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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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[88] M. Dudzik, *Prawo karne wobec narażenia życia*…, p. 220.

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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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