ISSUE OF "DANGEROUS" PERPETRATORS IN RESEARCH AND CASE LAW

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DOI: 10.26399/iusnovum.v12.4.2018.34/m.rogacka-rzewnicka

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

Cytuj jako:

Rogacka-Rzewnicka M., *Issue of "dangerous" perpetrators in research and case law [Problematyka sprawców „niebezpiecznych" w badaniach i orzecznictwie]*, „Ius Novum" 2018 (12) nr 4, s. 47–61. DOI:10.26399/iusnovum.v12.4.2018.34/m.rogacka-rzewnicka

Cite as:

Rogacka-Rzewnicka, M. (2018) 'Issue of "dangerous" perpetrators in research and case law'. *Ius Novum* (Vol. 12) 4, 47–61. DOI:10.26399/iusnovum.v12.4.2018.34/m.rogacka-rzewnicka