

[15] M. Safjan, L. Bosek (ed.), *Konstytucja RP*, Vol. 1: *Komentarz do art. 1–86*, Warsaw 2016.

[16] P. Kardas, M. Gutowski, *Konstytucja z 1997 r. a model kontroli konstytucyjności prawa*, Palestra No. 4, 2017, pp. 11–29.

The above consideration of dispersed constitutional review of rules of law solves only partially the problem of the absence of the normative basis at the ordinary statutory level for a witness to take advantage of the right to refuse to testify in a different procedure from the criminal one when the circumstances described in Article 182 §3 CPC arise.

Consequently, attention should be drawn to the fact that the doctrine applies the model to the possibility of refusing to follow a given statutory law or seeking a relevant pro-constitutional interpretation rather than a situation when a given provision is missing from the legal order. It is beyond any doubt, then, that the problem of constitutionality of a law may be analysed by a common court that is to issue a decision in a given case, but the question remains open whether the same court is allowed, similarly, to seek the right legal grounds for resolving the case in a situation closer to a legislative omission (*zaniechanie prawodawcze*).

In M. Grzybowski's opinion, a legislative omission refers to a situation where contrary to an order following from prevailing laws – normative obligation – the legislator has failed to pass the required regulations or regulated a matter in an incomplete and insufficient manner. In the first of the described situations, we can see omission proper (absolute omission); in the second – relative (partial) omission. Following the above line of thought, M. Grzybowski referred to the Constitutional Tribunal's judgement of 3 December 1996, where in the justification, the Tribunal stated that it had no competence to assess the lawmaker's omissions involving failures to issue a legislative act, even if the obligation to issue it followed from constitutional norms. On the other hand, in the case of a legislative act which has been issued and is in force, the Constitutional Tribunal is authorised to assess its constitutionality also with regard to pointing out missing regulations without which, because of the regulatory nature of the act, it may raise doubts about its compliance with the Constitution. The charge of unconstitutionality may, therefore, apply both to what the legislator included in the given act of law and area omitted from the act, even though that area should have been regulated if the Constitution had been followed.[17]

Answering then the question whether a court is allowed to seek the right legal grounds for resolving the case in a situation closer to a legislative omission, it is possible to give a partially positive answer based on two assumptions, which are crucial, in my opinion. First, a court or authority which does not operate on the basis of the criminal procedure may accept a witness's right to refuse to testify as described in Article 182 §3 CPC as long as the court decides that there are reasonable grounds to assume that the legislator could and should have introduced the given solution to the civil law or administrative procedure but failed to do so. The fact that a rule defining an appropriate right of an individual is not indicated in procedural provisions directly does not mean that the person is deprived of the right when – by interpreting the provisions, using most frequently systemic

[17] M. Grzybowski, *Zaniechanie prawodawcze w praktyce polskiego Trybunału Konstytucyjnego*, published on http://www.confeuconstco.org/reports/rep-xiv/report_Poland_po.pdf [accessed on 8/07/2018], and the judgement of the Constitutional Tribunal, as referred to therein, of 3 December 1996, K 25/95, OTK ZU 1996, No. 6, item 52.

interpretation – it is possible to derive the right from the existing regulations, even if those are not included in the procedural laws applied by the given authority. Such an interpretation, however, cannot lead to creating completely new solutions, unknown in the Polish legal order, because then the interpretation would acquire a law-making role.

Furthermore, it is possible to conclude, by making an interpretation, that Article 182 §3 CPC should be applied to other proceedings than criminal ones as long as we assume that the failure to repair such a "legislative omission" by a court or authority will lead to the application of law with unconstitutional consequences affecting the individual. Such a consequence, which is inconsistent with the Constitution, could be forcing someone to testify in spite of the right to silence guaranteed in the Constitution as a component of the right to defence.

On the other hand, on the grounds of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (henceforth: ECHR),[18] W. Jasiński observes that in the decisions of the European Court of Human Rights, apart from the right not to incriminate oneself, another term is also used, namely the right to silence. As the author convincingly argues, the two terms: the right not to incriminate oneself and the right to silence cannot be regarded as equivalent. Their meanings overlap. On the one hand, as the author notes, the right to silence is an element of the right not to incriminate oneself. This is because the latter includes not only refusal to provide statements which may incriminate one but also refusal to provide incriminating factual evidence. On the other hand, the right to silence involves not only statements that are incriminating in nature.[19] It is beyond doubt, however, that an effective right to silence, at least from the moment of presenting charges to a suspect, is part of the right to fair trial following from the Convention.

With regard to the right to silence, the decision-making of the European Court of Human Rights is quite extensive but its deeper analysis would not be possible in this paper. A representative example, which is worth discussing, though, is the Grand Chamber's case of *Ibrahim and Others v. the United Kingdom*.[20] The Court's discussion in the relevant scope shows the difficulty of unambiguous delineation of limits of the right to silence.

The Court indicates that the right not to incriminate oneself focuses mainly on respecting the accused person's will to remain silent and assumes that the prosecutor in a criminal case makes an effort to prove his argument without resorting to evidence obtained by threat or coercion, against the accused person. The right to silence during an interrogation by the police and the privilege of not incriminating oneself are commonly recognised international standards, forming the basis of the

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[18] Journal of Laws [Dz.U.] of 1993, No. 61, item 284.

[19] W. Jasiński, *Prawo do nieobciążania się w procesie karnym w świetle standardów strasburskich*, Prokuratura i Prawo No. 7–8, 2015, p. 11.

[20] The judgement issued by the Grand Chamber of the ECtHR of 13 September 2016 in the case *Ibrahim and Others v. the United Kingdom*, Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09, as well as the body of court decisions referred therein, discussing in detail the comments presented by the Court – paras. 266–269.

concept of fair procedure pursuant to Article 6 ECHR. As assessed by the Court, the justifiability of the rights follows also from the protection of the accused against inappropriate use of force by the authorities, which contributes to the avoidance of court errors and achievement of the aims of Article 6 ECHR.

It should be noted that recognising the privilege of not incriminating oneself does not protect against submission of an incriminating statement by itself but against obtaining evidence by threat or force. The existence of coercion raises doubts whether the right not to incriminate oneself has been respected. For these reasons, the Court must always consider first the nature and extent of coercion used to obtain evidence. As the Court shows, it identified in its decision-making body at least three types of situations which raise doubts about inappropriate use of coercion, violating Article 6 ECHR.

The first occurs if a suspect is obligated to testify under a threat of sanctions and because of that decides to testify or suffers consequences for refusing to testify.

The second concerns physical or psychological pressure, often assuming the form of treatment in breach of Article 3 ECHR, used to obtain actual evidence or statement.

Finally, the third refers to a situation where the authorities use a stratagem to extract information that has been impossible to obtain during the interrogation.

Testimony obtained under duress which does not seem to be incriminatory in nature, such as revealing remarks or information taken only from replies to questions about facts, may be used in criminal proceedings to support the indictment, for example to deny or dismiss other statements made or evidence provided by the accused person or to undermine their reliability in some other way. In connection with the above, the right not to incriminate oneself cannot be justifiably limited to directly incriminating statements.

The right to freedom from self-incrimination is not absolute, though. In the Court's assessment, the extent of applied coercion is inconsistent with Article 6 ECHR if the coercion contradicts the privilege of not having to incriminate oneself. Not every form of direct coercion denies the sense of the privilege of not having to incriminate oneself and leads to violation of Article 6 and the ECHR standards. In the Court's assessment, what is important here is the use of evidence obtained under duress during a criminal trial.

Applying the above comments to considerations about the possibility of refusal to testify by a witness in civil law or administrative proceedings, if the witness has been presented with charges in criminal proceedings and the established facts are identical or essentially similar to the facts relevant to the criminal proceedings, then forcing the witness to testify under threat of criminal liability, combined with the witness's fear of being sentenced for giving false evidence, could lead to the conclusion that Article 6 ECHR has been violated.

It seems similar to the situation when a witness can use the right to refuse to answer particular questions, if it is noted every time that the witness refuses to answer a question because he or she is afraid of threatening criminal liability, which is a form of forcing the witness to incriminate him/herself. This is a kind of stratagem, because even though the witness may not be threatened with criminal

liability for giving false evidence, he or she is nevertheless forced to use the right to refuse to answer particular questions aiming to incriminate him or her and in connection with this he or she may effectively and unintentionally point to factual issues that can lead to his or her criminal liability. It is not accidental that the accused person has the right to give evidence and also to refuse to do so without stating a reason, which is not identified by the legislator with the possibility of refusing to answer each particular question.

On the other hand, the Court in its decisions emphasizes the actual use of evidence obtained under duress in criminal proceedings. Undoubtedly, evidence from a suspect's testimony given in other proceedings when he or she appears as witness cannot form the basis for establishing facts in a case, interestingly, not even to the suspect's benefit. In this sense, effective use of evidence obtained in such a manner is limited. The content of the minutes from the hearing of the witness cannot be overlooked, though, as it may help the prosecutor to seek further evidence against the suspect. From this perspective, the scope of actual use of such evidence is broadened. This is emphasized by M. Kurowski, who states that the idea of Article 182 §3 CPC is to use information taken from given testimony because the testimony itself cannot be used directly against an accused person.[21]

If the principle of *nemo se ipsum accusare tenetur* is applicable not only to a suspect and an accused person but also to a "suspected person" and "potentially suspected person",[22] then it seems that a witness who defends him/herself in criminal proceedings against presented charges should not be forced to testify in different proceedings from the criminal ones where the content of the testimony could incriminate him or her. It is sometimes stressed that the right to defence entails the possibility of selecting a strategy of defending oneself, in particular, an accused person may choose an active or passive defence. One of the aspects of the right to defence in criminal proceedings is the right to passive defence, expressed in the aforementioned procedural rule of *nemo se ipsum accusare tenetur*, which prohibits self-incrimination and providing evidence against oneself.

The essence of the discussed rule amounts to giving an accused person freedom to decide whether to participate actively in proceedings against him or her. Protection against self-incrimination refers in the first place to the person accused in criminal proceedings but the scope of the *nemo se ipsum accusare tenetur* principle is not limited by the criminal proceedings defined by presenting a charge on the one hand, and issuance of a legally valid decision on the other. In particular, we should completely agree with the following: that the scope of the protection resulting from the principle allows a witness, in certain situations, to refuse to testify as well as it allows a person obligated to provide information in proceedings to refuse to comply with the procedural obligation.[23] Lastly, taking into consideration all the foregoing considerations, it seems reasonable to assert that the essence of the right

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[21] M. Kurowski, [in:] D. Świecki (ed.), *Kodeks postępowania…*, Vol. 1, Warsaw 2013, p. 592.

[22] Cz. Kłak, *„Osoba podejrzana" oraz „potencjalnie podejrzana" w polskim procesie karnym a zasada nemo se ipsum accusare tenetur*, Ius Novum No. 4, 2012, p. 74.

[23] P. Nowak, *Definicja podejrzanego i oskarżonego a konstytucyjne prawo do obrony*, Czasopismo Prawa Karnego i Nauk Penalnych Vol. 4, 2016, p. 70.

of defence, as defined by both the Constitution and the Criminal Procedure Code, must not be adversely affected in civil or administrative proceedings if the subject matter of such proceedings is relevant from the perspective of a possible criminal liability of a person who has been charged in criminal proceedings and who is subsequently required to testify as a witness in civil or administrative proceedings to provide certain significant evidence that might be relevant to the criminal proceedings. Obviously, a solution postulated within a certain time horizon would be to amend the Code of Administrative Procedure and the Code of Civil Procedure by introducing solutions corresponding to the one adopted in Article 182 §3 CPC, whereby the right to refuse to testify as a witness would be vested in a person who in other pending proceedings is accused of a crime the essential facts of which are covered by the civil or administrative proceedings in question and with regard to which this person would be subpoenaed as a witness.

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DEFENDANT'S RIGHT TO REFUSE TO TESTIFY AS A WITNESS IN CIVIL AND ADMINISTRATIVE PROCEEDINGS: OBSERVATIONS IN VIEW OF ARTICLE 182 §3 CPC

Summary

The article addresses issues related to the right of a witness in civil or administrative proceedings to refuse to testify in a situation where the witness has been charged in criminal proceedings. In criminal proceedings, it is beyond doubt that a witness may refuse to testify altogether if he or she is accused of complicity in a crime dealt with in the proceedings pending in another case. Regardless of the construction of the contents of Article 182 §3 CPC, a corresponding

right has not been formulated with respect to civil or administrative proceedings, even though a witness may be required to testify in such proceedings with regard to facts of relevance to his or her criminal liability. In practice, this may generate a situation which is in breach of the right to defence of the accused and, at the same time, a witness in other pending proceedings. It does not seem a sufficient guarantee for such a witness would consist only of the right to refuse to answer specific questions asked of him or her during the hearing.

Keywords: witness, suspect, testimony, refusal, silence, question, charges

PRAWO OSKARŻONEGO DO ODMOWY ZŁOŻENIA ZEZNAŃ W POSTĘPOWANIU CYWILNYM I ADMINISTRACYJNYM – SPOSTRZEŻENIA NA TLE ART. 182 §3 K.P.K.

Streszczenie

Artykuł porusza problematykę związaną z prawem świadka w postępowaniu cywilnym lub administracyjnym do odmowy złożenia zeznań w sytuacji, gdy temu świadkowi zostały przedstawione zarzuty w postępowaniu karnym. W postępowaniu karnym nie ulega wątpliwości, że świadek może w całości odmówić złożenia zeznań, o ile w innej toczącej się sprawie jest oskarżony o współudział w przestępstwie objętym postępowaniem. Niezależnie od rozumienia treści art. 182 § 3 k.p.k., analogiczne uprawnienie gwarancyjne nie zostało sformułowane w postępowaniu cywilnym i administracyjnym, mimo że świadek może być przesłuchiwany w tych postępowaniach na okoliczności istotne dla jego odpowiedzialności karnej. W praktyce może to prowadzić do sytuacji naruszającej prawo oskarżonego, a zarazem świadka w innym postępowaniu, do jego obrony. Nie wydaje się, aby wystarczającą gwarancją dla takiego świadka było wyłącznie prawo do odmowy odpowiedzi na poszczególne pytania zadawane mu w toku przesłuchania.

Słowa kluczowe: świadek, podejrzany, zeznania, odmowa, milczenie, pytanie, zarzuty

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"HOW COME I CANNOT FLY A DRONE ABOVE THE PRIME MINISTER'S OFFICE?" – CRIMINAL AND CIVIL LIABILITY OF A DRONE OPERATOR IN POLAND

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1. INTRODUCTION[1]

Opening of the European market for drones/remotely piloted aircraft systems (RPAS) – or the civilian use of drones – is an important step towards the aviation market of the future.[2]

By 2050, a number of different aircraft categories are expected to be operating, diverse in size, performance and type, with some still having a pilot on board, but many remotely piloted or fully automated.[3]

As part of the "Żwirko i Wigura" programme implemented by the Polish Development Fund (PFR), part of the sky over Poland will be opened for testing new drone applications. The plan assumes the launch of what is called a sandbox, i.e. a separated part of the airspace, in which the current quite restrictive UAV

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2 See more in: European Commission, Communication from the Commission to the European Parliament and the Council: *A new era for aviation. Opening the aviation market to the civil use of remotely piloted aircraft systems in a safe and sustainable manner*, Brussels, 8 April 2014, COM/2014/0207 final.

3 European Commission, *Flightpath 2050: Europe's Vision for Aviation*, Report of the High Level Group on Aviation Research, Brussels 2011, p. 28.

(unmanned aerial vehicle) regulations would not allow such an operation, and the sandbox would make it possible to operate drones in natural conditions.[4]

In Poland, the Central European Drone Demonstrator (CEDD) has also been established. An agreement for the creation of a development and testing zone for drones in the Metropolitan Association of Upper Silesia and Dąbrowa Basin (Górnośląsko-Zagłębiowska Metropolia, GZM) was signed on 26 September in Katowice, southern Poland. The signatories of the document are the local GZM authorities, the Civil Aviation Authority (ULC) and the Polish Air Navigation Services Agency (PAŻP).[5] The undertaking involves a testing centre on a defined geographical area for all drone systems and applications by different technological entities.

The Polish drone sector in 2015 was valued at about PLN 165 million and today it is worth over PLN 250 million.

A new EU regulation on RPAS will enter into force in the coming months. The legislative process aimed at the extension of the EU competence to include safety regulations in this area is ongoing. On 11 September 2018, the revised Basic Regulation[6] entered into force. This might facilitate the traffic of drone operators within the EU.[7] These regulations will define the principles of flight, training, certification, registration, etc.[8] However, the question of liability still remains beyond its scope. Therefore, the national regulations would be applicable.

The goal of the article is to show the importance of the knowledge on regulations concerning drones since those systems are available to anyone nowadays. A drone bought in a supermarket can fly in the range of 5–7 kilometres and at the altitude of a few hundred metres. The operator of such a drone needs to know the operational rules, especially when using it in a city or close to an airport. By causing damage, the operator can be held liable under both criminal and civil law.

Unfortunately, there are more and more incidents in Poland with drones, both intentional and unintentional. For example, on 20 July 2015 a Lufthansa Embraer

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[4] See more at: https://www.pfr.pl/pl/aktualnosci/pfr-o-programie-zwirko-i-wigura [accessed on 05/10/2018].

[5] http://www.pansa.pl/?lang=_pl&opis=wiecej&id_wyslane=1337.

[6] Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, OJ L 212 of 22.8.2018.

[7] See more at: http://www.ulc.gov.pl/pl/publikacje/wiadomosci/4443-informacje-na-temat-nowych-unijnych-przepisow-dotyczacych-bezzalogowych-statkow-powietrznych [accessed on 27/09/2018].

[8] For the comparison of the national regulations on drones in the EU and other countries, see B.I. Scott (ed.), *The Law of Unmanned Aircraft Systems. An Introduction to the Current and Future Regulation under National, Regional and International Law,* Kluwer Law International BV, the Netherlands 2016. See also T.T. Takahashi, *Drones in the national airspace*, Journal of Air Law and Commerce Vol. 77, No. 3, 2012; and B. Kapnik, *Unmanned but accelerating: Navigating the regulatory and privacy challenges of introducing unmanned aircraft into the national airspace system*, Journal of Air Law and Commerce Vol. 77, No. 2, 2012.

ERJ-195 performing flight LH-1614 from Munich to Warsaw with 108 passengers and five members of crew, was on its final approach to Warsaw's runway when the crew reported in a quite aggravated and shocked tone that they had just had a near collision with a drone. The drone passed in about a 20- to 40-metre distance.

The goal of this paper is to identify regulations in place concerning criminal and civil liability in the discussed area. The article will also present an overview of the operational regulations in Poland before introducing the unified EU law.

2. POLISH AVIATION LAW

Polish air transportation has a long tradition that goes back to the early 1920s. In 1922, the world's first regular air routes: Warsaw–Lwów[9] and Warsaw–Gdańsk were launched by the Polish airlines. An even earlier, ad hoc service, connecting Warsaw with Paris, via Prague and Strasbourg, "testifying to cordial Franco-Polish relations", was of a rather symbolic nature, due to the problem of flying over the German territory.[10] In 1929, LOT Polish Airlines was established which is now considered a leader among the Central and Eastern European airlines. LOT started to fly over the Atlantic in 1938 and projected launching of a regular transatlantic service scheduled to start in 1940.[11]

In 1928, President of Poland enacted the Ordinance on Air Law which was one of the first in the world. Taking into consideration technical developments of the air industry and the socio-economic changes which took place in Poland, in 1962 the Parliament adopted a new Act on Air Law, and in 2002 a new Act: Aviation Law, which is now in force.

3. POLISH REGULATIONS CONCERNING DRONES

The Act of 3 July 2002: Aviation Law[12] in its Article 126 para. 1 states that unmanned aerial vehicles may be operated in the Polish airspace. According to Article 126 para. 2, unmanned aerial vehicles must be equipped with the same flight, navigation and communication facilities as either a manned aircraft performing a flight in line with visual flight rules (VFR) or instrument flight rules (IFR) within a defined class of airspace. The derogations applicable to manned aircraft in this respect apply uniformly to UAVs. Under the regulations, unmanned flights are allowed, provided that certain requirements for the equipment and the qualifications of flight crew

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[9] Until 1939, the city of Lwów was a part of Poland. Since then, the spelling of its name has changed to Lvov, currently Lviv.

[10] R. Stefanowski, *50th Anniversary of LOT Polish Airlines*, 1979-1-18, RAD Background Report/11.

[11] A. Konert, *Air carrier liability under Polish Air Law*, Indian Journal of International Law Vol. 50, No. 2, 2010.

[12] Journal of Laws [Dz.U.] of 2002, No. 130, item 1112, as amended; hereinafter: Aviation Law.

are met. Pursuant to the Act, the detailed conditions and rules for the operation of unmanned flights have been specified in the relevant regulations.

The Regulation of the Minister of Transport, Construction and Maritime Economy of 26 March 2013 on the exclusion of certain provisions of the Aviation Law as non-applicable to certain types of aircraft and defining conditions and requirements for the use of these aircraft[13] was the very first attempt to introduce general requirements for unmanned aircraft operations and it was one of the first such regulations in Europe.

This Regulation stipulates detailed flight rules, the operator's responsibility, etc., but it does not provide for the liability.

It is worth mentioning that currently in Poland the visual line of sight (VLOS) operations could be conducted in non-segregated airspace. Beyond visual line of sight (BVLOS), operations require segregated airspace. Due to the large number of segregated areas in Flight Information Region EPWW, it might be inconvenient to create more, because each additional zone may limit access to the desirable uncontrolled airspace for general aviation.[14]

In order to address that issue, the Civil Aviation Authority of the Republic of Poland has published the draft amending the above-mentioned Regulation for public consultation.

The purpose of the amendment is to introduce changes to the regulations governing the BVLOS operations. The dynamically developing market and unmanned aviation industry have revealed significant limitations, which result in the need to separate airspace for BVLOS operations. The amendment will significantly simplify the procedure by establishing special categories of BVLOS operations based on risk analysis and up to 120 metres AGL[15].

4. OPERATOR'S RESPONSIBILITIES

According to the 2016 Regulation, an unmanned aircraft (it is an aircraft with a take--off mass of not more than 150 kg, used only in operations within the visual line of sight for non-recreational or sport purposes) flight shall be performed only with the assurance that in each flight phase a safe horizontal distance from persons, property, vehicles, construction works or other airspace users not available or under the operator's control is maintained in the event of a failure or loss of control of the unmanned aircraft. On the other hand, model aircraft (it is an aircraft with a take-off mass of not more than 150 kg, used only in operations within the visual line of sight for recreation or sport purposes) operations shall be performed only while maintaining a horizontal

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[13] Amended by the Regulation of the Minister of Infrastructure and Construction of 8 August 2016 amending the regulation on the exclusion of certain provisions of the Aviation Law as non-applicable to certain types of aircraft and defining conditions and requirements for the use of these aircraft, Journal of Laws [Dz.U.] of 2016, item 1317; hereinafter: 2016 Regulation.

[14] M. Włodarczyk, *Drony – najmłodsi użytkownicy przestrzeni powietrznej*, SMS Biuletyn Bezpieczeństwa PAŻP No. 2, 2017, p. 13.

[15] Above ground level.

distance of not less than 100 metres from the boundaries of buildings, towns, settlements or gatherings of people in the open air and maintaining a horizontal distance of not less than 30 metres from persons, vehicles, construction objects not available or under the operator's control. However, the rules concerning the distance from people and buildings do not apply to the model aircraft with weight of less than 0.6 kg.

The model aircraft operator and the unmanned aircraft operator must operate:

- taking into account the meteorological conditions, structure and classification of airspace and information on restrictions in air traffic;
- in the CTR zone on terms specified by the air traffic service provider;[16]
- in the ATZ zone with the consent of the manager of the zone and on the terms specified by him;
- in the dangerous zone, MCTR[17] or MATZ[18] zone with the consent of the manager of a given zone and on conditions defined by him;
- in the restricted zone covering National Parks only with the consent of the manager of a given National Park and under conditions specified by him;
- in the prohibited zone only with the consent of the manager of a facility covered by the zone and under the conditions defined by him;
- in the ADIZ[19] zone after informing the air traffic service (ATS) unit responsible for the space in which the flight is to be performed, or AMC Poland, about the location and time of flights;
- in the case of flights in construction works, with the consent of the facility's manager and in accordance with safety rules agreed with him.

The obligation to report the flights to the ATS[20] provider in the CTR and ATZ zones does not apply to flights operated by unmanned aircraft/model aircraft with take-off mass not exceeding 25 kg at a distance of more than 6 kilometres from the airport boundary and up to a height of 100 metres above the ground. For flights in the CTR zone that do not meet the above requirements the notification to the air traffic services provider (Polish Air Navigation Services Agency) is necessary.[21]

The operator of the model aircraft must:

1) exercise due caution,[22] avoid any act or omission that could:
   a. create a safety risk, including the threat to air traffic safety,
   b. obstruct air traffic,
   c. disrupt peace or public order, and
   d. expose anyone to damage.

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[16] The detailed flight rules to be met in order to fly in CTRs are described at the Polish Air Navigation Services Agency website: http://www.pansa.pl/index.php?menu_lewe=ops&lang=_pl&opis=OPS/ops_rpa [accessed on 27/09/2018].

[17] Military Control Zone.

[18] Military Aerodrome Traffic Zone.

[19] Air Defence Identification Zone.

[20] Air Traffic Services.

[21] See the detailed rules at: http://www.pansa.pl/index.php?menu_lewe=ops&lang=_pl&opis=OPS/ops_rpa.

[22] According to Article 2 para. 14, due caution means caution consisting in increased attention, adjusting the operator's behaviour or securing and adapting the take-off and landing site of the model aircraft or terrain over which the flight takes place to the conditions and situations that change during the flight as necessary to enable a safe flight.

2) control the flying model so that it avoids collision with other aircraft;
3) ensure that the flying model he operates gives priority to manned aircraft;
4) be responsible for the decision to perform the flight and its correctness, and the appointment and participation of the observer in the performance of flights does not release him from the responsibility for the safety of performed operations;
5) use the flying model and control devices in accordance with the manufacturer's recommendations and restrictions, if published;
6) check the technical condition of the model aircraft before the flight;
7) perform flights only with a model aircraft that is technically efficient.

5. CRIMINAL LIABILITY

There are no special regulations on drones regarding criminal liability. However, one can find criminal provisions in the Aviation Law and the Criminal Code which could apply to a drone operator as well. First of all, a drone user can violate the air traffic regulations. In such a case, Articles 211 and 212 Aviation Law apply.

Article 211 provides for several offences related to performing flights with aircraft in violation of the provisions of the Act, and among others stipulates that: anyone who operates a flight using an aircraft incompliant with the required airworthiness or with the restrictions specified in the airworthiness certificate, anyone who performs a flight against the obligations regarding the conditions of use of the aircraft in the Republic of Poland or anyone who, despite the ban on the emission of a laser beam or light from other sources in the airspace areas, emits or causes the laser beam or light from other sources to be emitted in the direction of the aircraft in a way that may cause glare and consequently create a safety hazard to the aircraft or the health of the crew and passengers on board, is subject to a fine, limitation of liberty or imprisonment for up to one year. The same punishment is imposed on a person who, not fulfilling his duty, allows such acts to be committed.[23] An example of the infringement of this Article is a situation when a person with a VLOS flight licence performs a BVLOS flight or when a person with outdated aeromedical examinations flies a drone, a person operating a drone is under the influence of alcohol or drugs, a person performs acrobatics with a drone over a residential area or a group of people, etc.

Article 212 provides for several offences violating the provisions of the Act in the field of air traffic and, among others, states that: anyone who, when performing a flight with an aircraft, violates air traffic regulations in force in the area in which the flight takes place or crosses the state border without the required permit or in violation of the permit conditions, or anyone who, contrary to the provisions of the Act, uses signs and signals in traffic that are unrelated to this movement or in a way that could be misleading to air traffic service units or aircraft crew, is punishable by imprisonment of up to five years. The same punishment is imposed on a person

[23] See the commentary on Article 211 in M. Żylicz (ed.), *Prawo lotnicze. Komentarz*, Warsaw 2016.

who, not fulfilling his duty, allows such acts to be committed. If the perpetrator acts unintentionally, he is subject to a fine, limitation of liberty or imprisonment for up to one year.[24] An example of the infringement of this Article is a situation when a person flies a drone in the CTR zone (for accuracy at a distance of, e.g. 2 km from the airport) and has not informed the relevant services (ASM 1 and TWR) about the intention to perform the operation, and has not obtained proper flight conditions approval. Another example is when a person uses a drone to smuggle goods across the state border or a person uses a drone in the restricted area above a National Park without the consent of its authorities.

There are also provisions in the Criminal Code (henceforth: CC) that could apply to a drone user. First of all, responsibility for causing a disaster in air traffic could be involved. Pursuant to Article 173 CC, anyone who causes a disaster on land or water or to air traffic, and thereby endangers the life or health of many people, or property to a significant degree is liable to imprisonment for between one and ten years. If this act results in the a person's death or in grievous bodily harm to many people, the offender is liable to imprisonment for between two and twelve years. If the offender acts unintentionally, he is liable to imprisonment for between three months and five years. If this unintentional act results in the death of a person or in grievous bodily harm to many people, the offender is liable to imprisonment for between six months and eight years. According to Article 174 CC, anyone who causes an immediate danger of a disaster on land or water or to air traffic is liable to imprisonment for between six months and eight years. If the offender acts unintentionally, he is liable to imprisonment for up to three years.

Moreover, anyone who causes grievous bodily harm in the form that: deprives a person of his or her sight, hearing, speech or the ability to procreate, or inflicts on another person a serious crippling injury, an incurable or prolonged illness, a potentially fatal illness, a permanent mental illness, a permanent total or significant incapacity to perform a profession, or a permanent serious bodily disfigurement or deformation, is liable to imprisonment for between one and ten years. If the offender acts unintentionally, he is liable to imprisonment for up to three years. If this act results in a person's death, the offender is liable to imprisonment for between two and twelve years (Article 156 CC). Anyone who causes a bodily injury or an impairment to health other than those specified in Article 156 §1 is liable to imprisonment for between three months and five years. Anyone who causes a bodily injury or an impairment to health lasting up to seven days is liable to a fine, the limitation of liberty or imprisonment for up to two years. If the offender acts unintentionally, he is liable to a fine, the limitation of liberty or imprisonment for up to one year (Article 157 CC).

Furthermore, anyone who, through the persistent harassment of another person or another person's next of kin, creates a justified sense of danger or significantly violates the person's privacy, is subject to imprisonment for up to three years. Anyone who pretends to be another person and uses his or her image or other

[24] *Ibid*., see the commentary on Article 212.

personal data in order to cause property or personal damage is liable to the same penalty (Article 190a CC).

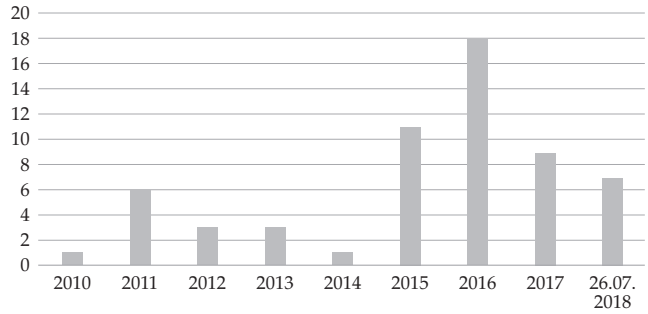
Finally, there is a risk for a domestic trespass. Anyone who forces his way into another person's house, apartment, premises, quarters, or a fenced plot of land, or does not leave such a place, despite the demand from an authorised person, is liable to a fine, the limitation of liberty or imprisonment for up to one year (Article 193 CC).[25]

In order to promote safety and to inform about legal consequences of reckless use of drones, the Civil Aviation Authority of the Republic of Poland and the Polish Air Navigation Services Agency have prepared several safety information campaigns, among others, the "Fly Wisely, Be Safe" campaign[26].

Unfortunately, neither information campaigns nor the most perfect regulations will protect against threats that may be caused by the presence of a drone in a place not intended for it. The appearance of unreported unmanned aircraft in the controlled space is the issue identified worldwide affecting aviation safety. From time to time, the media comment on events related to filming a large passenger aircraft from a close distance, and the interruption of an approach to the international airport due to the identification of a drone. Those incidents often disturb air traffic and cause the closure of the airport for some time. Poland is not an exception, and every year there are drone-related occurrences reported as part of the PAŻP's safety management system. Although the events involving the presence of drones have not led to an accident and caused some necessary actions by the air traffic controllers and flight crew, it should be remembered that the unreported drone can potentially affect air traffic and safety of passengers and flight crew.

The number of occurrences related to UAVs is illustrated in the chart below.[27]

Number of reported air occurrences concerning drones in FIR EPWW



Source: 2018 Bi-Annual Safety Report for Flight Information Region EPWW

[25] For more, see M. Żylicz (ed.), *Prawo lotnicze*…

[26] http://latajzglowa.pl or http://www.ulc.gov.pl/pl/publikacje/wiadomosci/4289-lataj-bezpiecznie-lataj-z-glowa-rusza-spot-edukacyjny-o-dronach [accessed on 27/09/2018].

[27] See: 2018 Bi-Annual Safety Report for Flight Information Region EPWW.

After a near-collision between Lufthansa's plane and a drone in 2015, the Police immediately responded and dispatched a helicopter as well as ground forces to search for the drone operator, but was unsuccessful at first in locating him or the drone. Continued investigation resulted in identification of the operator: a 39-year-old resident of Piaseczno, located underneath the approach path runway 33 spanning from about 3 to 6.5 NM from the threshold runway 33. The drone user admitted to having flown his drone in the area on 20 July 2015 and faced charges of endangering aviation safety that could send him to prison for up to eight years.

On 26 September 2016, a Russian citizen operated a drone over the Prime Minister's Office, Belvedere (Residence of the President of the Republic of Poland) and the Ministry of National Defence in Warsaw. According to information provided by the media, the man was handed over to the Warsaw Police. The District Prosecutor's Office in Warsaw passed the investigation to the Internal Security Agency. Investigators were at that point trying to determine the purpose of the flight and what information was collected by the drone.[28] The Russian drone operator was arrested. The Prosecutor's Office presented him with allegations of violation of aviation law, and the Internal Security Agency applied to the Border Guard for expulsion from Poland. Apparently, he was surprised to hear that he could not fly a drone over the government buildings, the Belvedere and other important headquarters of national institutions.

The most important governmental institutions are situated in the specific part of Warsaw where the Flight Restricted Area (ROL48) has been designated. An operator flying illegally in this area can face the charges of five-year imprisonment[29] or, if he acts unintentionally, is subject to a fine, limitation of liberty or imprisonment for up to one year.[30]

One could state that the penalty for such an act might be too severe and law seems strict in this respect. However, it is possible to fly legally in this area.

To operate a flight in the ROL48 Flight Restricted Area, the approval of the State Security Office (former Government Protection Bureau) is needed. The Office is a Polish equivalent of the United States Secret Service, providing antiterrorism services and VIP security services for the Polish government. To obtain formal approval from the Office to conduct an RPA flight in ROL48, the operator should send the application form at least five days prior to the flight. The Office then can remove restrictions for a specific flight or refuse to do so due to national

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[28] https://www.defence24.pl/dron-nad-kancelaria-premiera-zatrzymano-operatora-obywatela-rosji [accessed on 08/10/2018].

[29] Article 212 para. 1(1) Aviation Law:

Who, performing a flight using an aircraft:

a) violates the air traffic regulations in force in area in which the flight is taking place,
b) crosses the state border without the required permit, or in violation of the terms of the permit,
c) violates, issued on the basis of Art. 119 para. 2 of the Act, prohibitions or flight restrictions in the Polish airspace introduced due to the military necessity or public safety, (…) is subject to imprisonment of up to five years.

[30] Article 212 para. 3 Aviation Law.

security reasons. The approval of such a flight can be obtained only by the licensed Unmanned Aerial Vehicle Operator.[31]

On 17 July 2017, a CCTV operator noticed a drone flying over the Royal Castle in Warsaw and Sigismund's Column. He informed the Police about the incident. Officers detained a 29-year-old tourist from China in the area of the Castle Square. The charges were pressed on the basis of Article 212 para. 1(1) Aviation Law. As the operator claimed that he had no knowledge about the Restricted Area, the event resulted in less severe charges of a fine, limitation of liberty or imprisonment for up to one year.[32]

Reckless drone operators include not only tourists. The owner of a drone in Gniezno, a city in the Wielkopolskie Voivodship, who on 14 June was flying his drone near the Gniezno cathedral could be a subject of the criminal liability. The man did not have the permit required for the flight from the Military Air Traffic Control Tower in Powidz as the whole city is covered by the Military CTR. He could be liable for the offence under Article 212 para. 1(1) Aviation Law as well.[33] Such repercussions could have been avoided by contacting the air traffic controller of the Powidz Air Traffic Control and obtaining the approval of the flight. Similar events have taken place also in other parts of Poland, and new cases are constantly broadcasted by the media. Many of those are ongoing, yet there is one well-known instance that ended up with a court judgement. The defendant was accused that on 4 December 2017 he operated an unmanned aerial vehicle above the Belvedere and Royal Łazienki Gardens which are in the Flight Restricted Area (ROL48) and EPWA CTR (Control Zone) of the Warsaw Chopin Airport. The flight was operated without consent from the Polish Air Navigation Services Agency and the State Security Office. The court found the operator guilty of the offence he was accused of under Article 212 para. 1(1a) Aviation Law, and on this basis the court sentenced him and punished with a six-month imprisonment. Under Article 69 §1 and 2 CC and Article 70 §1 CC, the imprisonment sentence was conditionally suspended for a trial period of two years. The operator was also obliged not to fly unmanned aircraft on the territory of the Republic of Poland and to pay a fee to the State Treasury in the amount of PLN 1,000 to cover court costs. As the number of illegal flights is rising, such incidents may result in similar court judgements.

One of the interesting cases are illegal flights in the National Parks. Due to their nature and necessity to protect the environment, the Restricted Areas are established in such places. Flights in those areas are possible only upon the approval from the manager of the Restricted Area. In case of the National Parks, it is usually the Park director. The Park management is often free to impose restrictions and requirements to be met in order to obtain the approval to conduct a flight. Some Parks decide to prohibit all drone activities. In case of the Tatrzański National Park, the operator

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[31] https://sop.gov.pl/pl/o-sluzbie/loty-w-rol48/zgoda-na-loty-rol48/231,Loty-w-ROL48.html [accessed on 06/10/2018].

[32] http://warszawa.wyborcza.pl/warszawa/7,54420,22105043,latal-dronem-nad-zamkiem-krolewskim-teraz-poniesie-kare.html [accessed on 07/10/2018].

[33] http://moje-gniezno.pl/artykuly/czytaj/19916/latal-dronem-w-poblizu-katedry-grozi-mu-nawet-rok-wiezienia.html.

must file an application form, including the details on the operator and flight. What is worth pointing out, Park managers can charge fees for drone flights. In case of the Tatrzański National Park, they range between PLN 300 (EUR 70) and PLN 15,000 (EUR 3,500), depending on the flight purpose. The fees in case of flights for educational purposes are significantly lower than for commercial reasons.[34] There are known cases when the restrictions are not observed, and the Park management can impose the penalty on the operator caught by the Park Security Officer or bring a lawsuit.[35]

6. CIVIL LIABILITY

There are no special regulations for drones regarding civil liability. Therefore, the general provisions on civil liability apply. For damages caused to third parties, the general regulations for the liability of an operator of manned aircraft are applicable. Aviation Law of 2002 stipulates in Article 206 that the liability for damage caused by the aircraft operation is regulated by civil law with respect to liability for damage caused by the use of mechanical means of transport operable by the forces of nature. Thus, this Article refers to the Civil Code, and particularly to Articles 435 and 436. Article 435 §1 Civil Code establishes the rule of strict liability for injuries caused by enterprises or establishments which are set in motion by natural forces, like steam, gas, electricity, fuel. The enumeration is not exclusive and atomic energy should be included. The same liability is imposed by Article 435 §2 Civil Code on establishments manufacturing or using high explosives, for instance, mines. A person running the enterprise on his own account is liable for injury caused by the accident, unless he proves that the damage has been the result of force majeure or incurred through the exclusive fault of the person injured or of a third party. Article 436 Civil Code refers to traffic accidents caused by motor vehicles. According to this Article, the liability depends on the possession of the vehicle and not on its ownership. The result is that in the case of theft, the owner of a car ceases to be liable. There are two important exceptions to this rule. Principles of liability based on fault are applicable when persons are transported gratuitously and in the case of a collision (see Article 436 §2 Civil Code). A gratuitous guest must prove the fault of the possessor (or his servant). In the case of a collision, general principles decide how much the fault of each driver has contributed to the damage.[36]

The liability of the operator is, therefore, strict and he cannot escape it, unless he proves that the damage has been the result of force majeure or incurred through the exclusive fault of the person injured or of a third party.[37]

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[34] http://tpn.pl/kontakt/zalatw-sprawe/filmowanie.

[35] http://podhale24.pl/aktualnosci/artykul/52544/Turysci_lamia_zakaz_lotow_dronami_nad_Tatrami.html [accessed on 08/10/2018].

[36] For more, see A. Szpunar, *The law of tort in the Polish Civil Code*, The International and Comparative Law Quarterly Vol. 16, No. 1, January 1967, pp. 86–102.

[37] For more, see A. Konert, *Odpowiedzialność za szkodę na ziemi wyrządzoną ruchem statku powietrznego*, Warsaw 2014.

There is also a risk of infringement of personal rights when using a drone. Pursuant to Article 23 Civil Code, the personal interests, in particular health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement-related achievements are protected by civil law, independently of protection under other regulations. According to Article 24 Civil Code, any person whose personal interests are threatened by another person's actions may demand that the actions be ceased, unless they are not unlawful. In the case of infringement, he may also demand that the person committing the infringement perform the actions necessary to remove its effects, in particular that the person make a declaration of the appropriate form and substance. On the terms provided for in the Civil Code, he may also demand a pecuniary compensation or that an appropriate amount of money be paid for a specific public cause.

The use of drones can also trigger the liability for unlawful dissemination of the image. Pursuant to Article 81 of the Act on copyright and related rights, dissemination of an image requires the permission of a person depicted on it. In the absence of explicit reservation, no authorisation is required if the person has received the agreed payment for posing. The dissemination of the image does not require the permission in case of: a well-known person, if the image has been made in connection with performing public functions, in particular political, social and professional ones; a person who is only presented as a detail of a whole, such as a gathering, landscape, public event.

7. INSURANCE AND PUBLIC SAFETY

Regarding the insurance, Appendix 7 of the Regulation of the Minister of Transport, Construction and Maritime Economy of 26 March 2013 on the exclusion of certain provisions of the Aviation Law as non-applicable to certain types of aircraft and defining conditions and requirements for the use of these aircraft specifies the requirements for third-party liability insurance of people using: hang gliders, paragliders with foot take-off, parachutes and unmanned aircraft with a take-off mass of up to 20 kg. The insurance covers damage caused by the person operating the aircraft in connection with the operation of these aircraft.[38]

The third-party liability insurance of the person operating the aircraft covers damage consisting of:

1) bodily injury, health disorder or death of a third party;
2) damage to the property of a third party on the surface of the earth, water or airborne.

[38] Section 1.1 of the Regulation of the Minister of Transport, Construction and Maritime Economy of 26 March 2013 on the exclusion of certain provisions of the Aviation Law as non-applicable to certain types of aircraft and defining conditions and requirements for the use of these aircraft.

The obligation of the third-party liability insurance for a person operating aircraft arises on the day of the beginning of a flight or a jump, performed in the whole or in part of the Polish airspace.

The minimum limit of liability for third-party liability insurance of persons operating unmanned aircraft with a take-off mass from 5 to 20 kg, to the extent of damage caused to third parties in relation to one event, the effects of which are covered by the third-party liability insurance contract, is the equivalent in PLN to 3,000 SDRs.

An unmanned aerial vehicle, including a flying model, may be destroyed, immobilised or taken control over if:

1) the course of the flight or the operation of unmanned aircraft:
   a. threatens the life or health of a person,
   b. poses threat to protected objects, devices or areas,
   c. disrupts the mass event or threatens the safety of its participants,
   d. raises a reasonable suspicion that it can be used as a means of a terrorist attack;
2) unmanned aircraft performs flight in the airspace in the part in which flight restrictions have been introduced or located over the territory of the Republic of Poland, in which the flight of the aircraft is prohibited from ground level up to a specified altitude.

The above actions are authorised by the Police officers and other authorities.

8. CONCLUSIONS

It is crucial for a drone user to be aware of the existing regulations. For one flight, a drone operator can be liable based on both criminal and civil law: in terms of criminal punishment, for example for a domestic trespass, and in civil terms, for instance for violation of personal rights. The drone operator should, therefore, take all necessary measures to ensure flight safety. There are different sources from which the operator can obtain the information on flight restrictions in the area where he intends to fly a drone. It could be the website of the ANSP (air navigation service provider), in Poland: PAŻP,[39] or a dedicated application such as a drone radar.[40] Nevertheless, whatever source of information or tools the operator would use, he is solely responsible for the flight and its outcome. That is why, the proper preparation before the drone flight is crucial and mandatory in today's complex aviation and legal environment.

Unfortunately, the possibility of occurrences related to UAVs are still a fact. Although it is true that most of the incidents have not led to an accident, it should be remembered that an unreported drone can potentially affect the air traffic and safety of passengers and a flight crew. The main problem is a difficulty in identifying a drone operator. The time between the incident and the ATC notification to the

[39] http://www.pansa.pl/index.php?menu_lewe=ops&lang=_pl&opis=OPS/ops_rpa.
[40] https://droneradar.eu.

Police is usually so long that it makes it impossible to find and identify the operator. In the view of the authors of this article, it is necessary to introduce a registration of all drone operators, which would allow automatic identification of a drone user.

Some of the countries or manufacturers try to find a solution on their own. For example, DJI company's drones simply will not take off in a place where the flight is forbidden (e.g. airports or military bases) thanks to GPS communications. However, software limitations are not sufficient, because they do not prevent flights over people. Another example is Japan where airports and other sensitive points are equipped with their own drones, which are connected to a sensitive radar system. If an alien flying object appeared in the sky, then the drone-guardsman will immediately fly to it, hover over and shoot it down.[41]

Another issue is technology development pace which is faster than the lawmakers introducing new regulations. Three years ago, no one could imagine a plug-and-play consumer drone with a take-off mass less than 600 grams that could register 4K videos and fly long distances. Now such drones are available on the market in every bigger store offering electronics. The Polish regulations treat more liberally drones with the MTOM[42] of less than 600 grams.

This allows the flight to be conducted more than 1 km from the airport boundary (fencing) in the CTR zone and with the use of an unmanned aircraft and model aircraft with a take-off mass of not more than 0.6 kg and up to the altitude of 30 metres or up to the highest obstacle, including trees or buildings and other objects, within a radius of up to 100 metres from the operator. Heavier drones require the coordination with the ANSP (they are also allowed to fly higher than obstacles in line with the flight principles issued by PAŻP and in later cooperation with the ATC).

While this approach helps the market to develop and operators to operate lighter drones which will not interfere with manned aviation, the legislation is and will always be lagging behind the technological development.

The reasoning behind introducing the weight specification by the regulator might be at the time being the will to distinguish between the toy-drones and professional-use ones or to reduce harmful effects of potential incident involving drones. The first objective has already been challenged by the market, which offers smaller, lighter drones with better and better capabilities, moving the boundary between toys and professionally-used UAVs. However, the other reason may still be valid as an attempt to reduce the regulatory impact on restrictions on devices which potentially create less severe outcome of an incident due to their smaller size.

The European Commission has published the draft Commission Implementing Regulation on the rules and procedures for the operation of unmanned aircraft. The Opinion of the EASA No 01/2018: Introduction of a regulatory framework for the operation of unmanned aircraft systems in the "open" and "specific" categories[43] stated the intentions to implement an operation-centric, proportionate, risk- and

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41 See: https://www.spidersweb.pl/2015/12/dron-w-siatce.html [accessed on 05/10/2018].

42 Maximum Take-Off Mass.

43 https://www.easa.europa.eu/sites/default/files/dfu/Opinion%20No%2001-2018.pdf [accessed on 08/11/2018].

performance-based regulatory framework for all UAS operations conducted in the "open" and "specific" categories.

The draft regulation defines different classes of UAVs based not only on MTOM but also introduces the kinetic energy as the reference point. The lightest subclass is C0 which includes drones weighing less than 250 grams, and the second subclass consists of drones between 250 grams and 900 grams or with kinetic energy of less than 80J.[44] There are three more classes with different MTOM and characteristics and functionalities of the UAVs themselves. It all shows the tendency to find the "golden ratio" of drone operations among the regulators. However, it is important to point out that the approach of the states which prepared the regulations years ahead before drafting the legal solutions by the European Union deserves an approval and should be assessed as positive. Thanks to the existing rules, the market is regulated safely and it keeps the number of operators in check in the same time allowing them to fly without imposing unnecessary restrictions.

In the meantime, the pursuit of lawmakers, the technology and the imagination of drone operators will continue to develop. The finish line of this race is the full integration of unmanned and manned aviation in a safe manner. Time will show how and when the industry will achieve this goal.

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"HOW COME I CANNOT FLY A DRONE ABOVE THE PRIME MINISTER'S OFFICE?" – CRIMINAL AND CIVIL LIABILITY OF A DRONE OPERATOR IN POLAND

Summary

The developing branch of unmanned aviation is undoubtedly opening the new possibilities to aviation applications. The prospect of economic growth, technology availability, liberal regulations and decreasing costs of unmanned aerial vehicles reduce the entry threshold for more and more operators in Europe and worldwide. This trend is largely visible in Poland where the number of licensed drone operators in the third quarter of 2018 exceeded 8,500. The number of unlicensed, so-called recreational and sport users of drones, might be a few or even dozens times higher. While trained and licensed operators are most probably aware of their responsibilities and potential hazards the drone operations might create, recreational users tend to be more reluctant to fly by the book and less informed on potential liability of their actions. The new branch of long-time developed and matured aviation sector might require increased efforts of lawmakers, however, criminal and civil liability regulations concerning manned aviation can be successfully applied to unmanned aerial vehicles. The authors of this study present an overview of these regulations on the example of Polish provisions in order to confirm that the conscious use of the new technology is crucial for its further development and sustaining the liberal approach of lawmakers and other aviation users.

Keywords: aviation, aviation law, drones, drone operator

"CZEMU NIE MOŻNA LATAĆ DRONEM NAD KANCELARIĄ PREMIERA?" – ODPOWIEDZIALNOŚĆ KARNA I CYWILNA OPERATORA DORNA W POLSCE

Streszczenie

Rozwijająca się gałąź lotnictwa bezzałogowego niewątpliwie otwiera nowe możliwości dla przemysłu, nie tylko lotniczego. Wizja wzrostu gospodarczego, dostępność technologii, liberalne regulacje i malejące koszty bezzałogowych statków powietrznych przyczyniają się do coraz większej liczby operatorów w Europie i na całym świecie. Tendencja ta jest bardzo widoczna w Polsce, gdzie liczba licencjonowanych operatorów dronów w trzecim kwartale 2018 roku przekroczyła 8 500. Liczba nielicencjonowanych, tak zwanych rekreacyjnych i sportowych, użytkowników dronów może być kilka, a nawet kilkadziesiąt razy wyższa. Licencjonowani operatorzy najprawdopodobniej są świadomi swoich obowiązków i potencjalnych zagrożeń, jakie mogą stwarzać operacje BSP. Użytkownicy rekreacyjni natomiast są mniej poinformowani o potencjalnej odpowiedzialności za swoje działania. Ta nowa gałąź dojrzałego sektora lotniczego może wymagać wzmożonych wysiłków ustawodawcy, jednak przepisy dotyczące odpowiedzialności cywilnej i karnej w odniesieniu do załogowego lotnictwa mogą z powodzeniem zostać zastosowane do bezzałogowych statków powietrznych. Autorzy niniejszego opracowania przedstawiają przegląd tych regulacji na przykładzie polskich przypadków, aby potwierdzić, że świadome korzystanie z nowej technologii jest najważniejszym czynnikiem jej dalszego rozwoju.

Słowa kluczowe: lotnictwo, prawo lotnicze, drony, operator drona

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DATA PROTECTION OFFICER IN THE LIGHT OF THE PROVISIONS OF THE GENERAL DATA PROTECTION REGULATION (GDPR)

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An information security administrator played an important role in the enforcement of the provisions of the Act of 29 August 1997 on the protection of personal data[1] as his main task was to ensure the compliance with the provisions of this statute, especially by:

– checking the compliance of data processing with the provisions;
– supervising development and updating of documents describing the way of data processing and technical and organisational means ensuring their protection, as well as the compliance with the rules determined in the documents; and
– ensuring that persons authorised to process personal data get acquainted with the provisions on their protection.[2]

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [3] entered into force on 25 May 2016 and has been applicable since 25 May 2018. The provisions of Chapter IV Section 4 GDPR (Articles 37 to 39) regulate the designation, status and tasks of the data protection officer (hereinafter: DPO). The function constitutes a counterpart of the

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1 Uniform text, Journal of Laws [Dz.U.] of 2016, item 922.

2 For information about the designation, tasks and status of the information security administrator, see: R. Szałowski, *Administrator bezpieczeństwa informacji*, Ius Novum No. 4, 2016, pp. 208–224 and the literature referred to therein.

3 OJ L 119 of 4.5.2016; hereinafter: GDPR.

information security administrator that operated earlier based on the provisions of Act on the protection of personal data.

The article aims to present, analyse and assess new regulations of the European Union law concerning the DPO's designation, tasks and status.

1. DESIGNATION OF THE DATA PROTECTION OFFICER

The DPO designation is regulated in Article 37 GDPR. The EU legislator calls the assignment of the DPO duties to a particular person a designation, which does not seem to be an accurate term in the light of legal jargon because it actually concerns employment, which seems to be confirmed by the specification laid down in Article 37 para. 6 stipulating that the DPO may be a staff member or fulfil tasks based on the basis of a service contract.

The DPO designation may take place as part of the fulfilment of the obligation determined in the GDPR provisions or result from the use of the adequate authorisation. The controller[4] or the processor[5] designate the DPO.

The issue concerning the scope of the obligation to designate the DPO is regulated in Article 37 para. 1 GDPR. The controller and the processor always designate the DPO when at least one of the three conditions laid down in the provision is fulfilled. The designation of the DPO is an obligation of the controller or the processor independently, which means that "the obligation can be fulfilled only by the controller or only by the processor, or by both entities at the same time".[6] Editing the content of the provision, the EU legislator ignores the fact that in the light of the GDPR provisions concerning the scope of rights of the obliged party, i.e. the controller or the processor, employment may not be possible in accordance with national laws. Thus, using the GDPR terminology, the controller or the processor may designate, i.e. employ, the DPO if, at the same time, he performs the function of the head of a unit or is authorised to employ staff in the organisation.

The first reason for the obligation is the performance of data processing by a public authority or body, except for courts acting in their judicial capacity. Thus, it concerns not only public authorities or bodies but also other entities, e.g. organisational or administrative units.[7] There is an opinion presented in literature

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[4] In accordance with Article 4(7) GDPR, "controller" means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.

[5] In accordance with Article 4(8) GDPR, "processor" means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

[6] E. Bielak-Jomaa, [in:] E. Bielak-Jomaa, D. Lubasz (ed.), *RODO ogólne rozporządzenie o ochronie danych. Komentarz*, Warsaw 2018, p. 770. Similarly, P. Litwiński, P. Barta, M. Kawecki, [in:] P. Litwiński (ed.), P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. Komentarz*, Warsaw 2018, p. 556.

[7] For more on the concepts of public authority or body, see: P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony…*, pp. 557–559, and E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, pp. 772–773.

that also non-public entities performing public tasks are obliged to designate a DPO.[8] I do not share the opinion. It does not match the grammatical interpretation of the provision of Article 37 para. 1 GDPR because it constitutes grounds for deciding on the obligations. Thus, every obliged entity should be directly indicated in the content of the provision because the obligation it has cannot be subject to a presumption or the application of extended interpretation.

Regardless of the literal content of the provision, the legislator does not treat courts as an exception. If the exemption of courts from the obligation to designate a DPO is to exclude acting in their judicial capacity, this means that a court is obliged to designate a DPO but the scope of his competences (rights and obligations) must not cover the issues concerning the administration of justice.[9] Thus, a court shall designate an officer but "his or her duties will not include monitoring the compliance with the provisions in case of the data processing within a court's adjudication proceedings, e.g. data contained in court files or databases used to support adjudication".[10]

In accordance with Article 37 para. 3 GDPR, if the controller or the processor is a public authority or body, a single DPO can be designated for a few such authorities or bodies, depending on their organisational structure and size. As it is emphasized in literature, "the aim of this regulation is to avoid the designation of a single officer by a few big public authorities (or bodies processing a lot of data), and to designate a single officer by entities whose tasks are mutually connected. The provision does not indicate which of the entitled entities shall designate an officer and whether and under what condition they may withdraw from the earlier decision to designate a single DPO".[11] As M. Zadrożny emphasizes, "the designation of a single officer for a few entities should be carefully considered because it can result in fictitious supervision over the system of data protection in those entities".[12]

Other reasons for the creation of the obligation to designate a DPO concern only non-public entities, although the content of Article 37 para. 1 GDPR lacks such a reservation. It results *a contrario* from the general wording of the provision of para. 1(a) laying down the obligation for public authorities or bodies; thus, every public authority or body must designate a DPO, regardless of any subject-related circumstances. If the legislator indicates those reasons in the content of para. 1(b) and (c), it should be assumed that they apply only to non-public entities.

The designation of a DPO is the obligation of the non-public controller or the processor if their main activity[13] consists in data processing on a large scale:

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[8] P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony*…, p. 559.

[9] Similarly, E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie*..., p. 775.

[10] K. Syska, *Administrator bezpieczeństwa informacji a inspektor ochrony danych – porównanie przesłanek powołania, statusu i zadań*, Monitor Prawniczy No. 20 (supplement), 2016, p. 76.

[11] *Ibid*.

[12] M. Zadrożny, *Inspektor ochrony danych (IOD) jako następca ABI*, [in:] A. Dmochowska, M. Zadrożny (ed.), *Unijna reforma ochrony danych osobowych. Analiza zmian*, Warsaw 2016, Legalis.

[13] In accordance with one of the theses of Recital 97 GDPR, in the private sector, the core activities of a controller relate to this body's primary activities and not to the processing of personal data as ancillary activities.

– and the nature, scope and aims of such operations require regular and systematic monitoring of persons whose data are processed, or
– data that are subject to processing belong to a special category referred to Article 9 para. 1,[14] and personal data concerning convictions and law violations referred to in Article 10.[15]

First of all, it should be stated that, while an obligation to designate a DPO by public authorities or bodies is absolute in nature and is not limited, the same obligation addressed to non-public entities was edited in a relatively liberal way. This raises serious doubts because a DPO should serve the ensuring of personal data protection, regardless of the fact whether a public or a non-public entity processes them.

The liberalism of the legislator's approach to the designation of a DPO by a non-public entity is expressed in the limitation of this obligation for the controllers and processors of data on a large scale within the scope of their main activity and only when the nature, scope and aims of the processing operations require regular and systematic monitoring of persons whose data are processed, or when data processed on a large scale within the main activity belong to special categories of personal data or personal data concerning convictions and law violations. Thus, monitoring people, even regularly and systematically, does not create the discussed obligation if it is not performed on a large scale, or when the scale of monitoring is large but it takes place beyond the sphere of the main activity. Similarly, the processing of special category personal data or personal data concerning convictions and violations of law does not result in the obligation to designate a DPO if it is not the main activity of the controller or the processor, which creates the need to process such data on a large scale or if a potentially obliged entity processes such data within the main activity but the scale cannot be recognised as large.

The reasons for the obligation to designate a DPO by a non-public authority, to a big extent, were edited with the use of insufficiently determined concepts[16] (e.g. a large scale of processing, regular and systematic monitoring) which raise serious doubts. A particular controller or processor, in order to establish whether they have the obligation resulting directly from the GDPR provisions, must interpret them, which may result in the interpretation different from that of the supervisory authority. Failure to designate a DPO against the obligation laid down in GDPR carries an administrative fine determined in Article 83 para. 4 GDPR. It should

[14] In accordance with the wording of the provision, the data include data revealing the racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership and genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

[15] In accordance with the provision, processing of personal data concerning convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by the Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority.

[16] The interpretation of the concepts is the subject matter of literature, see E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, pp. 778–783, and P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony…*, pp. 560–566.

be added that in accordance with the rules of interpretation, the reasons for an obligation edited in a normative act should be subject to a narrowed interpretation.

As Article 37 para. 2 GDPR stipulates, a group of undertakings[17] may appoint a single data protection officer provided that a data protection officer is easily accessible from each establishment. The possibility of being easily accessible from each establishment as the condition for the designation of a single DPO laid down in para. 2 *in fine* seems to be practically irrelevant in the light of contemporary development of telecommunications and the Internet.

It is rightly raised in literature that if the GDPR provisions do not ban performing the DPO function, at the same time, for a few controllers or processors, "there will also be (…) a possibility of designating the same person to perform the function of a DPO by unrelated entities".[18] It should be added that there are no formal obstacles to employ the same person as a DPO by a public authority or body and an entrepreneur.

In accordance with the provision of Article 37 para. 4, the controller or processor or associations and other bodies representing categories of controllers or processors may or, where required by the Union or Member State law, shall designate a DPO. The provision is applicable only to non-public entities because all public authorities and bodies have the obligation pursuant to the GDPR provisions.

The same GDPR provision grants private entities the right to designate a DPO even if it is not their obligation. The right is general in nature and not limited by any circumstances. Thus, a decision on designating a DPO or not is at the controller's or the processor's discretion.[19] K. Witkowska emphasizes that in case the controller or the processor performs an activity that is subject to professional secrecy, designation of a DPO "will be a good solution for them and a means of ensuring more efficient and effective protection of data (…)".[20]

The provision of Article 37 para. 5 GDPR stipulates that a DPO must be designated on the basis of professional qualities and, in particular, expert knowledge of data protection law and practices and the ability to fulfil the tasks. As it is emphasized in Recital 97 GDPR, the necessary level of expert knowledge should be determined in particular according to the data processing operations carried out and the protection required for the personal data processed by the controller or the processor. The solution is recognised as "clear tendency to create a professional nature of the DPO function".[21] As far as the ability to fulfil the tasks is concerned, it may include, inter alia, passing knowledge, conducting training or efficient communication.[22]

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[17] According to the definition adopted in Article 4(19) GDPR, "group of undertakings" means a controlling undertaking and its controlled undertakings.

[18] P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony*…, p. 568.

[19] D. Lubasz, *Europejska reforma ochrony danych osobowych – nowe obowiązki administratora w ogólnym rozporządzeniu o ochronie danych*, [in:] E. Bielak-Jomaa, D. Lubasz (ed.), *Polska i europejska reforma ochrony danych osobowych*, Warsaw 2016, p. 84.

[20] K. Witkowska, *Data protection officer, czyli inspektor ochrony danych w ogólnym rozporządzeniu o ochronie danych*, [in:] *Polska i europejska reforma...*, p. 242.

[21] M. Chodorowski, *Nowe prawa i obowiązki administratora bezpieczeństwa informacji (inspektora ochrony danych) w świetle najnowszych opinii wydanych przez Grupę Roboczą Art. 29*, [in:] M. Kawecki, T. Osiej (ed.), *Ogólne rozporządzenie o ochronie danych osobowych*, Warsaw 2017, p. 157.

[22] K. Syska, *Administrator bezpieczeństwa informacji*…, p. 77.

The GDPR provisions do not indicate the reasons for a DPO dismissal; "thus, it should be assumed that the issue is left for regulation in national laws".[23]

2. DATA PROTECTION OFFICER'S TASKS

The DPO's tasks are laid down in Article 39 GDPR in the form of a closed catalogue. It is rightly raised in literature that in accordance with the English wording of the Regulation, the catalogue is open in nature.[24] Thus, it is necessary to agree with the stance that the DPO's tasks enumerated in GDPR "are determined as a minimum not closing the way to all activities and actions aimed at protecting personal data".[25]

The first task laid down in Article 39 para. 1(a) GDPR is to inform and advise the controller, the processor and the employees who carry out processing of their obligations pursuant to this Regulation and to other Union or Member State data protection provisions. The performance of the task may consist in conducting lectures, workshops and training or development of informative materials.[26] However, materials developed under the aegis of the supervisory authority should constitute the basic source of information. This would be the basis for uniform practice of applying the provisions on the protection of personal data developed within this body's fulfilment of a task (resulting from Article 57 para. 1(d) GDPR), consisting in promoting the awareness of controllers and processors of their obligations under the Regulation. As far as advising controllers, processors and employees is concerned, the DPO's task is limited, in my opinion, to suggestions concerning the way of performing tasks within the scope that does not require the interpretation of law, because such issues should be the competence of the entity providing legal advice in the organisation.

Secondly, according to Article 39 para. 1(b) GDPR, the DPO's task is to monitor compliance with this Regulation, with other Union or Member State data protection provisions and with the policies of the controller or processor in relation to the protection of personal data.[27] Monitoring means observing or checking; thus, the activity is not connected with any powers that might be derived from a supervisory-control function (e.g. possibility of requesting explanations). A purpose-related interpretation makes it possible to assume that what is established in the course of monitoring should be passed to the controller with suggestions of the ways of eliminating revealed irregularities. However, the presented suggestions are not binding on the addressee.

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[23] M. Piech, *„Deregulacyjna" nowelizacja i unijna reforma zasad ochrony danych osobowych z perspektywy administratora danych osobowych*, [in:] *Polska i europejska reforma*…, p. 47.

[24] See P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony*…, p. 592; and E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie*..., p. 808.

[25] A. Lewiński, *Administrator bezpieczeństwa informacji – zagadnienia konstrukcyjne*, [in:] *Polska i europejska reforma*..., p. 155.

[26] E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie*..., p. 810.

[27] Monitoring includes the assignment of responsibilities, awareness-raising and training of staff involved in processing operations and the related audits.

The third DPO's task (Article 39 para. 1(c) GDPR) is to provide advice where requested as regards the data protection impact assessment and monitor its performance pursuant to Article 35. The indicated task results from the obligation imposed on the controller based on Article 35 para. 1 GDPR to carry out an assessment, prior to data processing, of the impact of the envisaged processing operations on the protection of personal data, taking into account the nature, scope, context and purposes of the processing, where a type of processing, in particular using new technologies, is likely to result in a high risk to the rights and freedoms of natural persons.

Carrying out an assessment of the impact on the protection of personal data, the controller must consult a DPO, provided he has been designated, and the DPO's task is to present an opinion on the described situation. The legislator determines the DPO's task in Article 39 para. 1(c) GDPR as providing advice where requested as regards the data protection impact assessment and monitoring its performance pursuant to Article 35. In Article 35 para. 2, the controller's activity is called seeking advice of a DPO and in Article 39 para. 1(c) it is referred to as requesting, and a potential DPO's response as providing advice that, however, cannot be treated as binding. According to the content of Recital 77, the DPO is authorised to provide guidelines on the implementation of appropriate measures and on the demonstration of compliance by the controller or the processor, especially as regards the identification of the risk related to the processing, its assessment in terms of origin, nature, likelihood and severity, and the identification of best practices to mitigate the risk. However, "it is the organisation and not the DPO that is obliged to ensure compliance with the law on the protection of personal data (…)".[28]

The provision of Article 39 para. 2 GDPR stipulating that the DPO in the performance of his tasks has due regard to the risk associated with processing operations, taking into account the nature, scope, context and purposes of processing, seems to be important only in relation to the fulfilment of the discussed task.

Fourthly, the DPO's task is to cooperate with the supervisory authority and to act as the contact point for the supervisory authority on issues relating to processing, including the prior consultation referred to in Article 36, and to consult, where appropriate, with regard to any other matter (Article 39 para. 1(d) and (e) GDPR). In accordance with Article 37 para. 7 GDPR, the controller or the processor must communicate the contact details to the supervisory authority. It is indicated in literature that the data include "the first name and surname and a correspondence address as well as an e-mail address or telephone number".[29] In Articles 13 and 14 GDPR, editing the responsibilities of the controller and the processor towards the data subject, the legislator obliges them to provide information about their identity and contact details. In the provision of Article 37 para. 7 GDPR, however, it is not indicated that the DPO's identity is an obligatory element of the information provided by the controller or the processor to the supervisory authority. Is it possible

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[28] M. Chodorowski, *Nowe prawa i obowiązki…*, p. 151. Similarly, E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, p. 810.

[29] K. Syska, *Administrator bezpieczeństwa informacji…*, p. 77.

that the European legislator's will was to guarantee the DPO's anonymity in his cooperation with the supervisory authority?

The GDPR provisions "do not precisely define the supervisory authority's competences towards a DPO".[30] As E. Bielak-Jomaa emphasizes, "the obligation to cooperate with the supervisory authority specified in a general way certainly goes beyond consultation-advisory activities".[31] The concept of cooperation with the supervisory authority should be interpreted as authorisation and obligation to joint work, supporting the supervisory authority by the DPO and the DPO by the supervisory authority, which pursuant to the provision of Article 57 para. 3 GDPR must be done free of charge. The fulfilment of a contact point role means the indication of the DPO as an entity being a potential source of information for the supervisory authority in issues concerning data processing.[32] It is emphasized in the doctrine that it may concern "allowing the supervisory authority access to documents and information in order to fulfil tasks referred to in Article 57, as well as to exercise the investigative powers, corrective powers, authorisation and advisory powers in accordance with Article 58".[33] However, this approach raises doubts because the provisions of Articles 57 and 58 GDPR do not indicate that the legislator envisaged whatever role of the DPO in this area. His participation, e.g. in conducted proceedings, would have to be legally determined first. On the other hand, it is not the DPO but the controller, the processor and, if appropriate, their representative who are the addressees of the obligation to provide the supervisory authority with all the information required for the performance of its tasks, which is laid down in Article 58 para. 1(a) GDPR.

The fifth task indirectly results from Article 38 para. 4 GDPR. In accordance with it, data subjects can contact the DPO with regard to all issues related to processing of their data and to exercise their rights under this Regulation. In accordance with Articles 13 and 14 GDPR, regardless of the method of obtaining data by the controller or the processor, they should provide data subjects with the DPO's contact data. Editing the scope of this obligation, the legislator skipped the DPO's identity, which means that the DPO remains anonymous to a data subject, which is hard to approve of. "In some situations, the knowledge of the DPO's identity may prove to be desirable from the point of view of creating an appropriate relation between the data subject and the DPO."[34]

In the situation indicated above, it should be assumed that the DPO's task, and precisely speaking obligation, is to provide entities with information concerning cases connected with the processing of their personal data and the exercise of rights

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[30] *Ibid*.

[31] E. Bielak-Jomaa, *Wyzwania przed administratorami bezpieczeństwa informacji (inspektorami ochrony danych) w związku z wejściem w życie ogólnego rozporządzenia o ochronie danych*, Monitor Prawniczy No. 20 (supplement), 2016, p. 5.

[32] M. Chodorowski, *Nowe prawa i obowiązki…*, p. 154.

[33] E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie*..., p. 813.

[34] G. Sibiga, K. Syska, *Działania organizacyjne i informacyjne związane z wyznaczeniem i wykonywaniem funkcji inspektora ochrony danych*, Monitor Prawniczy No. 20 (supplement), 2017, p. 26.

they have under GDPR. "Data subjects may ask questions directly to the DPO and expect the DPO's answers."[35] E. Bielak-Jomaa states that, since the controller is the addressee of the obligation (e.g. resulting from Article 15 GDPR), "the role of the DPO formally consists in preparing draft answers to data subjects".[36] Taking into account the controller's liability for failure to comply with the GDPR provisions, it is necessary to ask a question whether the controller's stance on the issue should not be subject to assessment by a person providing legal services for the organisation.

As far as contacting the DPO with regard to exercising a data subject's rights is concerned, the procedure raises doubts because, e.g. the provisions of Article 15 (right of access), Article 16 (right of rectification), Article 17 (right to erasure), and Article 18 (right to restriction of processing) indicate that their enforcement takes place in the form of a complaint filed to the controller. One can have doubts whether filing a request to the DPO bears legal effects if a data subject knows the controller's identity and his contact data.

3. DATA PROTECTION OFFICER' STATUS

The designation of a DPO based on professional qualities, in particular expert knowledge of data protection law and practices and the ability to fulfil the tasks, as well as the status of this body laid down in Article 38 GDPR are to guarantee efficient fulfilment of tasks by the DPO.

First of all, it should be indicated that the legislator obliges the controller and the processor to ensure that the DPO is involved, properly and in a timely manner, in all issues that relate to protection of personal data and guaranteeing access to personal data and data processing operations. The fulfilment of tasks by the DPO requires maintaining up-to-date and complete knowledge about data processing and protection in the organisation. However, the very general provision ensuring the DPO's right of access to personal data raises serious doubts because it can suggest that it should be permanent and unlimited. The issue needs more precise determination because access to personal data may be necessary in order to fulfil only some tasks and if the data constitute information that is protected by the law based on other provisions, the general regulation of GDPR cannot ignore limitations to access to such information, which results from national law.

"If a DPO is to verify the compliance with rules and procedures in the field of data processing and safeguard the rights and freedoms of individuals, the DPO must be guaranteed independence."[37] The collector and the processor should ensure that the DPO does not receive any instructions regarding the exercise of those tasks. The DPO directly reports to the highest management level of the controller or the processor. This means that the legislator strives to ensure the DPO's independent position, which is directly expressed in Recital 97 GDPR. In accordance with it, data

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35 M. Chodorowski, *Nowe prawa i obowiązki…*, p. 155.
36 E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, p. 805.
37 E. Bielak-Jomaa, *Wyzwania przed administratorami...*, p. 6.

protection officers, whether or not they are employees of the controller, should be in a position to perform their duties and tasks in an independent manner.

The instructions referred to are to concern the performance of tasks, i.e. the way of their fulfilment. "In the field of the performance of tasks, DPOs have absolute discretion."[38] This is the DPO who has expert knowledge and skills to perform tasks on his own, within the limits of the law, and decide on the implementation procedures.

However, the limitation introduced by the legislator is not applicable to the possibility of delegating tasks. Of course, the highest management level, to which the DPO reports, is entitled to delegate tasks. The controller or the processor can do this when they are authorised by the highest management. The limitation is not applicable when the controller plays the role of the highest management at the same time. In my opinion, the provision excluding the possibility of giving instructions to the DPO should not be overestimated because the DPO does not have decision-taking powers.

The instructions laid down in the discussed provision addressed to the controller and the processor and with regard to providing the DPO with resources necessary to carry out those tasks and to maintain his expert knowledge are unquestionable.

A conclusion made in Article 38 para. 3 GDPR that the DPO shall not be dismissed or penalised by the controller or the processor for performing his tasks cannot be interpreted as a kind of immunity granted to the DPO. Firstly, the limitation to the possibility of dismissing or penalising is to be applicable only to the performance of his tasks. Thus, penalisation or dismissal is possible if the DPO does not fulfil the tasks. Secondly, the issue of limitation concerns the controller or the processor and does not cover potential rights of an entity that the EU legislator refers to as the highest management level. If the head of a unit is also the controller, they may undertake steps against the DPO within the performance of a managerial function. Thirdly, the provision cannot be treated as a mechanism ensuring a lack of criminal, disciplinary or civil liability. It is emphasized in literature that the protection of the DPO against penalisation is only applicable to "the manner and content of his activities connected with his performance of duties provided that they are in compliance with GDPR".[39]

Article 38 para. 5 GDPR stipulates that the DPO shall be bound by secrecy or confidentiality concerning the performance of his tasks, in accordance with Union or Member State law. E. Bielak-Jomaa emphasizes that "it is not clear whether the discussed provision constitutes the DPO's secrecy on its own",[40] and eventually draws a conclusion that the provision "directly determines subject- and object-related scope of the DPO's secrecy".[41] In my opinion, such a conclusion is groundless because there is no content in the DPO's activity that would require legal protection due to the performed function. However, such protection is necessary with regard to

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38 E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, p. 802.
39 M. Chodorowski, *Nowe prawa i obowiązki...*, p. 148.
40 E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, p. 805.
41 *Ibid*., p. 806.

the information provided to the DPO. The Union legislator refers to other EU or Member State regulations if such norms lay down the obligation to keep information available to the DPO secret. Thus, the obligation does not constitute a separate, new value. The ban on providing information about the performance of tasks to unauthorised entities is in force if it is laid down in other legal acts that may determine the status of information at the DPO's disposal. In the described situation, the opinion that the DPO shall "be made exempt from secrecy if the controller or the processor decides so"[42] is groundless. The procedure of making the DPO exempt from secrecy in case of information protected by the law should be each time analysed individually, depending on its type in the context of the provisions constituting it.

The DPO can also carry out other tasks and duties. It is emphasized in literature that "due to the workload imposed on the DPO as a result of the new regulations, it seems really difficult to perform the function by an employee who has other duties connected with another post".[43] The controller or the processor must ensure that such tasks and duties do not cause a conflict of interests. The entities may satisfy the employer's demands only in a situation when they are identified with the highest management level the DPO directly reports to. Avoiding a conflict of interests should, in my opinion, mean that the DPO is not delegated tasks requiring the processing of personal data in circumstances not related to the performance of the DPO's function and such activities that would be directly connected with ensuring the security of data. Therefore, I do not share the opinion presented in literature suggesting that the controller may delegate a task of "maintaining a record of personal data processing activities" (Article 30 GDPR) to a DPO.[44]

4. CONCLUSIONS

The regulation of the DPO's position and competences laid down in Articles 37 to 39 GDPR is very general and indefinite in nature.

The DPO's status is insufficiently specified. There is not a requirement of legal education for the post and the performance of the tasks requires the skill of applying the provisions of law. The DPO must train entities indicated in GDPR but these are also the supervisory authority's tasks. The DPO monitors personal data processing in an organisation but his powers in this area are not precisely determined. If the controller or the processor are the addressees of comments on the irregularities revealed in the course of monitoring, although they are responsible for data processing in compliance with the provisions of law, they are not obliged to take into consideration the comments made by the DPO, who, on the other hand, is not authorised to inform the supervisory authority about the revealed irregularities. The GDPR provisions only stipulate, as

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[42] P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony*…, pp. 586–587.

[43] M. Zadrożny, *Inspektor ochrony danych (IOD)*…

[44] P. Litwiński, P. Barta, M. Kawecki, *Rozporządzenie UE w sprawie ochrony*…, p. 593. Also see: E. Bielak-Jomaa, [in:] *RODO ogólne rozporządzenie...*, p. 809; K. Syska, *Administrator bezpieczeństwa informacji*…, p. 78; P. Fajgielski, *Rejestry czynności przetwarzania danych osobowych*, Monitor Prawniczy No. 20 (supplement), 2017, p. 37.

a rule, the cooperation between the DPO and the supervisory authority but do not lay down its forms. The competences of the DPO as a contact point for a data subject are not precisely determined. Doubts concern, in particular, a situation when a data subject, exercising his rights, files requests to a DPO, while the GDPR provisions stipulate that the controller or, if applicable, the processor shall be the addressee.

The Article 29 Working Party for the Protection of Individuals with regard to the Processing of Personal Data developed Guidelines concerning data protection officers adopted on 13 December 2016, recently amended and adopted on 5 April 2017.[45] The interpretation provided in the Guidelines is not discussed in the present article. The Article 29 Working Party ceased to exist on the date of GDPR entry into force, i.e. 25 May 2018. In accordance with Recital 139 GDPR, the European Data Protection Board (EDPB) substitutes for the Article 29 Working Party for the Protection of Individuals with regard to the Processing of Personal Data established based on Directive 95/46/EC. In accordance with Article 70 para. 1(e) GDPR, the EDPB must ensure the consistent application of this Regulation, and on its own initiative or at the request of one of its members or the Commission examines any question covering the application of this Regulation, issues guidelines and recommendations, and determines best practices in order to encourage consistent application of this Regulation. There is an opinion expressed in the doctrine that "a strong position of the EDPB shall ensure uniform application and interpretation of the provisions by the EU bodies for the protection of personal data, which will have a positive impact on strengthening the role of this body at the stage of coordinating stands of data protection bodies and will ensure more consistent application at the national level".[46] However, the potential guidelines, recommendations and best practices developed by the EDPB will not be binding in the light of Article 288 Treaty on the Functioning of the European Union.[47] Thus, acts issued by the EDPB in the future, regardless of the level of readiness to apply them by the bodies operating on the basis of GDPR, should not blur the scientific reflection on the content of the GDPR provisions concerning the DPO.

In the light of the general wording of the GDPR provisions concerning the DPO, there is an opinion in the doctrine according to which "in order to determine the rules of the officer's functioning and competences more precisely, it is necessary to develop and implement an internal organisational act, e.g. rules and regulations or a set of principles concerning the performance of the DPO's function".[48] I do not share the opinion because a different interpretation might be adopted in such rules

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[45] 16/EN, WP 243, Polish version (unofficial translation): www.giodo.gov.pl/pl/1520259/10066, [accessed on 27/02/2018]. The Working Party for the Protection of Individuals with regard to the Processing of Personal Data is an advisory body established based on Article 29 Directive of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of those data, OJ L 281/31 of 23.11.1995.

[46] G. Sibiga, *Wdrażanie ogólnego rozporządzenia o ochronie danych. Aktualne problemy prawnej ochrony danych osobowych*, Monitor Polski No. 20, 2017, p. 13.

[47] OJ of 2016, C 202/01.

[48] G. Sibiga, K. Syska, *Działania organizacyjne i informacyjne…*, p. 23.

and regulations, which seems natural, and thus, the DPO's status and the rules of performing the function would be different in particular organisations.

According to another stand, only within the limits determined in GDPR, "the national provisions may regulate the matters covered in the Regulation".[49] The content of this act, however, lacks provisions that might constitute the obligation or authorisation of national legislators to refer to GDPR.

It is directly emphasized in literature that the regulation of the DPO's status and tasks in a general manner may hamper their real implementation in practice.[50]

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[49] G. Sibiga, *Dopuszczalny zakres polskich przepisów o ochronie danych osobowych po rozpoczęciu obowiązywania ogólnego rozporządzenia o ochronie danych – wybrane zagadnienia*, Monitor Prawniczy No. 20 (supplement), 2016, p. 18.

[50] M. Chodorowski, *Nowe prawa i obowiązki…*, p. 157.

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DATA PROTECTION OFFICER IN THE LIGHT OF THE PROVISIONS OF THE GENERAL DATA PROTECTION REGULATION (GDPR)

Summary

The article aims to present, analyse and assess the legal grounds for the designation, tasks and status of the data protection officer in the light of the provisions of Articles 37 to 39 Regulation 2016/679 (EU) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
The obligation to designate a DPO is imposed on public authorities and bodies with no limitations. On the other hand, in case of non-public entities, it has been considerably narrowed. The DPO's status is not sufficiently determined. There is no requirement for the DPO to have professional legal qualifications and he has been assigned tasks requiring the knowledge on the application of law. The DPO must monitor personal data processing in an organisation but his powers with regard to this area have not been sufficiently determined. If the controller or the processor is the addressee of comments on irregularities revealed in the course of monitoring, although they are responsible for data processing in compliance with the law, they are not obliged to take into consideration the DPO's comments, and the DPO is not authorised to inform the supervisory authority about the revealed irregularities. The GDPR provisions only stipulate, as a rule, the cooperation between the DPO and the

supervisory authority but do not lay down its form. The DPO's competences as a contact point for a data subject have not been precisely determined, either. Doubts are raised especially in connection with a situation when data subjects, exercising their rights, file their claims to the DPO. The GDPR provisions indicate that they should be addressed to the controller or, if applicable, the processor. The general regulation of the DPO's status and tasks may hamper their implementation in practice.

Keywords: personal data, personal data protection, data protection officer, GDPR

INSPEKTOR OCHRONY DANYCH W ŚWIETLE ROZPORZĄDZENIA O OCHRONIE DANYCH (RODO)

Streszczenie

Przedmiotem artykułu jest prezentacja, analiza i ocena podstaw prawnych wyznaczania, zadań oraz statusu inspektora ochrony danych w świetle przepisów art. 37–39 rozporządzenia Parlamentu Europejskiego i Rady (UE) 2016/679 z dnia 27 kwietnia 2016 r. w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i w sprawie swobodnego przepływu takich danych oraz uchylenia dyrektywy 95/46/WE (ogólne rozporządzenie o ochronie danych).
Obowiązek powołania IOD ciąży bez ograniczeń na organach i podmiotach publicznych, natomiast w odniesieniu do podmiotów niepublicznych został znacznie zawężony. Status IOD jest niedookreślony. Nie wprowadzono warunku spełnienia przez IOD wymogu posiadania wykształcenia prawniczego, a powierzono mu zadania wymagające umiejętności stosowania przepisów prawa. IOD monitoruje przetwarzanie danych osobowych w organizacji, ale jego uprawnienia w tej materii nie zostały dookreślone. Jeżeli adresatem uwag o nieprawidłowościach ujawnionych w toku monitorowania będzie administrator danych lub podmiot przetwarzający, to chociaż są oni odpowiedzialni za przetwarzanie danych zgodnie z przepisami prawa, nie są zobowiązani do uwzględniania uwag IOD, który z kolei nie jest upoważniony do informowania organu nadzorczego o stwierdzonych nieprawidłowościach. Przepisy RODO przesądzają jedynie, co do zasady, o współpracy IOD z organem nadzorczym, lecz nie konkretyzują jej form. Nie zostały precyzyjnie określone kompetencje IOD jako punktu kontaktowego dla podmiotu danych. W szczególności wątpliwości dotyczą sytuacji, gdy podmiot ten, korzystając z przyznanych mu uprawnień, przedstawia żądania pod adresem IOD, w sytuacji gdy przepisy RODO wskazują, że ich adresatem ma być administrator danych bądź, gdy ma to zastosowanie, podmiot przetwarzający. Ogólnikowa regulacja statusu oraz zadań IOD może w praktyce utrudniać ich realizację.

Słowa kluczowe: dane osobowe, ochrona danych osobowych, inspektor ochrony danych, RODO

Cytuj jako:

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LIABILITY FOR UNLAWFUL MAKING PROTECTED WORKS AVAILABLE TO THE PUBLIC AND FOR PROVIDING HYPERLINKS TO SUCH WORKS ON SOCIAL NETWORKING WEBSITES

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There has been a rapid development of social networking sites in the last years and as a result, more and more people use them. Social networking services are a special type of Internet services within which it is possible to develop social networking websites. Social networking sites serve their users, e.g. to contact other people having the same interests. Users have an opportunity not only to give access to some materials but also share them with other users. It should be noted that those users create their own accounts which they administer and, depending on the type of service, they are offered various functions. For example, within those services, it is possible to form particular interest groups, to send materials, and to communicate on an Internet forum or directly (e.g. with the use of applications provided by a given web portal). The article does not aim to focus on all functionalities of social networking portals but only on the one, the use of which may potentially violate copyright. The problem is important because social networking portal users are convinced that the functionality making it possible to give access to materials by successive users one by one causes that they will not be held liable even if the materials they give access to are provided unlawfully.

The functionality of social networking portals consists not only in making materials available on one's account, which results in the opportunity to get to know ones that other users have, but also in the possibility of making them available by

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other users on their accounts. The functionality of their further provision results from the fact that the social networking service gives their users a tool that enables them to use and make available[1] on their accounts the material uploaded by another person. It should be emphasized that the person who makes the material available does not upload it to the social networking website but only uses what has already been uploaded by placing hyperlinks to such material. Users of social networking services unquestionably upload more and more materials that can be subject to copyright protection. As a result, quite often, uploading infringes the law. Taking that into account, it is necessary to consider what activities performed within the functionality of social networking portals may constitute a source of copyright violation. Not only uploading particular materials protected by copyright by the first user should be analysed, but also successive users' activity of re-posting the material to others. Summing up, it should be stated that in some cases not only a person who has posted the material first but also a person who makes it available (provides a hyperlink) shall be liable for the infringement of copyright. The analysis covers the liability of entities laid down in the Act on copyright and related rights[2]. Apart from those considerations, the article analyses the issue of social networking websites' liability as they are entities that provide electronic services but do not participate in the act of making materials available. Such a thesis raises a series of questions. First of all, it is necessary to answer a question whether an act of posting a material protected by copyright on a social networking website may constitute grounds for liability for the infringement of copyright. Next, it is necessary to consider whether the successive re-posting may also be the violation of law and if so, what the reasons for that liability are.

The specificity of social networking operations requires considering what the violation of copyright on the web portal may consist in. Undoubtedly, like in case of "traditional infringements", the violation of authors' economic rights on a web portal will occur when a particular user infringes another person's copyright. This means that if a user posts somebody else's work on his account, this activity is a direct violation of copyright. As a result, examining whether the violation of the author's economic rights has occurred, it is necessary to compare the concept of violation referred to in Article 79 para. 1 Act on copyright with the actual activity infringing somebody else's copyright.

The fact of infringement is independent of attribution of fault to a given entity, which means that the infringement alone may take place by intentional or unintentional fault and in a situation when the fault cannot be attributed to

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[1] In accordance with Article 6 para. 1(3) Act on copyright, dissemination of a work takes place when a work, with the author's consent, is made available to the public in any way. This means that dissemination is a special legal form of making a work available to the public. As a result, making available to the public may be lawful as well as unlawful. Taking that into account and realising the fact that the provisions of the Act on copyright often use those concepts inconsistently, in case of making a work available to the public unlawfully, I will use the concept of "making available" and not "disseminating".

[2] Act of 4 February 1994 on copyright and related rights, uniform text, Journal of Laws [Dz.U.] of 2018, item 1191, as amended; hereinafter: Act on copyright.

perpetrators of the infringement.[3] The recognition of an infringement does not mean that a copyright holder will always be able to make all claims referred to in Article 79 para. 1 Act on copyright. The recognition of an infringement is the first circumstance making it possible to bring a claim. At the same time, it is also a circumstance which should be proved in case of making claims. In practice, prints of Internet pages with unlawfully provided materials protected by copyright, the authenticity of which is confirmed by a professional proxy or a notary, may constitute evidence for such claims. Courts admit both forms of confirmation as sufficient evidence that the infringement has occurred. By the way, it is worth mentioning that not all social networking services are open to the public. Internet services, as a rule, are divided into open (public) ones that are accessible to all Internet users (external social networking) and those called closed (private) services, accessible to particular users (e.g. a given company's staff).[4]

The general rule for the functioning of social networking services is that they provide their users with the possibility of determining the level of privacy and adjusting it to their needs. This means that a user, posting a particular material, may decide to what extent it will be made available. He may make it available to the public or a predefined group of people, or only one person, or "hide" it in the way that no other user will get access to it. In the light of that, a question is raised when an infringement occurs. This question requires an analysis of the scope of infringement through the prism of the regulations of the Act on copyright concerning the principle of allowed use. Doubtless, if an entity, making some work available to the public with the use of a social networking portal, can efficiently refer to the principle of allowed public or private use, infringement does not take place. Due to the fact that the provisions of the Act on copyright limit considerably the allowed public use, it is worth examining whether a web portal user may refer to the principle of allowed private use.

Discussing the possibility of applying the principle of allowed private use referred to in Article 23 Act on copyright, first of all, it is necessary to determine entities to which the regulation is applicable. Article 23 para. 2 Act on copyright answers the question indicating that the scope of private use covers the use of single copies of a work by people being in personal relationship, especially blood kinship, affinity or social relationship. As a result, there is no doubt that private use concerns natural persons. What suggests it is the description of the circle of "persons being in personal relationship". Blood kinship, affinity or social relationship may refer only to natural persons. Moreover, attention should be drawn to the fact that the provision is not applicable to all natural persons. According to the stand expressed by the Appellate Court in Warsaw, it cannot be assumed that the above-mentioned regulation is applicable to a person doing business and obtaining profits from that

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[3] See P. Podrecki, *Komentarz do art. 79*, [in:] D. Flisak (ed.), *Prawo autorskie i prawa pokrewne. Komentarz*, LEX 2015.

[4] See A. Szewczyk, *Popularność funkcji serwisów społecznościowych*, Zeszyty Naukowe Uniwersytetu Szczecińskiego. Studia Informatica (at present: Studia Informatica Pomerania) No. 28, 2011, p. 384.

activity.[5] In the context of social networking services functionality, it should be indicated that some of those services provide users with an opportunity to open a company account, i.e. one that is connected with the performance of professional activities. It must be noted, however, that in case of natural persons doing business, it is sometimes difficult to distinguish their professional activity in the service from the private one. Nevertheless, it is necessary to state that a person who makes a work available to a potential customer will not be able to refer to the principle of allowed private use. The nature of the website cannot determine whether a given person may apply the principle or not. What is decisive is the purpose for which a work is made available and an entity given access to it (being in the circle of people in personal relationship, especially blood kinship, affinity and social relationship).

Regardless of the above-presented considerations concerning the possibility of referring to the principle of private use by an entity making a work available, it is necessary to determine facts related to making a work available to the public that may indicate an infringement. In general, as it has been indicated above, two ways of making content available with the use of social networking services may be distinguished. The first one consists in posting the material protected by copyright in the social networking service directly. The second one consists in making available of hyperlinks to formerly posted materials (re-posting). Undoubtedly, both forms of dissemination may be related because there are situations in which a user posts material protected by copyright and, at the same time, provides other users with a possibility of making it available to more users. On the other hand, another user makes the material available providing a hyperlink to the source on his account.

The analysis of the issues requires appropriate interpretation of the provisions of national law through the prism of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[6] and case law of the Court of Justice of the European Union (hereinafter: CJEU or the Court of Justice). While the rules of liability of a person unlawfully posting material protected by copyright in a social networking service do not raise doubts, the issue concerning liability of a person making the material available with the use of a hyperlink is controversial. Depending on whether the material to which a link has been posted was formerly made available to the public lawfully or not, the liability of a person re-posting it is based on different rules.

In case of re-posting, the material protected by copyright, which was formerly made available to the public in compliance with law (i.e. disseminated in the

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[5] In accordance with the judgement of the Appellate Court in Warsaw of 5 February 2003, I ACa 601/02, LEX No. 1680981, "Pursuant to Article 23 para. 2 Act on copyright and related rights, the scope of private use covers the circle of persons having a personal relationship, especially blood kinship, affinity or social relationship. It cannot be assumed that the above-mentioned provision is applicable to the defendant involved in business activities and obtaining profits from that". The opinion that the allowed private use does not concern the so-called commercial use is also expressed in the doctrine; see W. Machała, *Dozwolony użytek prywatny w polskim prawie autorskim*, Warsaw 2003, p. 68; J. Barta, R. Markiewicz, *Prawo autorskie*, Warsaw 2010, pp. 169–161.

[6] OJ L 167/10, 22 June 2001; hereinafter: Directive 2001/29/EC.

meaning of the provisions of the Act on copyright), the interpretation of the provisions of Directive 2001/29/EC expressed in the Court of Justice judgement of 13 February 2014 in the case C-466/12[7] is of key importance. The Court of Justice ruled that: "Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute 'an act of communication' to the public, as referred to in that provision".[8] Referring the above suggestion to a situation in which a user of a social networking website places a link to such materials on his account in the service, it is necessary to draw attention to his conduct that cannot be classified as a violation when an entity posting the material addresses it to an unlimited number of people. In accordance with the CJEU stand, such conduct cannot be recognised as making works available to the public at all within the meaning of Article 3(1) Directive 2001/29/EC. A situation is different when a link is made available to a bigger number of people than the entity posting the material protected by copyright originally intended. In the quoted judgement, the Court of Justice directly indicated that "(…) in order to be covered by the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, a communication, (…) concerning the same works as those covered by the initial communication and made, as in the case of the initial communication, on the Internet, and therefore by the same technical means, must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public" (para. 24). It seems that such a situation can be extremely rare. It results from the fact that most social networking services provide a possibility of determining the circle of persons who may have access to material posted by a particular user (privacy settings). As a result, a person posting a hyperlink to the material would have to circumvent the service privacy protection (changing its functionality) or upload the material after prior downloading it. This would certainly be making the material available to the public recognised as the infringement.

A situation when the material protected by copyright is made available without the copyright holder's consent remains another issue. What is important in such a situation is whether a person making a link available did it within their commercial activity or not.

First of all, it is necessary to note that the considerations concerning links to the content posted on the net unlawfully because they are subject to copyright protection must be preceded by general comments concerning the nature of the

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[7] CJEU judgement of 13 February 2014 in case *Nils Svensson and Others v. Retriever Sverige AB*, C-466/12, LEX No. 1424770.

[8] In accordance with Article 3(1) Directive 2001/29/EC, "Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them".

Internet and its role. The comments are important for the comprehension of the meaning of the rights guaranteed in the Charter of Fundamental Rights of the European Union,[9] i.e. on the one hand, the right resulting from Article 11 CFR, freedom of expression and the right to information, and on the other hand, the rights of entities entitled under copyright. In the judgement of 8 September 2016, C-160/15, the CJEU directly stated that "(…) the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information".[10] In addition, the CJEU noted that "(…) it may be difficult, in particular for individuals who wish to post such links, to ascertain whether website to which those links are expected to lead, provides access to works which are protected and, if necessary, whether the copyright holders of those works have consented to their posting on the internet. Such ascertaining is all the more difficult where those rights have been the subject of sub-licenses. Moreover, the content of a website to which a hyperlink enables access may be changed after the creation of that link, including the protected works, without the person who created that link necessarily being aware of it".[11] The above statements made the CJEU conclude that "Article 3(1) of Directive 2001/29/EC (…) on the harmonization of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed".[12]

Referring the above statement to the national legislation, it is necessary to consider whether an entity making available of a hyperlink to the materials protected by copyright, which have been posted in the social networking service without the consent of the copyright holder, should be treated as the direct perpetrator of the infringement or as an accessory (Article 411 Civil Code).

Discussing the possibility of recognising a person making available of a link to materials protected by copyright as an accessory, it is necessary to state that the person cannot be classified as one. One should highlight an opinion expressed in case law that the conduct of an accessory should help a perpetrator cause damage, i.e. create circumstances for it to take place. It does not matter, at the same time, whether an accessory obtains financial profit from somebody else's

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[9] OJ C 303/01, 14 December 2007, as amended; hereinafter: CFR.

[10] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV*, *Playboy Enterprises International Inc.*, C-160/15, LEX No. 2099013, para. 45.

[11] *Ibid.*, para. 46.

[12] *Ibid.*, cf. the ruling.

prohibited act; on the other hand, an entity acting in this role should be aware, i.e. have the knowledge, that their activity may contribute to causing damage.[13] Moreover, somebody who has not cooperated with a perpetrator in causing damage cannot be recognised as an accessory,[14] which means a person whose activity was preceded by the perpetrator's activity,[15] because as a rule it applies to assistance in causing damage that can take place only before actually causing it.[16] Based on the above judicial opinions, one can assume that a person making a hyperlink available starts implementing an act, regardless of an activity of a perpetrator, who directly and unlawfully posted material protected by copyright on the Internet. Since the next person making a hyperlink available cannot be recognised as an accessory within the meaning of Article 422 Civil Code, it is necessary to consider in what situations the person may be recognised as a perpetrator of the direct infringement. In accordance with the stance expressed in the above-quoted CJEU judgement,[17] in specified situations it will be recognised as the violation of copyright, i.e. posting links to materials formerly unlawfully posted on the Internet by another user will be recognised as making works available to the public without the consent of the copyright holder.[18] However, in accordance with the interpretation adopted in this judgement, liability depends on whether a particular person has committed the act within their commercial activity and on the type of offence that can be attributed to them.

It should be highlighted that in the light of the above interpretation, the liability of people who make available hyperlinks to the material protected by copyright and are not involved in commercial activities depends, inter alia, on proving intentional

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[13] Judgement of the Appellate Court in Gdańsk of 21 May 2015, I ACa 39/15, LEX No. 1953163.

[14] In accordance with the judgement of the Appellate Court in Warsaw of 13 June 2014, I ACa 1754/13, LEX No. 1488728, "An entity that, without the element of cooperation, only allows or in another way facilitates other people's activities cannot be recognised an accessory within the meaning of Article 422 Civil Code. Thus, in order to attribute accessory conduct to an entity, it is necessary to prove that they were aware they assisted a principal in unlawful conduct that may cause damage".

[15] Judgement of the Appellate Court in Warsaw of 13 June 2014, I ACa 1754/13.

[16] See the Supreme Court judgement of 20 September 2013, II CSK 657/12, Legalis. Also see M. Kondek, *Komentarz do art. 422*, [in:] K. Osajda (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna*, Warsaw 2017, Legalis.

[17] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc.*, C-160/15.

[18] In the light of the above stance of the CJEU, it is not possible to assume this to be right that "with regard to the right to make a work available to the public regardless of whether there is a possibility of (a) 'exact absorption' of CJEU judgements concerning (...) the issue of [referencing with the use of click-links to works posted on the Internet] or only (b) their partial implementation (...), it is necessary to adopt the interpretation of national law based on a different construction (indirect infringement of copyright instead of the direct one) from the one adopted by the CJEU while interpreting Directive 2001/29/EC of 2001". Thus, R. Markiewicz, *Zdezorientowany prawnik o publicznym udostępnianiu utworów*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego No. 4, 2016, p. 5 ff. In accordance with the interpretation by the CJEU, a perpetrator posting hyperlinks to works unlawfully posted in the net makes them available to the public, which violates copyright. If "making available to the public" is attributed to a person, it means he is a direct not an indirect perpetrator.

or unintentional fault in the form of negligence. However, in case of business entities, the provisions of copyright should be interpreted as meaning that the Directive 2001/29/EC imposes special duties on those entities as they are professionals operating in the market. Thus, their operations should be characterised by special diligence in checking whether the hyperlinks direct them to materials that have been posted on the Internet lawfully.[19]

In the light of the above statements, a few comments must be made in connection with what circumstances should be proved in a situation when copyright holders claim compensation based on general rules (Article 79 para. 1(3a) Act on copyright) as well as when they claim damages referred to in Article 79 para. 1(3b) Act on copyright.

In case of claiming compensation pursuant to general rules, it is necessary to provide evidence of the following circumstances: that in case a plaintiff is entitled as a holder of the author's economic rights, an unlawful infringement of copyright has occurred (a prohibited act); the infringement of copyright is caused by the fault (intentional or unintentional); financial loss has occurred and its amount is defined. In addition, it should be proved that there is a reason-cause relation between infringement of copyright and the damage.[20] The proper interpretation of Article 79 para. 1(3a) Directive 2001/29/EC leads to a conclusion that a copyright holder, in order to properly provide grounds for their claims, must prove that a person who has infringed their rights acted intentionally or unintentionally in the form of negligence.

By the way, it should be highlighted that intentional fault takes place in a situation when a perpetrator intends to infringe copyright (direct intent) or predicts the possibility of such an infringement and agrees for the result (oblique intent).[21] There is an opinion in literature that the assessment of a situation is much more difficult if a perpetrator acts unintentionally. According to A. Olejniczak, unintentional fault occurs when "a perpetrator does not want to act unlawfully and, although he takes into account such a possibility, does not agree for a result, groundlessly thinking that he may avoid it (recklessness, flagrant negligence). Negative assessment also concerns a situation when a perpetrator is unaware of the fact that his conduct

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[19] Also see T. Karaś, S. Żółtek, *Bezprawność w prawie cywilnym i karnym*, Prokuratura i Prawo No. 11, 2006, p. 115 ff.

[20] P.F. Piesiewicz, *Dochodzenie odszkodowania na podstawie art. 79 ust. 1 pkt 3a i 3b pr. aut. ze szczególnym uwzględnieniem wykładni pojęcia „stosownego wynagrodzenia"*, Palestra No. 1–2, 2018, pp. 71–75.

[21] As the Appellate Court in Łódź rightly indicated, "civil law does not define the concept of fault. With the use of the Criminal Code output in this area, it is assumed that the concept contains two components: an objective and a subjective one. The objective element means the conduct is not in conformity with the binding norms (unlawfulness *sensu largo*). The subjective element concerns the relation between the actor's will and consciousness and his act. In other words, fault may be attributed to a subject only in case there are grounds for negative assessment of their conduct from the point of view of both those elements: the so-called conduct chargeability". See the judgement of the Appellate Court in Łódź of 4 February 2014, I ACa 915/13, LEX No. 1438084. Also see M. Serwach, *Wina jako zasada odpowiedzialności cywilnej oraz okoliczność zwalniająca z obowiązku naprawienia szkody*, Wiadomości Ubezpieczeniowe No. 1, 2009, p. 84 ff and the literature and case law referred to therein.

may be unlawful, although he had an opportunity and a duty to carry out a proper assessment if he acted with due diligence (negligence)".[22] Undoubtedly, the above opinion blurs the difference between recklessness (conscious unintentionality) and negligence (unconscious unintentionality), because that author indicated "flagrant negligence" as a synonym of recklessness. It must be firmly emphasized that recklessness and negligence are two different forms of unintentional fault. The above differentiation is of key importance for the proper interpretation of Article 79 para. 1(3) Directive 2001/29/EC in the context of the above-quoted CJEU judgement of 8 September 2016.[23]

Referring to substantive criminal law, it should be indicated that the element distinguishing intentional fault from unintentional one is the lack of a perpetrator's intention. A wish to commit a tort is a form of direct intent. On the other hand, oblique intent occurs when a perpetrator agrees for his conduct to become a tort. As a result, it should be assumed that the essence of oblique intent is not the fact that a perpetrator of an infringement does not want to obtain the effect in the form of a tort but also does not want it to take place. This means that the realisation of a possible result has been indifferent to him and has not played an important role in the motivational process. The oblique intent takes place when two negative conditions are fulfilled. On the one hand, a perpetrator is not willing to commit a tort (the will is a decisive factor for direct intent), and on the other hand, he is not convinced that he may avoid the commission of an offence, which is typical of recklessness.[24] According to the above-quoted judicial opinion, "the most important element of the assessment whether a particular case involves oblique intent or recklessness is determination of an objective level of probability of committing a prohibited act and a perpetrator's awareness of this probability, which should be assessed with regard to the perpetrator's experience and common evaluation of a given incident. If the level is objectively high and is reflected in the perpetrator's awareness and, at the same time, he is convinced that a criminal result will not occur, the issue of *dolus eventualis* is unquestionable".[25]

Referring the forms of fault recognised in the Polish law to the above-quoted CJEU judgement,[26] it is necessary to highlight that in a situation when hyperlinks are made available without a commercial aim, the liability of a person concerned is limited to intentional fault with both direct and oblique intent, and unintentional fault in the form of recklessness. The above belief results from the fact that, in its judgement, the CJEU expressed the opinion that a person making a hyperlink available without a commercial aim who did not know or could not rationally know about unlawful nature of a publication of the material on a different website cannot

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[22] A. Olejniczak, *Komentarz do art. 415*, [in:] A. Kidyba (ed.), *Kodeks cywilny. Komentarz*, Vol. 3: *Zobowiązania – część ogólna*, 2nd edition, LEX 2014.

[23] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc.*, C-160/15.

[24] See the judgement of the Appellate Court in Szczecin of 15 January 2015, II AKa 219/14, LEX No. 1999331.

[25] *Ibid.*

[26] CJEU judgement of 8 September 2016 in case *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc.*, C-160/15.

be subject to liability (negligence or lack of fault). The essence of negligence is that the perpetrator of the infringement does not predict, i.e. does not know, that his conduct may constitute an activity infringing somebody's copyright. However, he might predict that if he were diligent enough.

In order to assess the fault in the form of negligence, the measure of diligence adopted as a pattern of proper conduct is decisive.[27] It is necessary to notice that the concept of "a pattern of proper conduct" should be understood in a different way in relation to a person involved in commercial activities connected with the operation of the social networking website and in a different way in relation to a person who is not involved in such activities. No provision of the Act on copyright imposes an obligation on a person posting a hyperlink to materials protected by copyright to check whether a particular material has been made available lawfully or not. The measure of due diligence in relation to a person who is not involved in commercial activities should be understood as meaning that the person, although not having the knowledge about unlawful posting of the material to which hyperlinks are provided, could presume their unlawful posting based on all accompanying circumstances (negligence, the so-called unconscious unintentionality).

The liability of people who made the above-mentioned hyperlinks available for commercial purposes is totally different. The discussion of the matter requires that two issues are explained: the issue of fault and the interpretation of "commercial purpose". As far as fault is concerned, it should be highlighted that the appropriate interpretation of Article 79 para. 1(3a) Act on copyright leads to a conclusion that an entity claiming his rights resulting from the infringement does not have to prove the fault of the perpetrator. Pursuant to the above-quoted CJEU judgement, Article 3(1) Directive 2001/29/EC constitutes the presumption of intentional and unintentional fault in the form of recklessness (conscious unintentionality). The Court of Justice states that when a hyperlink was made available for commercial purposes, it should be presumed that there was knowledge that the posted hyperlinks were to the materials unlawfully provided in the network. It does not raise any doubts that in case of direct intent (i.e. a will to commit a tort), oblique intent (i.e. agreeing for the commission of a tort) and recklessness (prediction of the commission of a tort, called conscious unintentionality), a perpetrator must know about the unlawful nature of his activity. As a result of the presumption, a person posting a hyperlink to materials protected by copyright and unlawfully provided in the net will have to prove that he is not at fault.

As far as determining the scope of the term "commercial purpose" is concerned, it seems that it should not only cover situations in which posting a hyperlink makes it possible to obtain direct income. Making a hyperlink available for commercial purposes should be interpreted in a broader sense, i.e. as meaning that a perpetrator obtains, e.g. benefits by drawing the attention of other users of the social networking site and their interest in his account, and as a result interest in his commercial activity.

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[27] See the Supreme Court judgement of 15 December 1954, 1 C 2122/53, Przegląd Ustawodawstwa Gospodarczego 1956, No. 7, p. 276.

The liability of a perpetrator in case of claims in accordance with the rules laid down in Article 79 para. 1(3b) Act on copyright looks totally different. The plaintiff under the above-quoted Article does not have to prove a perpetrator's fault but must prove that he is the holder of the author's economic rights; that his economic right has been infringed (a prohibited act); economic loss has occurred and, in case of claiming damages, provide the basis adopted for the calculation of the amount claimed. Moreover, he must prove that there is a cause-result relation between the incident resulting in the loss (infringement of the author's economic rights) and the loss incurred.[28] The lack of the obligation to prove fault does not have impact on the liability of a person who has made a hyperlink available for commercial purposes for, as it has been indicated above, the presumption of knowledge of the unlawful nature of the materials should be connected with intentional and unintentional fault in the form of recklessness (conscious unintentionality).

The liability of a person who has made a hyperlink available for no commercial purpose will be different. In the context of the above, a question is raised whether, if the liability laid down in Article 79 para. 1(3b) Act on copyright is not the one based on fault, such a person may be an entity legitimated passively. The answer to the question seems to be positive but a few reservations should be made. Undoubtedly, Article 79 para. 1(3b) Act on copyright is the entitlement for an entity whose economic rights have been infringed to make claims that are indicated therein. The interpretation made in the above-quoted CJEU judgement cannot annul this right. Thus, another question is raised concerning the rules laid down in the provision based on which a perpetrator may be held liable for making hyperlinks available for no commercial purposes if his liability depends on the occurrence of his intentional or unintentional fault in the form of recklessness (conscious unintentionality). The necessity of the occurrence of the perpetrator's fault within the scope described in the previous sentence does not change the scope of the evidence-taking proceedings. This means that the plaintiff claiming his rights still does not have to prove the perpetrator's fault. However, the formulation of claims indicates the scope of the other party's defence, which means that the entity legitimated passively (the perpetrator) will be able to raise a charge making him exempt from liability, i.e. that he has acted within his unintentional fault in the form of negligence (unconscious unintentionality); obviously, he will have to prove this circumstance.

Summing up, it is necessary to emphasize the significance of the CJEU judgement concerning posting hyperlinks to materials protected by copyright. As a consequence of the extraordinary nature of the judgement, it does not have impact on the general interpretation and application of the national law, i.e. Article 79 para. 1(3) Act on copyright, but exclusively concerns facts connected with posting links, including those on social networking websites. The judicial practice will show whether the appropriate interpretation of the CJEU judgement will result in the modified interpretation of Article 79 para. 1(3) Act on copyright. There is no doubt that the issue will require that adjudicating courts thoroughly analyse Directive 2001/29/EC and the conditions for liability laid down in the Act on copyright, especially

[28] P.F. Piesiewicz, *Dochodzenie odszkodowania…*, pp. 71–75.

concerning perpetrators' fault. It should be remembered that the liability laid down in Article 79 para. 1(3b) Act on copyright concerns liability that does not depend on fault. The interpretation of Article 3(1) Directive 2011/29/EC does not limit the possibility of claiming rights based on this regulation, however, since the liability of a perpetrator who is not involved in commercial activities is limited to intentional or unintentional fault in the form of recklessness (conscious unintentionality), the person may make himself exempt from liability formulating a charge and proving at least his negligence. What is also important is the presumption of infringement which, based on national legislation, results in the presumption of fault. If the perpetrator wants to free himself from liability, in case of claims against him under Article 79 para. 1(3a) Act on copyright, the presumption imposes on him an obligation to prove that he has acted without fault. On the other hand, in case of claims under Article 79 para. 1(3a) Act on copyright against a person who has provided links unrelated to professional activity, it is necessary to prove that his fault has been intentional or unintentional in the form of recklessness (conscious unintentionality). However, the perpetrator's negligence (unconscious unintentionality) cannot result in liability for the infringement of an author's economic rights.

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LIABILITY FOR UNLAWFUL MAKING PROTECTED WORKS AVAILABLE TO THE PUBLIC AND FOR PROVIDING HYPERLINKS TO SUCH WORKS ON SOCIAL NETWORKING WEBSITES

Summary

Users of social networking sites post more and more materials that may be subject to copyright and related rights. As a result, these activities quite often constitute a breach of law. The article describes what activities – carried out as part of the functionality of social networking websites – can result in copyright infringement. The analysis covers not only the issue of posting a specific material protected by copyright on the website by its user, but also subsequent activities consisting in making the material available (re-posting) by providing reference (hyperlinks). The author puts forward a hypothesis that in some cases not only the person who places material on a social networking website but also the person who makes the material available by posting a hyperlink to it is liable for the infringement of copyright.

Keywords: Internet, hyperlink, copyright, European law, subject of copyright, work, protection of author's economic rights, redress for the inflicted damage, social media

ODPOWIEDZIALNOŚĆ ZA BEZPRAWNE PUBLICZNE UDOSTĘPNIANIE UTWORÓW ORAZ ZA PUBLICZNE UDOSTĘPNIANIE HIPERLINKÓW DO TAKICH UTWORÓW W SERWISACH SPOŁECZNOŚCIOWYCH

Streszczenie

Użytkownicy serwisów społecznościowych zamieszczają coraz więcej materiałów, które mogą stanowić przedmiot ochrony prawem autorskim. W konsekwencji niejednokrotnie na skutek takiego umieszczenia dochodzi do naruszenia prawa. Niniejszy tekst opisuje, jakie czynności – realizowane w ramach funkcjonalności portali społecznościowych – mogą stanowić

źródło naruszenia prawa autorskiego. Analizie poddano nie tylko zagadnienie związane z umieszczeniem określonego materiału objętego ochroną prawa autorskiego na portalu przez użytkownika, lecz także czynności kolejne, polegające na dalszym udostępnianiu tego materiału (re-post) poprzez umieszczenie odsyłaczy (hiperlinków). Autor stawia tezę, iż w niektórych przypadkach odpowiedzialnym za naruszenie prawa autorskiego będzie nie tylko osoba, która umieściła określony materiał na portalu społecznościowym, lecz także osoba, która ten materiał dalej udostępniła poprzez zamieszczenie hiperlinku.

Słowa kluczowe: Internet, hiperlink, prawo autorskie, prawo europejskie, przedmiot ochrony prawa autorskiego, utwór, ochrona autorskich praw majątkowych, naprawienie szkody, media społecznościowe

Cytuj jako:

Piesiewicz P.F., *Liability for unlawful making protected works available to the public and for providing hyperlinks to such works on social networking websites [Odpowiedzialność za bezprawne publiczne udostępnianie utworów oraz za publiczne udostępnianie hiperlinków do takich utworów w serwisach społecznościowych]*, „Ius Novum" 2018 (12) nr 4, s. 131–144. DOI:10.26399/iusnovum.v12.4.2018.39/p.f.piesiewicz

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REOPENING OF COURT PROCEEDINGS BASED ON ARTICLE 540B CRIMINAL PROCEDURE CODE

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The normative grounds for reopening of court proceedings laid down in Article 540b of the Criminal Procedure Code (hereinafter: CPC) was introduced to criminal procedure law by the Act of 29 July 2011,[1] which entered into force on 14 November 2011. As it was indicated in the amending act, the aim of the norm was to implement the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA and 2008/909/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.[2] On the other hand, the justification for the bill suggests that the new grounds for reopening served to strengthen procedural guarantees of the accused in a situation when, regardless of the efficient substitute delivery of a summons or a notification, the accused has not received the information about the scheduled date and place of a trial or a court session. In the legislator's opinion, such a situation can occur, inter alia, when a household member who received a delivered letter does not hand it over to the accused or in case of a substitute delivery by post. It must be assumed that the legislator simply wanted to limit the possibility of recognising a sentence of a Polish court as one issued *in absentia*, in accordance with Article 4a Framework Decision 2002/584/JHA[3] amended

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1 Act amending the Act: Criminal Code, the Act: Criminal Procedure Code and the Act on liability of collective entities for prohibited acts carrying penalties, Journal of Laws [Dz.U.] of 2011, No. 191, item 1135.

2 OJ L 81 of 27.3.2009, p. 24.

3 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 of 18.7.2002, p. 1 ff; hereinafter: Framework Decision on EAW.

by Framework Decision 2009/299/JHA,[4] and thus decrease the risk of a refusal to surrender persons pursued based on Polish arrest warrants issued in order to execute a sentence in such circumstances.[5] The introduction of Article 540b CPC potentially gave grounds to indicate in Part D of the European Arrest Warrant that even if the convict had not been notified or summoned to appear at a trial in the way determined in Article 4a Framework Decision on EAW and a sentence had not been served to him, and he had not been represented by the counsel for the defence, nevertheless, there is a situation nullifying an optional reason for a refusal to execute the European Arrest Warrant in the form of "the right to re-examine the case" after the convict is surrendered to serve the sentence issued *in absentia*.

However, the legislator rightly assumed that the new grounds for reopening criminal proceedings cannot refer only to the proceedings in which, in order to execute a sentence issued *in absentia*, it is necessary to surrender a convict from another EU member state based on the European Arrest Warrant. The circumstance that someone has escaped from the country and has been transferred to Poland in order to serve a sentence cannot put him in a more advantageous procedural position than that of a person who has also been sentenced in his absence but is staying in Poland.[6]

Thus, there are no doubts that Article 540b CPC in Chapter 56 is applicable to all criminal proceedings matching the conditions laid down therein and not only to the proceedings in which a convict has been recaptured with the use of the surrender instrument based on the European Arrest Warrant.

After a few years of the new grounds for reopening court proceedings being in force, it is worth considering whether its introduction to the Criminal Procedure Code was necessary and whether the instrument fulfils the tasks of mutual recognition of sentences issued *in absentia* with respect to the transfer of persons based on the European Arrest Warrant. The present article aims to answer the above questions.

Since 2011, Article 540b CPC has been amended twice. In the original wording that was in force from 1 July 2015, the provision indicated two independent reasons for reopening proceedings. The first one concerned a situation in which a case is heard in the absence of the accused that has not been served with a notification of the time of a trial or a session, or has been served with it by other means than in person. However, in such a situation, the accused had to prove that he did not know about the scheduled date of a trial and the possibility of issuing a sentence in his absence. Undoubtedly, reopening proceedings based on that might concern

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[4] Council Framework Decision of 26 February 2009, OJ L 81 of 27.3.2009, p. 24 ff.

[5] For comparison of the issue, see: D. Dąbrowski, *Wydanie europejskiego nakazu aresztowania w celu wykonania orzeczonej in absentia kary pozbawienia wolności lub środka zabezpieczającego na tle gwarancyjnej funkcji procesu karnego*, [in:] T. Grzegorczyk, J. Izydorczyk, R. Olszewski (ed.), *Z problematyki funkcji procesu karnego*, Warsaw 2013, pp. 596–597.

[6] Differently and critically on referring the new condition for a retrial to all judgements issued *in absentia*: A. Lach, *Orzeczenia in absentia w europejskiej współpracy w sprawach karnych*, Europejski Przegląd Sądowy No. 6, 2012, p. 22; critically about the introduction of the provision to CPC: S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks postępowania karnego. Komentarz*, Vol. 2, Warsaw 2013, p. 384; A. Sakowicz, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2015, p. 1127.

all court proceedings concluded with a valid judgement closing the proceedings. The second reason was connected with the failure to serve judgements referred to in Article 100 §2 and §3 CPC and Article 479 §1 CPC (i.e. a sentence issued during a session in the absence of the accused; decisions on discontinuation of proceedings issued at a session in the absence of the accused; decisions on discontinuation of proceedings issued at a session or a trial in the absence of the accused if a court postponed the development of its justification, and a sentence *in absentia*) or their delivery by other means than in person; however, also in this case the accused had to prove that he did not know the content of the judgement and his rights, the time and way of appeal. Undoubtedly, the second reason was applicable to a narrower extent because it did not concern proceedings concluded with a sentence issued at a trial. On the other hand, both reasons for reopening proceedings were not applicable when the accused refused to receive correspondence or there were other circumstances laid down in Article 136 §1 CPC, when he did not receive correspondence sent to the address he had indicated (Article 139 §1 CPC) and also when the counsel for the defence took part in a trial or a session.

From the point of view of fulfilling the obligation to implement Framework Decision 2009/299/JHA, the grounds for reopening court proceedings laid down in Article 540b CPC were too broad. Undoubtedly, the legislator was not obliged to introduce the new normative grounds for challenging valid judgements.[7] For the purpose of fulfilling the above-mentioned aim of the amendment, it was sufficient to stipulate that reopening criminal proceedings concluded with a valid sentence was possible and to leave the proceedings concluded with a decision on discontinuation outside the scope of this regulation. Moreover, as it is rightly emphasized in the doctrine, although the legislator treated the two reasons for reopening proceedings as independent ones, they should not be dealt with independently. The fulfilment of a condition under Article 540b §1(1) CPC should not result in the reopening of proceedings in case a sentence issued *in absentia* was delivered to the accused and/or he appealed against it or approved of it and did not appeal against it.[8]

The provision of Article 540b CPC was changed for the first time in 2015 as a result of the amendment introducing a new adversarial model of a trial.[9] The reason for reopening proceedings laid down in Article 540b §1(2) CPC, resulting from non-delivery of a judgement or its delivery by other means than in person was referred to sentences and decisions that are subject to appeal and it also covered sentences issued at a trial and penal judgements in the form of orders. Article 540b §1(2) CPC indicated judgements referred to in Article 100 §3 and §4 CPC, thus, it referred to all sentences issued in the absence of the accused, regardless of the forum for issuing them. At the same time, under Article 540b §2 CPC, the possibility of efficient motion to reopen proceedings was excluded also when the delivery

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[7] Thus, S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks*…, pp. 384–385.

[8] Compare P. Hofmański (ed.), E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Vol. 3, Warsaw 2011, p. 407. The discussed provision also raised other interpretational doubts thoroughly discussed by S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks*…, pp. 387–390.

[9] Act of 27 September 2013, Journal of Laws [Dz.U.] of 2013, item 1247, which entered into force on 1 July 2015.

of a notification of the scheduled date of a trial or a session or the delivery of a sentence took place as a result of two advice notes.

The present wording of Article 540b CPC, developed in the amendment of 11 March 2016, which entered into force on 15 April 2016,[10] in order to reopen proceedings, requires that a notification of the scheduled date of a session or a trial be not delivered to the accused or be delivered by other means than in person. Thus, the possibility of reopening proceedings in case a sentence issued *in absentia* was not delivered to the accused was excluded. The provision still offers a possibility of reopening every court proceedings concluded with a valid judgement closing the proceedings[11] and not only with a sentence. The possibility of requesting a retrial is excluded if it is recognised that the correspondence was delivered in accordance with the terms laid down in Article 133 §2 CPC, thus in case of two advice notes, in case of refusal to receive a letter or the fulfilment of other conditions laid down in Article 136 §1 CPC, as well as in case of the change of the address and failure to provide a new address for delivery of correspondence, which results in the failure to receive correspondence sent to the address available to the proceeding bodies. Moreover, like in the former legal state, the possibility of reopening proceedings is nullified when the accused party's counsel for the defence has taken part in a trial or a session.

The justification for the bill amending the CPC of 2016 does not contain the motives for changing Article 540b CPC. However, it seems that the reason for giving up the second condition for a retrial was the change of the provisions regulating the delivery of sentences. In accordance with the legal state on 15 April 2016, a sentence must be served to the accused only in two cases: when the conditions laid down in Article 422 §2a CPC are met and in case a penal judgement in the form of an order is issued (Article 505 CPC). The legislator did not lay down an obligation to serve the accused with a sentence issued at a session, although there are proposals made in literature to apply Article 422 §2a CPC to a sentence issued in this forum by analogy.[12] Thus, in case of a sentence issued at a session referred to in Article 341 or 343 CPC, the sentence should be served to the accused who was deprived of liberty on the date of the session, did not have the counsel for the defence and, regardless of a motion filed, was not brought to the session.

The present scope of the application of Article 540b CPC is relatively narrow. Firstly, the situation in which a trial is conducted in the absence of the accused if his presence is statutorily obligatory is undoubtedly outside the scope of the grounds for a retrial. It concerns felony-related cases and only this part of a trial when activities laid down in Articles 385 and 386 CPC are performed. Due to the content of Article 439 §1(11) CPC, such proceedings result in an absolute reason for quashing a judgement, thus is also a reason for reopening criminal proceedings

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[10] Act of 11 March 2016, Journal of Laws [Dz.U.] of 2016, item 437.

[11] On the issue of understanding of the concept in case law, see J. Kosonoga, *Prawomocne orzeczenie kończące postępowanie sądowe w rozumieniu art. 540 § 1 k.p.k.*, Studia i Analizy Sądu Najwyższego. Przegląd orzecznictwa za rok 2017, Warsaw 2018, pp. 519–529.

[12] Thus, rightly, M. Kurowski, *Komentarz do art. 100 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 6.

ex officio (Article 542 §3 CPC) and not on the accused party's request. The absolute reason for an appeal also occurs when the accused was not properly summoned to the trial, and in case he was properly summoned to the trial, he did not appear, although his presence was obligatory and there were no circumstances allowing the hearing of the case in the absence of the accused as it is laid down in Article 376 or 377 CPC.

It seems that the case in which the accused party's obligatory participation in a trial results from the decisions of a presiding judge of the adjudicating bench or a court should be treated in a different way (Article 374 §1 second sentence CPC). Here, it is crucial to answer the question whether conducting a trial in the absence of the accused, in case the court formerly recognised his presence as obligatory, without a prior decision changing the former one, also results in the absolute reason for an appeal, or whether the hearing of the case in such a situation constitutes an implied change of the former decision on the obligatory presence of the accused. The question should be referred to situations not covered by Articles 376 or 377 CPC.[13] In practice, it mainly concerns the consequences of trials conducted in the absence of the accused when a presiding judge of the adjudicating bench had formerly recognised that presence as obligatory, a presiding judge's or court's decision was not quashed and the condition laid down in Article 377 §3 CPC, i.e. the notification of the accused of the scheduled trial in person, was not met. It must be remembered that the recognition of the notification as efficient as a result of two advice notes constitutes proper fulfilment of the obligation to notify of the first scheduled date of a trial within the meaning of Article 132 §4 CPC, however, it is not at the same time the serving of a notification in person within the meaning of Article 377 §3 CPC. It is unchangeably and rightly assumed in case law that the concept of "serving a notification in person" under Article 377 §3 CPC should be interpreted as a delivery of the notification to the accused personally or informing him in person about the successive scheduled date of the trial, e.g. the trial that was subject to postponement.[14] To sum up, proper notification of the first scheduled date of a trial does not have to constitute "informing the accused in person" within the meaning of Article 377 §3 CPC. In the discussed situation, in order to state whether conducting of a trial in the absence of the accused results in the absolute reason for an appeal, it is necessary to examine if the order of the presiding judge of the adjudicating bench or a court on the recognition of the suspect's presence as obligatory contained an object-related and time limitation. If the order or decision clearly indicated that the presence was obligatory in relation to particular activities, e.g. hearing or interrogating of some

[13] There are no doubts that conducting a trial in the absence of the accused in the conditions determined in Articles 376 or 377 CPC in case of offences without prior decision on conducting proceedings in the absence of the accused does not result in an absolute reason for an appeal. Thus, rightly, J. Matras, [in:] K. Dudka (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2018, pp. 1004–1005.

[14] Compare, inter alia, the Supreme Court judgement of 5 November 2010, III KK 286/10, LEX No. 653513; the Supreme Court judgement of 2 February 2012, V KK 438/11, OSNKW 2012, No. 5, item 51; the Supreme Court ruling of 6 March 2018, V KO 17/18, LEX No. 2488097. Also compare D. Świecki, *Komentarz do art. 377 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 17.

witnesses, after the activities have been performed the presence of the accused is no longer obligatory without the decision quashing its obligatory nature. By the way, it is necessary to approve of the proposal expressed in the doctrine that the order of a presiding judge or the decision of a court should always determine the object-related aspects.[15] As it seems, a different assessment is necessary in a situation in which, in spite of earlier decisions on the accused party's obligatory presence at the whole trial, i.e. an unlimited object- or time-related decision, a court proceeds in his absence, regardless of non-fulfilment of one of the conditions laid down in Article 367 or 377 CPC and the simultaneous lack of a reversal of the earlier decision on the recognition of the accused party's presence as obligatory. There are arguments for the assumption that such proceedings result in an absolute reason for an appeal under Article 439 §1(11) CPC.[16]

In the light of the above-presented considerations, it should be assumed that the condition for reopening court proceedings determined in Article 540b CPC is applicable only to the hearing of the case of the accused whose participation in a trial or a session was not obligatory.[17]

Further narrowing of the admissibility of a retrial results from Article 540b §2 CPC. What is called fictitious delivery, i.e. recognition of correspondence that was not received as delivered because of two advice notes, results in inadmissibility of a retrial. A similar consequence results from a refusal to receive a notification as well as the delivery of a notification to an address provided by the accused in a situation in which he changes the place of residence and does not inform the proceeding bodies about it. Thus, in general, only in case of the so-called serving a notification indirectly (e.g. to an adult household member), it is admissible to reopen the proceedings. However, at present this type of delivery is not applicable to the first scheduled date of a trial.[18] Thus, in practice, the reopening of proceedings is only admissible when a court undertakes to hear a case, despite the fact that the notification of a trial or a session has not been served as well as when a notification of the first scheduled date of a trial is by mistake sent to the address different from that indicated by the accused or is delivered in breach of Article 132 §4 CPC to

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[15] D. Świecki, *Komentarz aktualizowany do art. 374 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 6.

[16] For this issue, compare D. Świecki, *Komentarz aktualizowany do art. 439 Kodeksu postępowania karnego*, legal state as of 1 July 2018, WKP 2018, theses 104 and 108. The possibility of the occurrence of an absolute appellate reason in case of recognition of the accused party's presence at a trial as obligatory based on the presiding judge's or court's decision is also approved of in K. Boratyńska and P. Czarnecki, [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, Warsaw 2018, p. 1105.

[17] Thus, also rightly J. Matras, [in:] K. Dudka (ed.), *Kodeks…*, Warsaw 2018, p. 1270.

[18] The indirect service of the notification of the first scheduled date of the main proceedings was rightly excluded. In the case C-108/16 PPU (CJEU judgement of 24 May 2016 in the case *Dworzecki*, ECLI:EU:C:2016:346), the CJEU stated that the notification delivered to the address of the accused and handed over to an adult member of the household who undertook to pass the notification to the accused does not meet the requirements laid down in Article 4a(1)(a) point (i) Framework Decision on EAW if it is not possible to establish based on EAW whether and when, in a given case, the household member really handed over the summons/notification to the person concerned.

an adult household member or by other means indicated in Article 132 §2 or §3 or in Article 133 §3 CPC. However, in any of these cases, the accused will have to prove that he did not know about the scheduled date of a trial or a session and the possibility of issuing a judgement in his absence. The term "scheduled date of a trial or a session" used in Article 540b §1 CPC should be interpreted as a trial as such and not any other date of the trial adjournment or postponement. It is not justified to identify the term with the promulgation date, i.e. a date at which a sentence is to be pronounced.[19] In case of a trial conducted on a few dates, it is sufficient to notify the accused of the first date properly. A different interpretation would lead to an absurd conclusion that the reopening of court proceedings is possible, despite the fact that the accused knew about it. Potential failure to notify the accused or indirect notification (e.g. via an adult household member) of the scheduled date of an adjourned trial cannot result in a retrial because in case of the proper notification of the first date of a trial, the accused cannot prove he did not know about the date of a session or hearing.

A motion to reopen proceedings may also turn out to be efficient when the accused is only notified of the date of an adjourned or postponed trial[20] and the notification is served to him indirectly as defined in Article 132 §2 or §3 CPC or Article 133 §3 CPC. In such circumstances, it is sometimes possible to prove the lack of knowledge about the scheduled date of a trial or a session.[21] In a few judgements concerning Article 540b CPC, the Supreme Court or common courts rightly recognised that the accused reveals his knowledge of the scheduled date of a trial when he files a motion to change the date and it excludes the possibility of reopening proceedings later under Article 540b CPC.[22]

It should be remembered that apart from proving the lack of knowledge about the scheduled date of a trial or a session, the condition for reopening proceedings is that the accused makes it plausible that he did not know about the possibility of hearing the case in his absence. Both above-mentioned conditions must be met cumulatively,[23] however, the lack of notification or improper delivery of the notification of the scheduled date of a trial or a session does not result in the lack of information about the possibility of hearing the case *in absentia*. The accused is provided with the information about the content of Articles 374, 376, 377 and 422 CPC not only with the notification of the scheduled date of a trial (Article 353 §4 CPC) but also at the earlier stage of court proceedings when a copy of an indictment is sent to him (Article 338 §1a CPC). In addition, the accused is informed about the admissibility of conducting an adjourned trial without notification of its scheduled date (Article 353 §4a CPC). Successive information about the content of

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[19] J. Matras, [in:] K. Dudka (ed.), *Kodeks*…, p. 1270, thesis 3.

[20] Article 402 §1 CPC does not impose an obligation to notify the accused of the scheduled date of an adjourned trial, however, it does not exclude the possibility of delivering such a notification.

[21] Compare, *mutatis mutandis*, the judgement of the Appellate Court in Katowice of 3 July 2013, II AKz 365/13, LEX No. 1378325.

[22] The ruling of the Appellate Court in Katowice of 12 July 2016, II AKz 306/16, LEX No. 2139315; the Supreme Court ruling of 1 March 2017, SDI 95/16, LEX No. 2237425.

[23] Compare J. Matras, [in:] K. Dudka (ed.), *Kodeks*…, p. 1270.

Articles 376, 377, 419 §1 and 422 CPC is provided orally, provided the accused participates in a trial.

In accordance with Article 540b CPC, it is also not possible to reopen court proceedings concluded with the issue of a penal judgement in the form of an order at a session in the parties' absence. Although a penal judgement in the form of an order cannot rule a penalty of deprivation of liberty, it is not irrelevant to the procedure of the European Arrest Warrant. Both the penalty of deprivation of liberty and a fine ruled with the use of a penal judgement in the form of an order may be changed into a substitute penalty of deprivation of liberty for at least four months, thus it is possible to issue the European Arrest Warrant in order to transfer a person to execute this penalty. Since the legislator clearly excluded the obligation to notify the accused of the scheduled date of a session when a penal judgement in the form of an order would be issued, the condition for reopening proceedings cannot be applied to such proceedings in the way unambiguously identified with the statutory obligation to properly notify of the scheduled date of a trial or a session. The essence of the proceeding of a penal judgement in the form of an order consists in the fact that the accused is not notified of the scheduled date of his trial in advance. It should be noticed at the same time that a penal judgement in the form of an order should be served to the accused with the use of delivery methods that guarantee the delivery of the correspondence to the accused. The legislator excluded indirect delivery of this sentence in the way indicated in Article 132 §2 and §3 and Article 133 §3 CPC. Thus, only in case of the delivery of a copy of a penal judgement in the form of an order by mistake to an address different from the one indicated by the accused or in case of failure to receive correspondence containing a copy of a sentence issued *in absentia* for reasons independent of the accused and its recognition as delivered after two advice notes, there is a risk that the person concerned will not receive a copy of a penal judgement in the form of an order and will possibly fail to meet the seven-day time frame for lodging an objection. On the other hand, in case of inability to receive correspondence for reasons independent of the accused and recognition of its delivery as proper in accordance with Article 133 §2 *in fine* CPC, it is possible to renew the deadline for lodging an objection.[24] As a result, in order to be granted the rehearing of the case adjudicated *in absentia* within the proceedings of order imposition, there is no need to use the instrument of reopening court proceedings.

Some doubts may be raised in connection with the issue of admissibility of reopening court proceedings when they are conducted in the first instance in the way excluding admissibility of a retrial but the conditions under Article 540b CPC are met with regard to appellate proceedings. The provision is applicable to a situation in which "a case was heard in the absence of the accused". At the same time, there can be no doubts that hearing an appeal against the first instance court judgement still constitutes adjudication on the accused party's "case". This hypothesis is especially up-to-date at present in the face of considerably limited possibilities of cassation adjudication by an appellate court. Moreover, in Article 540b §1 CPC the

[24] Compare K. Eichstaedt, *Komentarz do art. 505 Kodeksu postepowania karnego*, legal state as of 1 July 2018, WKP 2018, thesis 3.

term "main trial" is not used but just "trial". However, if the legislator wants to refer particular procedural consequences exclusively to the main trial, it should be explicitly expressed with the use of the term "main trial" (as in case of Article 132 §4 CPC or Article 80 CPC). On the other hand, in relation to an appellate trial, the legislator simply uses a term "trial" (thus in Article 450 §1 to §3 CPC). Therefore, *lege non distinguente*, it should be assumed that a failure to notify the accused of the scheduled date of an appellate trial or notifying him by means other than in person, however with the exception of delivery methods indicated in Article 540b §2 CPC, gives grounds for reopening court proceedings, provided the accused proves that he did not know about the scheduled date of the appellate proceedings and a possibility of issuing a judgement in his absence, and also his counsel for the defence did not participate in the appellate trial. It is worth noticing that the accused can be notified about the scheduled date of an appellate trial, unlike in case of the main trial, also with the use of an indirect delivery. Moreover, the accused is not informed about the content of Article 450 §3 CPC so it would be much easier for him to prove that he did not know about the possibility of hearing the case in his absence.

The comprehension of the term "the trial resulting in the decision" used in Article 4a(1) Framework Decision on EAW is indirectly also in favour of such interpretation of Article 540b CPC. As it has been mentioned above, introducing Article 540b to CPC, the legislator aimed to limit the risk of refusal to execute warrants issued in order to surrender a person to execute a penalty ruled *in absentia*.[25] In accordance with Article 4a(1)(d) points (i) and (ii) Framework Decision on EAW, a refusal to execute a warrant is inadmissible in a situation a person was absent from "the trial resulting in the decision", which was not delivered in person, but after the transfer "he or she will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case including fresh evidence, to be re-examined, and which may lead to the original decision being reversed" and "will be informed of the time frame within which he or she has to request such a retrial or appeal". In the judgement in the case of *Tupikas*,[26] the Court of Justice of the European Union[27] stated that "in the case the issuing Member State instituted a two-tier system of jurisdiction, with the result that the procedure in criminal matters involves several instances and may give rise to successive judicial decisions and at least one of them was given in absentia, it is important to understand by 'trial resulting in the decision', within the meaning of

[25] It is necessary to apply the interpretation consistent with the aim of the Framework Decision on EAW. This means the obligation to establish such an effect of the interpretation that will allow the fulfilment of the aim of the Framework Decision so that the envisaged result would be obtained. Compare CJEU judgements: of 8 November 2016 in the case *Ognyanov*, C-554/14, ECLI:EU:C:2016:835, paras. 59 and 66; of 5 September 2012 in the case *Lopes De Silva Jorge*, C-42/11, ECLI:EU:C:2012:517, paras. 55–56; of 28 July 2016 in the case *JZ v. Prokuratura Rejonowa Łódź-Śródmieście*, C-294/16 PPU, ECLI:EU:C:2016:610, paras. 32–33.

[26] CJEU judgement of 10 August 2017 in the case *Tupikas*, C-270/17 PPU, ECLI:EU:C:2017:628, para. 81. Similarly, CJEU judgement of 10 August 2017 in the case *Zdziaszek*, C-271/17 PPU, ECLI:EU:C:2017:629, para. 82.

[27] Hereinafter: CJEU.

Article 4a(1) Framework Decision [on EAW], the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the fault of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law".

If Article 540b CPC were to fulfil its aim to facilitate mutual recognition of judgements, in case of a two-tier system of jurisdiction, the conditions for a retrial laid down in this provision should refer to the appellate proceedings.

The legislator laid down a monthly final time frame for lodging a motion for a retrial, however, it starts running on the day when the accused gets to know the sentence. Such regulation of the start of the time limit running should be recognised as unfortunate. Firstly, as it was noticed in literature,[28] the accused may learn about the judgement as a result of the delivery of an invalid sentence issued in his absence. Due to the content of Article 422 §2a CPC, the situation mainly applies to the accused deprived of liberty. In such a situation, the monthly final time frame for lodging a motion to be served a sentence with its justification in order to file an appeal starts running on the same date. Thus, the accused may give up a standard appeal measure and let the sentence become final still without losing the time to lodge a motion to reopen court proceedings. Undoubtedly, the legislator's intention was to make the discussed time frame start on the date of learning about the valid judgement. However, the wording of the provision does not exclude the above-presented interpretation.

Secondly, in a situation when the European Arrest Warrant is issued in order to surrender a person to serve the penalty imposed *in absentia* in Poland, the prosecuted person will learn about the issue of a sentence the moment he is acquainted with the order of the state body to execute the European Arrest Warrant. Moreover, the executing Member State judicial authority's obligation is to serve the sentence to the prosecuted person for information purposes (Article 4a(2) Framework Decision on EAW). This means that, in accordance with the content of Article 540 §1 CPC, still before the convict is surrendered to Poland, the time limit for lodging a motion to reopen the proceedings starts running. At the same time, the execution of the warrant alone, in case of no consent to surrender, may last longer than a month; and the stay of the sought person in the territory of the executing Member State considerably hampers the efficient filing of a motion for a retrial, which is subject to the obligatory representation of the accused by the counsel for the defence. Moreover, Article 4a(2) Framework Decision on EAW unambiguously stipulates that the provision of information on the right and date of requesting a retrial "after the surrender" of the sought person to Poland and the above-mentioned informative provision of the judgement by the executing Member State authorities "shall neither be regarded as a formal service of the judgement nor actuate any time limits for requesting a retrial or appeal".[29]

Another obstacle to recognising the instrument regulated in Article 540b CPC as one fulfilling its aim with regard to facilitating cooperation is its optional nature.

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[28] J. Matras, [in:] *Kodeks…*, pp. 1270–1271.

[29] Also compare A. Lach, *Orzeczenia…*, p. 22.

In case law it is assumed that the provision only makes it possible to reopen proceedings when the conditions defined therein occur but it does not oblige one to do that. As a result, "even in case when the circumstances and all conditions laid down in Article 540b §1(1) CPC are met, a court should reopen the proceedings only if it establishes that hearing the case in the absence of the convict might have considerable significance for the course of the court proceedings, the accused party's procedural guarantees and the merits of adjudication".[30] The indication that the proceedings "may be reopened" and not "shall be reopened", i.e. creating a possibility of refusing to reopen the proceedings regardless of the fulfilment of the requirements, causes that it is difficult to recognise Article 540b CPC as expressing "a sought person's right to have his or her case retried" within the meaning of Article 4a(1)(d) point (i) Framework Decision on EAW. Therefore, it is doubtful whether courts should mark point 1e in Part D of the EAW form and refer to the right to a retrial expressed in Article 540b CPC.

Up to now, the concept of "the right to a retrial" laid down in Article 4a(1)(d) point (i) Framework Decision on EAW has not been defined by the CJEU. Neither does the provision indicate conditions that may be applicable in the issuing Member State in order to reopen the case of the surrendered person.[31] In the above-mentioned case of *Dworzecki*, the Government of Poland argued that the issue of a judgement in the absence of the accused resulting from serving the notification and a copy of a sentence to him in an indirect way does not constitute an obstacle to the European Arrest Warrant execution, because the accused has the right to a retrial.[32] The Court only pointed out in the judgement that "(…) the executing judicial authority may also take into account the fact, to which the Polish Government referred at the hearing before the Court, that the national law of the issuing Member State in any event affords the person concerned the right to request a retrial, where, as in this instance, service of the summons is deemed to be effected when the summons is handed over to an adult member of the household of the person concerned".[33] The real and efficient right to a retrial may be spoken about only when, after a court establishes the fulfilment of all the conditions for a retrial, including the fact that the accused proves that he did not know about the scheduled date of a trial or a session and was not informed about a possibility of issuing a judgement in his absence, the court cannot refuse to reopen proceedings and cannot deprive a convict of the guarantee that was a condition for the executing judicial authority to surrender this person to Poland in order to execute the penalty ruled *in absentia*.

Summing up, it is necessary to state that the originally expressed fears that Article 540b CPC may considerably undermine the stability of valid judgements did

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[30] The ruling of the Appellate Court in Katowice of 30 April 2014, II AKz 257/14, LEX No. 1487573; the ruling of the Appellate Court in Katowice of 12 July 2016, II AKz 306/16, LEX No. 2139315.

[31] The content of Article 4a(1)(d) point (ii) Framework Decision on EAW suggests a rather obvious possibility of regulating the deadline for requesting a retrial.

[32] Compare para. 79 of the opinion of Advocate General Michal Bobek of 11 May 2016 in the case *Dworzecki*, C-108/16 PPU, ECLI:EU:C:2016:333.

[33] CJEU judgement in the case *Dworzecki*, para. 52.

not come true.[34] Even a cursory review of common courts' and the Supreme Court's case law leads to a conclusion that this condition for reopening court proceedings rarely results in challenging the valid judgement closing the proceedings.

Article 4a Framework Decision on EAW in general lays down five circumstances nullifying admissibility of a refusal to execute the European Arrest Warrant issued in order to execute a sentence passed *in absentia*: (1) personal notification of the accused of a trial; (2) notification of him or her in another manner but one that guarantees that it can be unambiguously established that the accused knew about the scheduled date of a trial (in both cases, the accused must also know about the possibility of issuing a judgement in his or her absence); (3) authorisation of the counsel for the defence by the accused in order to defend him or her and participate in a trial; however, the accused should grant this authorisation "knowing about the scheduled trial"; (4) service of the sentence and making it possible to appeal against a judgement issued *in absentia*, which right a person has given up; (5) serving the sentence to the accused after his or her surrender to the issuing Member State, where he will have the right to a retrial in his or her presence.

Due to an unfortunate indication of the beginning of the time limit to request a retrial running as well as the optional nature of the grounds for a retrial laid down in Article 540b §1 CPC, the provision seems not to fulfil the aim for which it was introduced to the Criminal Procedure Code. However, after the amendment to Article 374 CPC and the introduction of the accused party's optional participation in the main proceedings, they can be conducted in the absence of the accused much more frequently than before 1 July 2015. The accused does not have to be notified of the scheduled date of a trial personally. There can be doubts whether the provision of a notification by means of two correspondence advice notes meets the requirements for a delivery in such a manner that makes it possible to unambiguously establish that the accused knows about the scheduled date of a trial (requirements under Article 4a(1)(a) point (i) Framework Decision on EAW). Moreover, as a rule, a sentence is not served to the accused, and as a consequence only exceptionally it is possible to meet the condition under Article 4a(1)(c) Framework Decision on EAW. That is why, the possibility of indicating the right to a retrial under Article 540b CPC in Part D of the European Arrest Warrant form might, at present more often than before 1 July 2015, guarantee the surrender of a person in order to execute the sentence issued *in absentia*. However, making this basis for a retrial an instrument really facilitating cooperation within the European Arrest Warrant requires the legislator's intervention.

[34] Thus, S. Steinborn, [in:] L.K. Paprzycki (ed.), *Kodeks…*, p. 385.

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REOPENING OF COURT PROCEEDINGS BASED ON ARTICLE 540B CRIMINAL PROCEDURE CODE

Summary

The paper analyses the grounds for reopening criminal proceedings stipulated in Article 540b of the Criminal Procedure Code. The author argues that, although the aim of the introduction of this provision to the CPC in 2011 was to facilitate the surrender under the European Arrest Warrant of persons pursued in order to execute a sentence issued *in absentia* in Poland, that aim has not been achieved due to the flaws in the provision indicated in the paper. The start of the time limit running for lodging a motion for a retrial under Article 540b CPC, as well as the optional nature of such retrial have been critically assessed. It has also been proved that the concerns originally expressed in the doctrine that the discussed grounds for reopening of court proceedings may undermine the stability of valid judgements issued in criminal cases did not come to fruition.

Keywords: reopening of court proceedings, European Arrest Warrant, sentences issued *in absentia*

WZNOWIENIE POSTĘPOWANIA SĄDOWEGO NA PODSTAWIE ART. 540B KODEKSU POSTĘPOWANIA KARNEGO

Streszczenie

Artykuł zawiera analizę podstawy wznowienia postępowania karnego wyrażonej w art. 540b kodeksu postępowania karnego. Jak wykazuje autorka, chociaż wprowadzenie tego przepisu do k.p.k. w 2011 r. miało na celu ułatwienie wykonywania europejskich nakazów aresztowa-

nia zmierzających do przekazania osoby ściganej do wykonania kary orzeczonej w Polsce *in absentia*, to jednak ze względu na wskazane w artykule wady tej regulacji cel ten nie został osiągnięty. Krytycznie oceniono uregulowanie początku biegu terminu do złożenia wniosku o wznowienie postępowania na podstawie art. 540b k.p.k., jak również fakultatywność tego wznowienia. Jednocześnie w artykule wykazano, że nie sprawdziły się formułowane w doktrynie obawy, iż omawiana podstawa wznowienia postępowania sądowego spowoduje zachwianie stabilności prawomocnych wyroków wydawanych w sprawach karnych.

Słowa kluczowe: wznowienie postępowania, europejski nakaz aresztowania, wyroki wydawane *in absentia*

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GLOSS
on the Supreme Court ruling of 19 January 2017, I KZP 11/16[1] (with reference to the Supreme Court judgement of 21 June 2017, I KZP 3/17)[2]

The statement of the ruling is as follows:

"(...) [T]he normative phrase 'whoever being deprived of liberty based on a court's decision self-frees' should also be interpreted as an action that constitutes unlawful freeing from serving the penalty of deprivation of liberty in the system of electronic monitoring, and the perpetrator should be subject to criminal liability under Article 242 §1 CC."

The Supreme Court judgements indicated in the title are in close relationship and they should be discussed together. They were issued in connection with the following facts. In accordance with the decision of the Regional Court in K. of 14 October 2008, P. P. was sentenced to eight months of deprivation of liberty suspended for three years' probation. On 15 September 2011, the Court decided to execute the penalty. In the course of the executive proceedings, on 18 September 2014, the District Court in K. issued a decision letting the convict P. P. serve the penalty of deprivation of liberty outside prison in the system of electronic monitoring. On 9 November 2014, the convict left his place of residence without permission and failed to stay there until 19 November 2014. He did not contact the probation officer and did not answer his telephone calls. In the situation, on 17 November 2014, the District Court in K. issued a decision revoking the permission to serve the sentence in the system of electronic monitoring. P. P. was accused of "self-freeing in the period from 9 November 2014 to 17 November 2014 from the execution of the penalty of deprivation of liberty to which

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1 The ruling is available at http://www.sn.pl/sprawy/SiteAssets/Lists/Zagadnienia_prawne/EditForm/I-KZP-0011-16_p.pdf.

2 The judgement is available in the Legalis system.

he was sentenced by the Regional Court in K. on 14 October 2008 for the commission of an act under Article 178a §1 CC while serving the penalty in the system of electronic monitoring based on the decision of the District Court in K. of 18 September 2014, i.e. the commission of an offence under Article 242 §1 CC". On 5 June 2016, the Regional Court issued a sentence acquitting P. P. of committing the act he was accused of. The counsel for the defence and the prosecutor filed an appeal against the sentence (as far as other acts, not of our interest, are concerned). Hearing the appeal, the District Court in K. had doubts requiring the interpretation of statute and asked a prejudicial question whether "the convict's departure from the place of serving the sentence of deprivation of liberty in the system of electronic monitoring can be classified as the features of a causative act of an offence of self-freeing determined in the provision of Article 242 §1 CC".

The Supreme Court standard bench examining the matter issued a ruling of 19 January 2017, I KZP 11/16, and based on Article 441 §2 Criminal Procedure Code (henceforth: CPC) decided to refer the prejudicial question to the extended bench of the Supreme Court.[3] In the justification for the decision, the Supreme Court indicated that, in fact, "the question asked by the District Court concerns the problem of whether the normative phrase 'whoever being deprived of liberty based on a court's decision self-frees' should be interpreted in accordance with its literal understanding (the colloquial language directive) as freeing oneself from a locked area, convoy or monitoring by breaking 'the guard's fetters' or (in accordance with the legal language directive) also as any other activity that constitutes unlawful freeing from the regime of serving a sentence of deprivation of liberty in the system of electronic monitoring. In more precise terms, it is necessary to emphasize that what is of critical importance in the discussed case is the phrase 'whoever being deprived of liberty based on a court's decision self-frees'". The Court also noticed that: "the attempt to determine the present meaning of the provision of Article 242 §1 CC may be performed based on the selection of the appropriate linguistic interpretation directive. This makes it possible to avoid the kind of interpretation that by the use of purpose- or system-related method may create doubts concerning the violation of the *lex certa* principle. The interpretation goes beyond common interpretation because it results in defining the meaning of the provision of the substantive criminal law in the new normative situation [it concerns the introduction of the possibility of executing the penalty of deprivation of liberty in the system of electronic monitoring – P.P.], which forces the law enforcement body to establish new legal norms for determining criminal liability". Taking into consideration the legal language directive to interpret Article 242 §1 Criminal Code (henceforth: CC), the Supreme Court stated that the normative phrase "whoever being deprived of liberty based on a court's decision self-frees" used in the provision may also cover a convict's freeing from obligations resulting from a court's sentence of deprivation of liberty in the system of electronic monitoring. Justifying its stand, the Supreme

[3] The Supreme Court indicated that it did it having in mind diverse opinions on the issue and the importance of the adjudication for a court practice and legal consequences depending on the interpretation of the problem in question.

Court added that the concept of "self-freeing" has a broader meaning than "escape" and may also cover situations in which a perpetrator has not broken "the guard's fetters". The purpose- and system-related interpretation seems to support the Supreme Court's opinion. The Court also referred to the European Court of Human Rights case law based on Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[4] which results in broad interpretation of the concept of "deprivation of liberty",[5] however, it also pointed out judgements demonstrating narrow interpretation of the concept in question.[6] Eventually, the Supreme Court stated that "it would be justified to assume that the normative phrase 'whoever being deprived of liberty based on a court's decision self-frees' should also be interpreted as an action that constitutes unlawful freeing from serving the penalty of deprivation of liberty in the system of electronic monitoring, and the perpetrator should be subject to criminal liability under Article 242 §1 CC".

During the extended bench session on 26 April 2017, based on Article 441 §5 CPC, the Supreme Court decided to examine the appeal against the Regional Court in K. sentence of 5 April 2016. The Supreme Court justified its decision by the occurrence of a legal problem concerning intertemporal law. The Supreme Court judgement of 21 June 2017, I KZP 3/17, upheld the Regional Court judgement concerning the acquittal of P. P. from the commission of an offence under Article 242 §1 CC justifying it by stating that when the first instance court issued its sentence, electronic monitoring was a form of execution of the penalty of limitation of liberty and, although on 15 April 2016 the system was again connected with the penalty of deprivation of liberty, in accordance with the wording of Article 4 §1 CC, the statute more favourable for the perpetrator should be applied, i.e. Article 242 §1 CC in the normative context linking monitoring with the penalty of limitation of liberty. The Supreme Court did not express a clear stand concerning the possibility of applying Article 242 §1 CC to a person who "self-freed" from electronic monitoring. However, if it recognised Article 242 §1 CC in connection with the provisions determining electronic monitoring as a form of the penalty of limitation of liberty as the statute that is more favourable in the discussed case in the meaning of Article 4 §1 CC, a conclusion can be drawn that its stand was the same as in the ruling of 19 January 2017.

* * *

The answer to the question that the District Court asked, i.e. whether the convict's departure from the place of serving the penalty of deprivation of liberty in the system of electronic monitoring can be classified as the features specifying a causative act of an offence of self-freeing laid down in the provision of Article 242 §1 CC,

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[4] Journal of Laws [Dz.U.] of 1993, No. 61, item 284; hereinafter: ECHR.

[5] The Court stated that: "the type and intensity of limitations typical of the penalty of deprivation of liberty served in the system of electronic monitoring in their nature may be considered a form of 'deprivation of liberty' in the meaning of the Convention".

[6] Case of *Trijonis v. Lithuania* (the ECtHR judgement of 15 December 2005, Application no. 2333/02); case of *Raimondo v. Italy* (the ECtHR judgement of 22 February 1994, Application no. 12954/87).

requires examining two issues. Firstly, it is necessary to specify the scope of the meaning of the concept of "deprivation of liberty" in accordance with Article 242 §1 CC. Secondly, it is necessary to establish the legal and physical situation of the convict serving the penalty of deprivation of liberty in the system of electronic monitoring.

DEPRIVATION OF LIBERTY

It cannot raise doubts that the concept of "liberty" in accordance with Article 242 §1 CC should be interpreted in the same way as in case of unlawful deprivation of liberty (Article 189 CC). However, the provision refers to a perpetrator's "self-freeing". Apart from that, in accordance with one of the basic rules of law interpretation, the same terms functioning in the same legal act cannot be given different meanings (a ban on homonymous interpretation). Thus, what matters is the physical aspect of liberty, referred to as the mobility freedom, i.e. a person's freedom to change the place of stay according to his or her will.[7] Article 41 para. 1 Constitution of the Republic of Poland ("Personal inviolability and security shall be ensured to everyone. Any deprivation or limitation of liberty may be imposed only in accordance with principles and under procedures specified by statute") also deals with liberty in this meaning.[8] The situation of a perpetrator of an offence under Article 242 §1 CC should be examined in two aspects: physical and legal (formal) ones. Firstly, a perpetrator of an offence under Article 242 CC must really be deprived of liberty,[9] i.e. be in a situation in which he or she cannot change the place of stay according to his or her will. Of course, the concept of "the place of stay" should be interpreted rationally, as a room,

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[7] See M. Mozgawa, [in:] J. Warylewski (ed.), *System prawa karnego*, Vol. 10: *Przestępstwa przeciwko dobrom indywidualnym*, Warsaw 2016, p. 362. Thus also the judgement of the Appellate Court in Lublin of 15 December 1994, II AKr 202/94, OSA 1997, No. 11, p. 109.

[8] In its judgement of 11 October 2011, K 16/10 (OTK-A 2011, No. 8, item 80), the Constitutional Tribunal characterised a person's freedom as "an individual's ability to take decisions according to his or her own will, to have free choice of conduct in public and private life, not limited by other persons". Based on the Constitution, it is said that deprivation of liberty means preventing an individual from exercising that freedom (B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012, p. 267); on the other hand, the limitation of liberty consists in a ban on exercising some possibilities included in a person's freedom *sensu stricto* (e.g. a ban on changing the place of residence, a ban on driving) or forcing a person to perform some activities that the person would not do otherwise (e.g. obligation to do a certain job), while all other possibilities of "personal freedom" are left for an individual's disposal (P. Sarnecki, *Komentarz do art. 41 Konstytucji*, [in:] L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. 3, Warsaw 2003, p. 4).

[9] It is *opinio communis* so, for example, in the light of the Criminal Codes of 1997, 1969 and 1932, see: B. Kunicka-Michalska, [in:] A. Wąsek, R. Zawłocki (ed.), *Kodeks karny. Część szczególna. Komentarz do art. 222–316*, Vol. 2, Warsaw 2010, p. 337; A. Wojtaszczyk, W. Wróbel, W. Zontek, [in:] L. Gardocki (ed.), *System prawa karnego*, Vol. 8: *Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warsaw 2013, pp. 668–669; M. Siewierski, [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warsaw 1977, p. 682; W. Wolter, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warsaw 1973, p. 775 and 796; O. Chybiński, [in:] W. Świda (ed.), *Prawo karne. Część szczególna*, Wrocław–Warsaw 1980, p. 483; W. Makowski, *Kodeks karny. Komentarz*, Warsaw 1937, p. 483.

a set of rooms, or even the whole building or another unlocked place that cannot be left, which is protected by the establishment of guards or the application of adequate technical measures making it impossible to escape.[10] In the opinion of the Supreme Court, "The state of 'deprivation of liberty' is also a state in which a particular person is in a proper locked place or under supervision, and self-freeing is getting out of this locked place or supervision".[11] In another judgement, it was indicated that: "The possibility of committing an offence under Article 256 para. 1 CC [the equivalent of Article 242 §1 CC of 1997 – P.P.] starts when a perpetrator is in a locked place or 'under guard' and an offence is committed the moment 'the guard's fetters are broken'. The opinion is supported in literature where it is stated that the occurrence of an offence requires that a perpetrator should be deprived of liberty based on a legal decision of a competent body and it is not enough for him or her to know about the application of deprivation of liberty to him or her. It is also emphasized that only a person deprived of liberty may be a perpetrator of the offence and not a person who was sentenced to the penalty which has not been executed".[12] Thus, until a perpetrator has been physically deprived of liberty (locked or taken "under guard"), he or she cannot commit an offence of self-freeing. As it has been mentioned above, it is also not enough to physically deprive the perpetrator of liberty. The situation must be based on a court's decision or a legal order issued by another state body (a legal formal aspect of deprivation of liberty).

The establishment of the legal and physical situation of a convict serving the penalty of deprivation of liberty in the system of electronic monitoring requires the analysis of the regulations of the Criminal Procedure Code, in particular those concerning such person's rights and obligations. The penalty of deprivation of liberty in the system of electronic monitoring[13] is executed as stationary supervision (Article 43c §1 sentence 1 Penalty Execution Code, hereinafter: PEC), which consists in checking whether a convict stays in the places indicated by a court on particular days of the week and hours (Article 43b §3(1) PEC). A convict serving the penalty of deprivation of liberty in the system of electronic monitoring is obliged to: (1) carry a transmitter non-stop; (2) take care of technical means given to him or her, inter alia, in particular, protect them against loss, destruction, damage, or making them unfit for use, and ensure constant power supply to them; (3) give a monitoring body access to technical means provided in order to check them, repair or exchange every time the body demands it, including giving the employees of such body access to rooms in which the convict stays or to real estate the convict owns or has the right of management of; (4) provide information concerning the course of penalty service

[10] It cannot be claimed that deprivation of liberty takes place only when someone cannot move; actually, even a person serving the penalty of deprivation of liberty in prison can freely walk in the cell.

[11] The Supreme Court judgement of 23 September 1992, III KRN 129/92, OSNKW 1993, No. 1–2, item 6.

[12] The Supreme Court judgement of 9 December 1997, V KKN 26/97, Prokuratura i Prawo-wkł. 1998, No. 7, item 7.

[13] Electronic monitoring is the supervision of a convict's conduct with the use of technical means (Article 43b §1 PEC). On the other hand, the system of electronic monitoring signifies all the methods and technical means used to perform electronic monitoring (Article 43b §2 PEC).

and the imposed obligations fulfilment to a court president or an authorised judge, a probation officer, a supervising body and a body managing a monitoring centre, and appear before a judge or a probation officer each time they demand it; (5) remain in the place indicated by a court for a set period; (6) answer calls connected to the landline recorder; (7) enable a professional probation officer to enter an apartment or real estate where the call recorder is placed; (8) provide information referred to in para. (4) to all authorised persons when they demand it, also with the use of the landline recorder (Article 43n §1 and §2 PEC). The obligation referred to in para. (5) concerns a convict's stay in the place of permanent residence or another place indicated in particular time (Article 43na sentence 1 PEC). It should be noticed that in accordance with Article 43na sentence 2 PEC, a penitentiary court is obliged to determine the periods within the day and particular days of the week when a convict can leave the place of permanent residence or another indicated place for a period not exceeding 12 hours per day, especially for the purpose of (1) working; (2) performing religious practices or using religious services; (3) taking care of a minor, a disabled or a sick person; (4) education and self-education, and one's own creative activities; (5) using cultural, educational and sports facilities and taking part in cultural, educational and sports activities; (6) contacting his or her counsel for the defence, proxy or a chosen representative referred to in Article 42 PEC; (7) contacting entities referred to in Article 38 §1 PEC; (8) keeping in touch with the family and other close people; (9) using medical services or taking part in a therapy; (10) doing necessary shopping. It should be added that in situations that are especially important for a convict justified by health and family-related or personal reasons, a probation officer may let a convict leave the place of monitoring for a period not exceeding seven days at a time, if necessary in company of a close relation or a trustworthy person, immediately informing a court president, an authorised judge or a penitentiary judge about the fact and entering the information into the communication-monitoring system (Article 43p §1 PEC). As the concept of "deprivation of liberty" in accordance with Article 242 §1 CC cannot be identified with absolute deprivation of a person's freedom to choose the place of stay (isolation in a cell or even overpowering with the use of coercion measures), it should be pointed out that pursuant to the above-mentioned provision, deprivation of liberty differs from limitation of liberty by: (1) intensity of the limitation of a person's freedom to choose the place of stay, and (2) the level of ensuring the execution of the limitations imposed on a person (intensity of supervision and the type of technical means used). Taking into account the above-mentioned PEC regulations, one should state that if a convict has the right to leave the place of permanent residence or another indicated place for a period of 12 hours per day (in the periods determined by a penitentiary court), one cannot say that he or she is deprived of liberty, i.e. he or she cannot freely change the place of stay. It is true that the movement freedom is limited to indicated periods but, in fact, the deprivation of liberty that is connected with serving the penalty of deprivation of liberty in a traditional way means that a convict does not use the movement freedom (of course, in a certain range, i.e. he or she cannot leave a cell, prison or a place of stay outside prison, e.g. a workplace) without permission. Electronic monitoring is

a modern form of supervision of a place of a convict's stay, however, unlike a locked or another place under the supervision of particular persons, it does not make it impossible for the monitored person to leave the place without permission. Such a person can change the place of stay at any time without any obstacles. The only thing that stops him or her from doing it is a psychological barrier connected with the fact that failure to meet the conditions of serving the penalty in the discussed system carries a risk that a penitentiary court may revoke the permission and place him or her in prison. Thus, it should be stated that serving the penalty of deprivation of liberty in the system of electronic monitoring is not connected with depriving a convict of liberty but, in fact, a form of limitation of liberty.[14] It can be even

[14] Also compare K. Mamak, *Dozór elektroniczny – rozważania na tle kary pozbawienia wolności, kary ograniczenia wolności oraz przestępstwa samouwolnienia (art. 242 § 1 k.k.)*, e-CzPKiNP No. 3, 2017, p. 17; see the author's detailed comments on the differences between the "traditional" penalty of deprivation of liberty and the penalty executed in the system of electronic monitoring, *ibid.*, pp. 12–21. He also indicates that imminent features of the penalty of deprivation of liberty that do not occur in electronic monitoring are as follows: isolation, forced social integration, specific discipline and devastating influence on family and social life (*ibid.*, p. 29). As a result, he proposes to adopt a distinction between formal and physical deprivation of liberty. In such classification, electronic monitoring would constitute formal deprivation of liberty (*ibid.*, p. 21). Also see M. Szewczyk, A. Wojtaszczyk, W. Zontek, [in:] W. Wróbel and A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. 2: *Komentarz do art. 212–277d*, Warsaw 2017, p. 388; K. Postulski, *Zezwolenie na odbycie kary pozbawienia wolności w systemie dozoru elektronicznego*, Prokuratura i Prawo No. 1, 2017, p. 49; *idem*, *Kodeks karny wykonawczy. Komentarz*, Warsaw 2017, p. 320. In accordance with the already not binding Act of 7 September 2007 on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring (uniform text, Journal of Laws [Dz.U.] of 2010, No. 142, item 960, as amended), it was also assumed that the penalty of deprivation of liberty in the form of electronic monitoring was not connected with deprivation of liberty, see A. Kiełtyka, A. Ważny, *Ustawa o wykonywaniu kary pozbawienia wolności poza zakładem karnym w systemie dozoru elektronicznego. Komentarz*, Warsaw 2011, p. 57; M. Rusinek, *Ustawa o dozorze elektronicznym. Komentarz*, Warsaw 2010, pp. 30–31; M. Jankowski, A. Kotowski, S. Momot, A. Ważny, *Przyczyny niedostatecznego wykorzystywania ustawy o dozorze elektronicznym*, Instytut Wymiaru Sprawiedliwości, Warsaw 2012, p. 34. Also, R.A. Stefański indicated that the penalty of deprivation of liberty in the system of electronic monitoring is executed in non-custodial conditions. It is, therefore, getting close to the penalty of limitation of liberty, and what links it to the penalty of deprivation of liberty is first of all its name (R.A. Stefański, *Kara pozbawienia wolności w systemie dozoru elektronicznego*, Wojskowy Przegląd Prawniczy No. 4, 2007, p. 31). It should be remembered that the obligations of a convict pursuant to the Act of 7 September 2007 were the same as those that a convict serving the penalty in the system of electronic monitoring has at present (see Articles 8 and 10 of the Act). K. Zawiślan's opinion based on the above-mentioned statute was different; according to her, a person serving a penalty in the system of electronic monitoring is deprived of liberty, he or she is in isolation from the community (K. Zawiślan, *Dozór elektroniczny: izolacja czy iluzja?*, Państwo i Społeczeństwo No. 4, 2014, pp. 12 and 23). It should be noticed that the justification for the Bill on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring mentions electronic monitoring in the context of non-custodial measures (see Sejm of the Republic of Poland of the 5th term, paper no. 1237, pp. 2, 37–38). The justification for the Bill of 25 May 2012 amending the Act on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring also drew attention to the non-custodial aspect of the supervision (see Sejm of the Republic of Poland of the 7th term, paper no. 179, pp. 6–7). Similarly, the justification for the Bill of 11 March 2016 amending the Act: Criminal Code and the Act: Penalty Execution Code, which brought back the possibility of serving the penalty of deprivation of liberty in the system of electronic monitoring, stated that "electronic monitoring ensures a higher level of hardship and control than the probation measures used before and,

claimed that serving the penalty of limitation of liberty (actually nobody will question it that the penalty is not connected with depriving a convict of liberty) will sometimes be more troublesome for a convict than serving the penalty of deprivation of liberty in the system of electronic monitoring. It will be so, for example, in a situation when a court sentences a perpetrator of an offence to the penalty of limitation of liberty and imposes an obligation to perform supervised community service without remuneration and one or a few obligations referred to in Article 72 §1(2) to (7a) CC. It should be also remembered that in the course of serving the penalty of limitation of liberty, a convict cannot change the place of permanent residence without a court's permission and is obliged to provide information concerning the course of the penalty service[15] (Article 34 §2 CC). A convict is also under a probation officer's supervision (Article 55 §2 PEC).[16] It should be stated that as a convict serving the penalty of deprivation of liberty in the system of electronic monitoring is not really deprived of liberty, violating the conditions of supervision he or she does not commit an offence of self-freeing classified in Article 242 §1 CC.[17] However, he or she is subject to consequences of the violation of the conditions of serving the penalty in the system of electronic monitoring. In such a situation a penitentiary court revokes the permission to serve the penalty of deprivation of liberty in the system of electronic monitoring (Article 43zaa §1(2) PEC), however, in extraordinary situations justified by special circumstances, it may renounce it (Article 43zaa §2 PEC). A penitentiary court may revoke the permission to serve the penalty of deprivation of liberty in the system of electronic monitoring if a convict having the permission referred to in Article 43p fails to return to an indicated place until a set deadline (Article 43zab PEC). In case the permission referred to in Article 43zaa §1 or Article 43zab is revoked, a penitentiary court orders to place a convict in prison, about which he or she should be informed (Article 43zad PEC). Moreover, in case of intentional destruction, damage, making a transmitter and landline or mobile recorder unfit for use, a court may impose a compensation for the monitoring entity (Article 43s §1 PEC).[18]

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at the same time, a lower level of negative consequences of the penalty execution than in case of convicts' isolation" (Sejm of the Republic of Poland of the 8th term, paper no. 218). It should be indicated, although the value of it is just illustrative and it is not a convincing argument, that the Committee of Ministers of the Council of Europe, in para. 39 of its recommendation of 19 February 2014 on electronic monitoring, determines this monitoring as "a means of restricting the liberty of suspects or offenders"; Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c64a7 [accessed on 18/12/2017].

15 In accordance with Article 60 PEC, a court as well as a probation officer at any time may demand that a convict informs them about the course of the penalty of deprivation of liberty service and in order to do so ask a convict to appear in person.

16 In the same way as in case of the execution of the penalty of deprivation of liberty in the system of electronic monitoring, see Article 43d §3 PEC.

17 Thus also, K. Mamak, *Dozór elektroniczny…*, pp. 22 and 25; A. Wojtaszczyk, W. Wróbel, W. Zontek, [in:] *System prawa karnego…*, pp. 674–675; M. Szewczyk, A. Wojtaszczyk, W. Zontek, [in:] *Kodeks karny…*, p. 389, and L. Tyszkiewicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 1415.

18 Such conduct also constitutes a misdemeanour under Article 66a Misdemeanour Code.

COMMENTS ON THE SUPREME COURT'S ARGUMENTS

According to the Supreme Court, its opinion finds support in: (1) the linguistic interpretation of the provision, which must sometimes take into account not the colloquial meaning of a given concept but the meaning resulting from the normative context (pp. 14 and 17 of the justification),[19] (2) the historic interpretation (p. 18 of the justification), (3) the systemic interpretation (pp. 18–19 of the justification), (4) the purpose-related interpretation (p. 19 of the justification), and (5) the broad interpretation of the concept of "deprivation of liberty" based on Article 5 Convention for the Protection of Human Rights and Fundamental Freedoms (pp. 20–23 of the justification).

Re 1: In the conclusions concerning the linguistic interpretation, the Supreme Court stated that the interpreter of the features of an offence under Article 242 §1 CC "outright has an obligation to take into account changes in 'the normative surroundings' of the offence, unless it violates the *nullum crimen sine lege certa* principle, which does not take place in this case". It is necessary to agree with the Supreme Court that sometimes the linguistic interpretation should take into consideration the normative context of the provision interpreted. However, it is necessary to remember about the specificity of substantial criminal law and one of its basic principles, i.e. the ban on the application of an extended interpretation unfavourable for a perpetrator (*nullum crimen sine lege stricta*). In the discussed case, one cannot abandon, as the Supreme Court would like to, the traditional, colloquial meaning of the concept of "deprivation of liberty" because it would be in conflict with the above-mentioned principle. In a situation concerning criminal liability of a perpetrator of an act it is inadmissible to depart from the established concepts only because the legislator shaped a particular legal instrument (in this case, the penalty of deprivation of liberty) in this or that way. The fact that at present electronic monitoring is connected with the penalty of deprivation of liberty and not the limitation of liberty should not be important. The reading of PEC leads to a conclusion that the rights and obligations of a convict serving the penalty of deprivation of liberty in the system of electronic monitoring do not basically differ from those of the time when electronic monitoring was a form of limitation of liberty. Thus, should "the normative circumstances" suddenly change the meaning of the state of "deprivation of liberty"? What used to be the limitation of liberty instantly became the deprivation of liberty because a few words in statute changed? Thus, the reasoning based on legislative solutions may be fallible and when the case is connected with criminal liability, there can be no doubts about the meaning of a provision and even when they arise, in accordance with the *crimen sine lege stricta* principle, a provision should be interpreted precisely.[20] One can have an impression that the Supreme Court actually did not consider whether the conditions of serving the penalty of deprivation of liberty in the system of electronic monitoring constitute

[19] The Supreme Court used other methods of interpretation as auxiliary ones because the Court assumed the linguistic interpretation was clear and obvious.

[20] It is also necessary to remember about the (controversial in fact) possibility of using the *in dubio pro reo* principle (Article 5 §2 CPC) in relation to doubts that are legal in nature.

the deprivation of liberty but whether the penalty of deprivation of liberty served in the system of electronic monitoring is a form of the penalty of deprivation of liberty.[21] Obviously, it is an erroneous approach because Article 242 §1 CC concerns a person "deprived of liberty" and not a person "serving the penalty of deprivation of liberty". The error in the reasoning of the Supreme Court is also revealed in the following statement: "However, it does not seem that, apart from the broader scope of the concepts [electronic monitoring and the system of electronic monitoring – P.P.], the amendment [to PEC by the Act of 11 March 2016 – P.P.] changed the meaning in such a way that it excluded the recognition of the penalty of deprivation of liberty served at present in the system of electronic monitoring as a penalty that is absolute in nature, i.e. as 'deprivation of liberty' as laid down in Article 242 §1 CC". Unfortunately, two aspects of the penalty of deprivation of liberty were mixed: its (as a rule) absolute nature and physical isolation usually associated with this penalty. An absolute penalty of deprivation of liberty means in the legal language a penalty the execution of which has not been conditionally suspended. And one cannot deny that the penalty of deprivation of liberty in the system of electronic monitoring is absolute in nature in the indicated meaning. However, this does not mean that it is connected with the deprivation of liberty referred to in Article 242 §1 CC. All the same, it should be pointed out here that there are situations when a convict serves the penalty of deprivation of liberty and is really deprived of liberty. It occurs when he or she is temporarily permitted to leave prison without supervision (compare Article 242 §2 CC).[22] In such situations, although a convict is not deprived of liberty, he or she has obligations laid down in Article 140 PEC.[23]

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[21] One can read in the justification: "However, it should be emphasized that in the opposition to the above opinions [treating the penalty of deprivation of liberty in the system of electronic monitoring as a form of the penalty of limitation of liberty or a probation measure – P.P.], still in accordance with the former legal state, there is an opinion that the linguistic interpretation of Article 2 para. 1 Act on the execution of the penalty of deprivation of liberty outside prison in the system of electronic monitoring containing a legal definition of the system of electronic monitoring indicates that 'serving a penalty in the system of electronic monitoring is a type of service of the penalty of deprivation of liberty' (J. Róg, *Wykonywanie kary w systemie dozoru elektronicznego a prawo do zabezpieczenia społecznego*, Państwo i Prawo No. 2, 2012, p. 85)", and: "Attention should be drawn to the fact that in the judgement of 23 May 2014, III KK 16/14 (Lex No. 1469141), the Supreme Court recognised that serving the penalty of deprivation of liberty in the system of electronic monitoring is not an obstacle to assume that a perpetrator acted in the conditions of Article 64 §1 CC. It seems that the opinion may be recognised as an expression of uniform comprehension of the same penalty of deprivation of liberty but only in the different forms, and thus an indirect argument for the interpretation of the features of an offence of self-freeing, which was conducted by the Supreme Court". *Nota bene*, J. Róg quoted by the Supreme Court speaks in her article about the penalty of deprivation of liberty served in the system of electronic monitoring as a non-custodial measure (J. Róg, *Wykonywanie kary w systemie dozoru elektronicznego…*, p. 87).

[22] In accordance with Article 140 §4 PEC, the time when a convict stays outside prison based on permits referred to in §1 (it concerns awards listed in Article 138 §1(7) or (8)) or a permit referred to in Article 141a or in Article 165 §2), is not subtracted from the period of serving the penalty, unless a penitentiary judge rules otherwise in case of a convict's breach of trust.

[23] In case a convict makes use of the awards referred to in Article 138 §1(7) or (8) PEC or a permit referred to in Article 141a or in Article 165 §2 PEC, he or she is obliged to immediately appear at the Police station operating in the place of his or her residence at the time of permit

Re 2: The Court pointed out that: "In the context of previous considerations, it is also necessary to draw attention to a historic aspect. The Criminal Code of 1969 within the scope of offences against the justice system used two concepts: 'escape' and 'self-freeing'[24] (see E. Hansen, *Przestępstwa więźniów w okresie izolacji penitencjarnej*, Warsaw 1982, pp. 26–27). Against the background of the concept 'escape', the term 'self-freeing' has a broader semantic capacity and makes it possible to cover also such an activity (but not omission) that does not consist in 'breaking the guard's fetters'. One cannot fail to notice that the results of the presented interpretation may lead to questions whether minor failures to fulfil obligations resulting from electronic monitoring as the penalty of deprivation of liberty will also match the features of an offence of self-freeing". The Court referred to the distinction between "escape" and "self-freeing" made by E. Hansen based on the Criminal Code of 1969 (by the way, the author wrote about "absence without leave"). However, the difference between the concepts is not such as the Supreme Court indicates. According to E. Hansen, "escape" is connected with the intention to avoid serving a penalty for some reason (someone escapes "from something" or "to something").[25] An escape consists of three stages: the initial one (absence without leave), the next one (hiding) and the final one (finishing hiding).[26] On the other hand, absence without leave means that a person deprived of liberty departs from a place where he or she must stay without permission and against the given permission. The perpetrator's intention is to leave the place where he or she stays without permission and against the permission of a competent body.[27] In both cases, an escape and (self-freeing) absence without leave, a particular person deprived of liberty "breaks the guard's fetters"; the difference consists only in the perpetrator's intention and the period of being away from the guard.

Re 3: The Court indicated that: "Taking into consideration the systemic reasons, it is necessary to draw attention to the content of the provision of Article 244a §2 CC, which classifies an offence of preventing or hampering the electronic supervision of the ruled obligation connected with the penalty of a ban on taking part in mass events. The sanction laid down in this provision is the same as the sanction under Article 242 §1 CC. Thus, it seems that if the legislator decided to penalise the conduct consisting in avoiding electronic monitoring ruled in connection with a penal measure, it would be incomprehensible to assume that a similar conduct connected with avoiding the execution of the basic penalty of deprivation of liberty could be exempt from punishment". The statement made by the Supreme Court that if, in Article 244a §2 CC, the legislator penalised preventing and hampering the

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in order to confirm the place of stay (§1); a convict using permits referred to in §1 is obliged to report every instance of the change of place of stay at the Police station operating in the new place of his or her stay (§2); a prison director may oblige a convict using permits referred to in §1 to particular conduct, especially to stay in places determined in permits or to appear at the Police station more frequently (§3).

[24] By the way, the Criminal Code in force also uses both concepts.

[25] E. Hansen, *Przestępstwa więźniów w okresie izolacji penitencjarnej*, Warsaw 1982, pp. 27–28.

[26] *Ibid.*, p. 31.

[27] *Ibid.*, pp. 28 and 30; also see E. Hansen, *Samouwalnianie się skazanych pozbawionych wolności (Art. 256 k.k.)*, Nowe Prawo No. 4, 1978, p. 599.

electronic supervision of a perpetrator's obligation to stay in the place of permanent residence ruled in connection with the ban on entering mass events or the obligation to come to the Police station or a place indicated by the county, regional or city Police commander who has jurisdiction over the convict's place of residence during the mass event, it would not be understandable not to criminalise the conduct of avoiding to serve the basic penalty of deprivation of liberty in this form, becomes dangerously close to the reasoning inadmissible in substantive criminal law that if little is banned, much must be banned even more (*a minori ad maius*).[28] It cannot be an argument for the thesis made by the Supreme Court.

Re 4: The purpose-related interpretation makes the Supreme Court conclude that "the provision of Article 242 §1 CC protects the interest consisting in the proper functioning of the justice system; the interest is violated by a perpetrator by hampering the execution of parts of sentences concerning deprivation of liberty (compare the Supreme Court judgement of 5 October 2000, II KKN 31/00, Lex No. 50922). In other words, the proper execution of a court's sentence or a legal order issued by another state body is the direct object of protection. There is no doubt that the same object of protection is also typical of offences under Article 243 CC and under Article 244a §2 CC. It also fully concerns the protection of the execution of the penalty of deprivation of liberty served in the system of electronic monitoring". The Supreme Court is right to notice that the proper functioning of the justice system is the object of protection under Article 242 §1 CC. However, resorting to taking into consideration the protected interest for the interpretation of criminal law cannot disregard the statutory features of an offence and the indicated provision clearly refers to a person deprived of liberty. The protected object can only be important for the limitation of the scope of the concept of the "deprived of liberty",[29] and cannot influence the extension of the area of penalisation against the wording of a provision.

Re 5: The Supreme Court quoted the judgement of the European Court of Human Rights, where the concept of "deprivation of liberty" is broadly interpreted and may cover the penalty of deprivation of liberty served in the system of electronic monitoring. It should be noted, however, that there is a fundamental difference between Article 5 ECHR and Article 242 §1 CC. The former provision protects a man against unlawful deprivation of liberty by a state, while the latter lays down a penalty for self-freeing of a person who was deprived of liberty in accordance with the law. While in the former case a broad interpretation of "deprivation of liberty" is admissible because it does not harm an individual but is outright favourable to

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[28] See P. Hofmański, S. Zabłocki, *Elementy metodyki pracy sędziego w sprawach karnych*, Warsaw 2011, p. 239.

[29] In connection with that, some types of physical deprivation of liberty do not constitute deprivation of liberty in the meaning of Article 242 §1 CC because they are not related to the system of justice execution, e.g. preventive (order-related) detention by the Police in accordance with Article 15 para. 1(3) Act of 6 April 1990 on the Police (uniform text, Journal of Laws [Dz.U.] of 2017, item 2067, as amended) or administrative detention pursuant to Article 40 para. 1 Act of 26 October 1982 on upbringing in sobriety and preventing alcoholism (uniform text, Journal of Laws [Dz.U.] of 2016, item 487, as amended).

one (interpretation *pro homine*),[30] in the latter case, the broader understanding of the concept in question is adopted, the broader the scope of criminalisation and the bigger disadvantage for a perpetrator will occur. And thus, we return to the *nullum crimen sine lege stricta* principle.

CONCLUSIONS

Summing up, it is necessary to criticise the stand presented by the Supreme Court and discussed in the gloss. It seems that the reasons of the Supreme Court were articulated in the following sentence: "Although it does not result *expressis verbis* from the statutory provisions, the type of the penalty of deprivation of liberty served [in the system of electronic monitoring – P.P.] is, in fact, some kind of award for a convict. Thus, the Court asking a prejudicial question is right to notice that it should not result in impunity of a person self-freeing only because the penalty of deprivation of liberty has a little bit different formula than the 'classical' one and this formula results from generally more relative assessment of a convict by a court". Thus, the Supreme Court tried to find such interpretation of Article 242 §1 CC that would be just and would not award again someone who has already received something advantageous (serving the penalty outside prison). Such an assumption led, in my opinion, the Supreme Court to adopt extended interpretation of the provision in question. One can consider whether a penitentiary court's revocation of permission to serve a penalty in this form is a sufficient sanction for a convict who has evaded the penalty service in the system of electronic monitoring or whether the conduct should also be subject to criminal punishment. It is an open question but it is the legislator's task to take the decision and *in abstracto* analyse social harmfulness of this type of acts in the context of criminal law *ultima ratio.*

There is one more comment that is not important in case of the adoption of my stand; however, in case of the Supreme Court's stand is adopted, it has an impact on the determination of a convict's criminal liability. The possibility of attributing an offence under Article 242 §1 CC depends on a perpetrator's awareness of being deprived of liberty. It should be assumed that most people serving the penalty of deprivation of liberty in the system of electronic monitoring believe their state is the limitation of liberty at the most. This belief is strengthened by information from

[30] This interpretation is for the implementation of human rights, see C. Mik, *Metodologia interpretacji traktatów z dziedziny ochrony praw człowieka*, Toruński Rocznik Praw Człowieka i Pokoju No. 1, 1992, Toruń 1993, p. 19. In this context, it is necessary to refer to the judgement of the Supreme Administrative Court of 3 December 2009, II FSK 917/08 (Legalis), in which it is indicated that "In accordance with Article 31 para. 1 Vienna Convention on the Law of Treaties of 26 May 1969 (Journal of Laws [Dz.U.] of 1990, No. 74, item 439), a treaty should be interpreted in good faith, in compliance with common meaning that should be attributed to words used in their context and in the light of its subject matter and purpose. Thus, unlike in the system of an act of domestic law, the directives of the interpretation of international agreements require that always in the process of interpretation not only the linguistic interpretation be taken into account but also functional (teleological) interpretation, even in case the provisions of an agreement are linguistically clear".

the official sources. One can read on the website of System of Electronic Monitoring (*System Dozoru Elektronicznego*) that electronic monitoring is "the most modern *non-custodial* [emphasis added by P.P.] system of serving the penalty of deprivation of liberty. It supervises the fulfilment of obligations imposed on a convict by a court with the use of electronic equipment and makes it possible to serve the penalty of deprivation of liberty outside prison".[31] On the websites of the District Court in Białystok and the Regional Court in Zielona Góra, one can read that "Electronic monitoring lets a convict serve the penalty *in non-custodial conditions* [emphasis added by P.P.] in the place of residence with the use of electronic systems limiting his or her movement freedom and the change of the place of stay. (…) The system of electronic monitoring makes it possible, regardless of some restrictions, to live a relatively normal personal life, especially to keep in touch with the family, learn and work".[32] And the last but the strongest argument comes from the legislator. An annex to the regulation of the Minister of Justice of 10 October 2016 based on Article 43k §8 PEC[33] concerning a specimen of written information about a convict's rights and obligations connected with electronic monitoring as well as the consequences of evading those obligations[34] in the part entitled "Consequences of evading obligations by a convict", with regard to the issue of criminal liability, quotes Article 244a §2 and Article 244b CC. According to the legislator, a person who evades serving the penalty of deprivation of liberty in the system of electronic monitoring does not match the features of an offence under Article 242 §1 CC.

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[31] www.dozorelektroniczny.gov.pl/?page_id=18 [accessed on 18/12/2017].

[32] http://bialystok.so.gov.pl/pomoc-prawna/system-dozoru-elektronicznego.html; http://www.zielona-gora.so.gov.pl/?mod=188 [accessed on 18/12/2017].

[33] In accordance with the provision, the Minister of Justice shall determine, in the form of regulation, a specimen of written information referred to in §4, taking into consideration the necessity to understand this information also by people not using the assistance of a counsel for the defence. Article 43k §4 PEC stipulates that after the announcement or delivery of a decision on starting electronic monitoring, or a decision on granting permission to serve the penalty of deprivation of liberty in the system of electronic monitoring, a convict should be delivered written information on his or her rights and obligations connected with electronic monitoring as well as about consequences of evading those obligations.

[34] Journal of Laws [Dz.U.] of 2016, item 1692.

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GLOSS ON THE SUPREME COURT RULING OF 19 JANUARY 2017, I KZP 11/16 (WITH REFERENCE TO THE SUPREME COURT JUDGEMENT OF 21 JUNE 2017, I KZP 3/17)

Summary

The gloss discusses the question whether evading execution of the punishment of deprivation of liberty in the system of electronic monitoring by a convict can be treated as the offence of self-freeing from isolation referred to in Article 242 §1 of the Criminal Code. The author disagrees with the opinion of the Supreme Court that such conduct matches the statutory features of self-freeing.

Keywords: offence of self-freeing (Article 242 §1 CC), system of electronic monitoring, penalty of deprivation of liberty, lawful deprivation of liberty

GLOSA DO POSTANOWIENIA SĄDU NAJWYŻSZEGO Z DNIA 19 STYCZNIA 2017 R., I KZP 11/16 (NA TLE WYROKU SĄDU NAJWYŻSZEGO Z DNIA 21 CZERWCA 2017 R., I KZP 3/17)

Streszczenie

Glosa dotyczy kwestii możliwości zakwalifikowania uchylenia się skazanego od wykonywania kary pozbawienia wolności w systemie dozoru elektronicznego jako przestępstwa samouwolnienia określonego w art. 242 § 1 k.k. Autor nie zgadza się z poglądem Sądu Najwyższego, że wskazane zachowanie wyczerpuje znamiona przestępstwa samouwolnienia.

Słowa kluczowe: przestępstwo samouwolnienia (art. 242 § 1 k.k.), system dozoru elektronicznego, kara pozbawienia wolności, legalne pozbawienie wolności

Cytuj jako:

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