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CUMULATIVE LEGAL CLASSIFICATION AND THE STATUTE OF LIMITATIONS IN CRIMINAL LAW

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1. INTRODUCTION

The issue of concurrence of regulations and its consequences is often subject of study, especially in the doctrine of criminal law. A few monographs and many scientific articles have been devoted to the issue.[1] However, what is most often focused on is the essence of concurrence of regulations, its types and consequences for the grounds for sentencing and the type of penalty. The influence of a perpetrator's age on the cumulative legal classification and the relationship between the mode of prosecution of offences described in concurring provisions and the multiplication of grounds for sentencing are also considered. But the issue of the relationship between the cumulative legal classification and the statute of limitations concerning an offence described in one of the concurring provisions has not been so far the subject of a broader scientific analysis. It concerns a situation in which the same act committed by a perpetrator is classified cumulatively based on at least two provisions applying different sanctions, but in case of an offence carrying a more lenient sanction the penalisation period laid down in Article 101 of the Criminal Code (henceforth CC) has expired. A question is raised whether the provision should be eliminated from the grounds for sentencing or whether the

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[1] Compare, e.g. P. Kardas, *Zbieg przepisów ustawy w prawie karnym. Analiza teoretyczna*, Warsaw 2011; W. Wolter, *Kumulatywny zbieg przepisów ustawy*, Warsaw 1960; J. Majewski (ed.), *Zbieg przepisów oraz zbieg przestępstwa w polskim prawie karnym. Materiały II Bielańskiego Kolokwium Karnistycznego*, Toruń 2006; A. Spotowski, *Pomijalny (pozorny) zbieg przepisów ustawy i przestępstw*, Warsaw 1976; A. Zoll, *Zbieg przepisów ustawy w polskim prawie karnym*, Annales UMCS, Sectio G, Ius Vol. 60, No. 2, 2013, pp. 281–295 and the literature referred to therein.

statute of limitations for an offence classified cumulatively should be applied based on the sanction laid down in the most severe provision constituting grounds for penalisation in accordance with Article 11 §3 CC. The opinions of the representatives of jurisprudence can sometimes be found in commentaries on Article 11 §2 CC but they are usually limited to an indication that the problem is noticed in legal practice and to the approval of the opinions expressed by the judicature without a deepened substantiation of a particular solution. The practical values of the above-mentioned issue and the lack of its broader discussion in jurisprudence as well as the way in which the Supreme Court solved the problem in its resolution of 20 September 2018[2] inspire a closer examination of the issue.

2. CUMULATIVE CLASSIFICATION AND THE STATUTE OF LIMITATIONS IN THE JUDICATURE AND DOCTRINE OF CRIMINAL LAW

The judicature does not solve the issue signalled in the title and the introduction in a uniform way. At least two extreme views on the subject may be indicated.

Firstly, it is assumed that in case the punishment for an act that is part of an offence classified cumulatively and described in a provision imposing a more lenient penalty is barred under the statute of limitations, it is necessary to eliminate this provision from the grounds for sentencing. This is mainly the opinion presented in appellate courts' decisions. In accordance with the systemic interpretation, it is emphasised that in case of the cumulative classification based on Article 11 §2 CC, it is necessary to take into account the rules laid down in Articles 101 and 102 CC, which must lead to elimination of a provision determining the type of offence under the statute of limitations from the grounds for sentencing.[3] At the same time, it is pointed out that in the case presented, it is not well grounded to eliminate an "act" specified in the provision imposing a more lenient penalty that is barred under the statute of limitations and discontinue proceedings in accordance with Article 17 §1(6) of the Criminal Procedure Code (henceforth CPC). In such a case, there are two contradictory decisions concerning two different "fragments" of the same act (discontinuation of proceedings and sentencing). It must be emphasised, indeed, that the cumulative legal classification resulting from the real concurrence of statutory provisions takes place only when a perpetrator commits one act that must be subject to one uniform sentence. Only a modification of legal classification is admissible. In the presented case, recognition of a new type of offence classified under a few provisions and having the same period for penalty imposition under the statute of limitations determined by the most severe of the concurring provisions would lead to sentencing a perpetrator for the conduct that could not be punished if it occurred as an act classified separately. It is assumed that the elements

[2] I KZP 7/18, www.sn.pl.

[3] Thus, judgment of the Appellate Court in Białystok of 31 January 2013, II AKa 254/12, Legalis No. 715070.

decisive for an act unity and its cumulative classification cannot frustrate negative procedural conditions concerning its particular fragments. Due to the fact that a negative procedural condition under Article 17 §1(6) CPC is substantive in nature, it must influence the form of cumulative classification. Therefore, it is necessary to eliminate such regulations from the grounds for sentencing.[4] It is sometimes directly emphasised that if the same act matches the features laid down in at least two concurring provisions (based on the cumulative concurrence), but "one of the provisions is subject to the statute of limitations, in the light of Article 17 §1(6) CPC the cumulative classification is not admissible".[5] A similar solution is approved of in case of other circumstances excluding prosecution, such as a lack of a complaint filed by an authorised prosecutor or a motion to prosecute lodged by an authorised person, or abolition.[6]

Secondly, it is also necessary to indicate a contradictory opinion presented in case law in accordance with which, in case of the above-presented situation, the lapse of the period under the statute of limitations concerning a certain "fragment" of an act classified cumulatively does not influence the form of legal classification. This stand dominates in the Supreme Court judgments. In order to substantiate this solution, it is argued that it is not important how many features laid down in different provisions are matched by one act because in such a case this act constitutes only one offence. This means that the statute of limitations is applied to an act as a whole, although there are different limitation periods for different provisions. As a result, the period of punishment imposition barred by the statute of limitations is determined based on the most severe provision that constitutes the grounds for punishment (Article 11 §3 CC).[7] On another occasion, the Supreme Court clearly stated that since one prohibited act constitutes one offence, it is subject to one limitation period and there are no normative grounds for determining different limitation periods for particular fragments of this act. In case of the cumulative legal classification, it is necessary to determine what punishment is carried by an offence classified this way. As the issue of penalty imposition for such an act is unambiguously determined under Article 11 §3 CC laying down that a penalty must be imposed based on the most severe provision, it is necessary to assume that the limitation period determined in this provision is applicable and not the provisions stipulating a more lenient punishment. In case of the cumulative legal classification, we deal with only one act, thus only one limitation period can be considered. However, in the described situation, one offence is committed, which

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[4] See the judgment of the Appellate Court in Wrocław of 6 May 2015, II AKa 88/15, OSAWr 2015, No. 3, item 328; also see W. Daszkiewicz, *Glosa do wyroku SN z 10 kwietnia 1977 r., sygn. RW 116/77*, Nowe Prawo No. 6, 1978, p. 994; A. Wąsek, *Kodeks karny. Komentarz*, Vol. 1, Gdańsk 1999, p. 171.

[5] Compare the judgment of the Appellate Court in Wrocław of 19 June 2001, II AKa 218/01, OSA 2001, No. 10, item 63.

[6] See the judgment of the Appellate Court in Wrocław of 15 October 2015, II AKa 245/15, Legalis No. 1360975.

[7] Compare the Supreme Court ruling of 30 October 2014, I KZP 19/14, OSNKW 2015, No. 1, item 1; the Supreme Court ruling of 28 May 2015, II KK 131/15, KZS 2015, No. 9, item 9.

is subject to cumulative assessment resulting from the concurrence of norms.[8] The assumption that particular fragments of an act classified cumulatively must be assessed separately from the point of view of barring punishment under the statute of limitations would mean a division of one act into a few ones.[9] Moreover, it is raised that it is not the legal classification but an act committed by a perpetrator that is subject to the statute of limitations. Therefore, in case of the cumulative classification of an offence, it is necessary to assess its prospects for punishment from the point of view of the act unity.[10] Thus, the instrument of the statute of limitations refers to the integral entirety of an act in spite of the fact that the limitation periods applicable to particular types of offences within the cumulative legal classification are different.[11] The issue was also considered in the context of a continuous act. The Supreme Court judged that particular types of conduct characterising a continuous act to which the cumulative legal classification under Article 11 §2 CC is applied, even if it is possible to separate them in a natural way and they fully match the features of particular prohibited acts, cannot be analysed in the context of limitation periods separate from the content of Articles 11 §3 and 101 CC. As a result, punishment for the entire offence, not just its particular components, is barred under the statute of limitations and the limitation period for an offence classified cumulatively should be applied based on the most severe provision.[12] It is worth adding that in the context of the above-quoted standpoint of the judicature, a penalty is an indicator of the limitation period of its application and in case of the cumulative legal classification, it is a penalty laid down in the most severe provision. Thus, it is one that determines the length of the period under the statute of limitations.[13]

Appellate courts' judgments also express the above-quoted opinion that the limitation period barring punishment for an offence classified cumulatively results from the most severe provisions the features of which a perpetrator has matched. It is also expressed, e.g. in relation to a continuous act, in which case it is stated that if it is composed of conduct that may match separate features of a prohibited act, including those within the framework of a continuous act referred to in Article 12 CC with a simultaneous application of the cumulative legal classification, it will mean that the limitation period for the entire continuous act is to be determined by the limitation period appropriate for the type of act carrying the most severe penalty and constituting grounds for the penalty imposition at the same time. The above-presented opinion results from the way in which a continuous act as a single prohibited act is treated and to which the construction laid down in Article 11 §2 CC is applied. This makes the use of Article 11 §3 CC necessary, which determines the term when punishment is barred under the statute of limitations.

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[8] Thus, W. Wolter, *Kumulatywny zbieg przepisów…*, pp. 48–49.

[9] Compare the Supreme Court judgment of 14 January 2010, V KK 235/09, OSNKW 2010, No. 6, item 50.

[10] See the Supreme Court ruling of 22 March 2016, V KK 345/15, Legalis No. 1430515.

[11] Thus, the Supreme Court ruling of 19 October 2016, IV KK 333/16, Legalis No. 1537680.

[12] See the Supreme Court judgment of 23 November 2016, III KK 225/16, OSNKW 2017, No. 4, item 18; also compare the Supreme Court judgment of 29 October 2015, SDI 42/15, Legalis No. 1364797.

[13] See the Supreme Court ruling of 29 June 2017, IV KK 203/17, Legalis No. 1682039.

As it is emphasised, in the context of the limitation period for the imposition of punishment for an offence classified cumulatively, one cannot depart from the content of Article 11 §3 CC. There are no grounds for determining separate limitation periods for particular fragments of an act classified cumulatively.[14] Moreover, it is raised in appellate courts' judgments that due to the cumulative legal classification, particular provisions that it is composed of lose their independence. An offence determined this way carries a penalty laid down in the most severe provision and it is the indicator of the limitation period.[15] It is also worth pointing out that the cumulative classification results in a "new" type of an offence carrying a penalty laid down in the most severe provision, which determines the limitation period.[16]

The Supreme Court solved the dilemma connected with the two solutions to the problem discussed by issuing a resolution of 20 September 2018, where it states that in case of an act matching the features of two or more provisions of the Criminal Code and subject to cumulative legal classification (Article 11 §2 CC), the term of barring punishment under the statute of limitations should be determined in accordance with Article 101 CC, based on the size of punishment carried by an offence in accordance with Article 11 §3 CC or other conditions laid down in the provisions concerning the statute of limitations, and it is applicable to the whole offence classified cumulatively.[17] In the justification for the resolution, the Supreme Court first of all referred to the structure of an offence and indicated that the application of Article 11 §2 CC results in the specification of a new type of an offence. The Supreme Court highlighted that in case of the cumulative legal classification, it is necessary to examine "whether, in relation to every fragment of conduct distinguished with the use of the sets of features of concurring prohibited acts, in order to perform a legal assessment of the same act, there are also other elements that compose the structure of an offence". If, in relation to a fragment, there are e.g. grounds for excluding guilt (such as a perpetrator's age), that fragment should be eliminated in the cumulative classification. The Supreme Court noticed, however, that there are no grounds for identical treatment of the statute of limitations, which is not part of the structure of an offence. In order to leave all the concurring provisions in the grounds for sentencing, there must be conditions for criminal liability resulting from the structure of an offence related to each fragment of an act described cumulatively. In the further part of the justification, it is emphasised that if, in a particular case, there are not all conditions met for punishment for the fragments of an act classified cumulatively, i.e. not all the conditions for the application of a sanctioning norm,

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[14] Compare the judgment of the Appellate Court in Wrocław of 19 February 2015, II AKa 13/15, Legalis No. 1213468.

[15] See the judgment of the Appellate Court in Katowice of 2 August 2013, II AKa 480/12, KZS 2013, No. 4, item 15; the judgment of the Appellate Court in Wrocław of 22 December 2016, II AKa 337/16, Legalis No. 1576341; the judgment of the Appellate Court in Wrocław of 25 February 2016, II AKa 331/15, Legalis No. 1443569; the judgment of the Appellate Court in Katowice of 2 June 2016, II AKa 141/16, OSAKat 2016, No. 3, item 4; the judgment of the Appellate Court in Katowice of 22 June 2017, II AKa 150/17, Legalis No. 1658164.

[16] Compare the judgment of the Appellate Court in Katowice of 24 May 2013, II AKa 563/12, KZS 2013, No. 10, item 63.

[17] I KZP 7/18, www.sn.pl.

then there are no grounds for creating the cumulative concurrence of statutory provisions. As a result, the Supreme Court indicated in the justification that "it is necessary to recognise the stand as right but only in the part in accordance with which the lapse of the limitation period appropriate for the given type of offence, when the provision of the criminal statute containing its features remains in the cumulative legal classification with other provisions of the criminal statute, does not exclude its application in the legal classification of an act imputed to a perpetrator".

Similarly to case law, the above-discussed legal issue is not treated in a uniform way in the criminal law doctrine.

A. Wąsek is critical of the possibility of referring to a provision determining the type of offence prosecuted as a result of private charge in the legal classification not only because the prosecutor does not initiate a case *ex officio* but also when punishment is barred by the statute of limitations.[18] The author also refers to W. Daszkiewicz's opinion expressed still based on the Criminal Code of 1969, who states that in such a case the argument for elimination of the provision on an offence prosecuted as a result of a private charge is the substantive nature of the statute of limitations. As the statute of limitations bars punishment, its natural consequence is the elimination of a provision on an offence prosecuted as a result of a private charge if the term for that has expired.[19]

However, it is possible to indicate authors who interpret the issue in a different way. M. Gałązka, following some judgments of appellate courts as well as the Supreme Court, emphasises that barring punishment for an offence classified cumulatively based on the statute of limitations is applicable to the whole act and not just to particular provisions composing this classification. The length of the limitation period depends on the sanction laid down by the most severe provision, which in accordance with Article 11 §3 CC constitutes grounds for the imposition of a penalty for an offence classified cumulatively. The author does not provide any new arguments for this solution apart from those formulated by the judicature. However, she notices that there is a discrepancy in case law concerning the issue of admissibility of referring to legal classification of a provision that would decide on the lapse of the limitation period if it were an independent legal classification of an act.[20]

Probably, the only author who discusses the issue more broadly within the scope of the present analysis is M. Kulik, who asks a direct question whether in case of the cumulative concurrence in legal classification it is necessary to eliminate a provision specifying an offence for which the limitation period has lapsed. Making reference to literature, the author emphasises the essence of the cumulative concurrence, which is perceived as an instrument making it possible to describe the full content of a criminal act constituting a single offence. As a result of its application, as he continues to emphasise, "the assessment of a perpetrator's conduct is not multiplied (as it is in case of the ideal concurrence) but is a single, joint one. This means that

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[18] A. Wąsek, *Kodeks karny…*, p. 171.

[19] W. Daszkiewicz, *Glosa do wyroku SN z 10 kwietnia 1977 r., sygn. RW 116/77…*, p. 994.

[20] M. Gałązka, [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warsaw 2018, p. 149.

in such a situation we do not deal with a few types but one. It is a specific type. In a particular case, a new type of a prohibited act is created for the needs of a single case, the scope of statutory features of which is co-determined by the concurring provisions".[21] At the same time, the author points out, following P. Kardas's standpoint,[22] that it has nothing to do with any kind of legislative activity of a court but with "decoding one norm sanctioned by a few statutory provisions".[23] Next, he states that in the presented situation, we deal with a prohibited act with its own set of statutory features determined by concurring provisions and carrying its own statutory penalty resulting from the most severe of the concurring provisions. He directly adds that it is what determines the limitation term. It does it with respect to the entire type, which is composed of the features originally belonging to prohibited acts being in cumulative concurrence of provisions, those that specify such prohibited acts as well as those with a short limitation period.[24] In this author's opinion, a different assessment of the issue must mean that we deal with many offences and the statute of limitations barring punishment not concerning the offence but the legal classification.[25]

3. AUTHOR'S STAND ON THE ISSUE

It seems that the answer to the question whether a provision describing an offence for which the limitation period has lapsed remains in the cumulative classification of an act should be preceded by the solution of another problem, i.e. whether the cumulative classification results in the creation of a new type of an offence carrying a penalty laid down in the most severe provision. The question asked in this way should be given a definitely negative answer. It must be reminded that the types of prohibited acts are not determined by practice but by the legislator. It is a statute that, following the *nullum crimen sine lege* principle, determines the features of a prohibited act. Moreover, the quoted principle results in a different rule, i.e. *numerus clausus* of the types of prohibited acts and a ban on developing them with the use of legal constructions laid down in the criminal statute.[26] If it were assumed that thanks to the cumulative classification a new type of a prohibited act is created, it would be necessary to state that the catalogue of prohibited acts is indeed open.

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[21] M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warsaw 2014, p. 232.

[22] P. Kardas, *Zbieg przepisów ustawy…*, pp. 233–234.

[23] M. Kulik, *Przedawnienie karalności…*, p. 232.

[24] *Ibid*., p. 233.

[25] *Ibid*.

[26] As a prohibited act can only be determined in statute, it means that the catalogue of such acts is limited to those that are clearly specified in such a legal act. For more on the issue, see, e.g. W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 94; R. Dębski, *Zasada nullum crimen sine lege i postulat wyłączności ustawy*, Acta Universitatis Lodziensis, Folia Iuridica No. 50, 1992, p. 100; T. Bojarski, *Typizacja przestępstw i zasada nullum crimen sine lege (wybrane zagadnienia)*, Annales UMCS, Sectio G, Vol. 24, 1977, p. 147; J. Długosz, *Ustawowa wyłączność i określoność w prawie karnym*, Warsaw 2016, p. 146.

There are many configurations of overlapping features laid down in statute because of a big number of types and it is not possible to classify them all as the practice is richer than the statutory law and often occurs faster. An open catalogue of prohibited acts cannot be in agreement with the *nullum crimen sine lege* principle. Thus, it is necessary to agree with P. Kardas who states that "the directive expressed in the provision constituting the construction of cumulative classification does not lead to awarding law enforcement bodies legislative functions in any case".[27] A law enforcement body does not develop a new type of an offence by applying the cumulative legal classification but performs the assessment of one act through the prism of a few provisions, to which it is obliged pursuant to the content of Article 11 §2 CC. However, it is difficult to agree with another opinion of the same author assuming that the application of the legal construction discussed results in "the creation of a new type of a prohibited act composed of the elements expressed in the features of concurring provisions of the Criminal Code".[28] The function of the provision of Article 11 §2 CC is not to develop a new type of a prohibited act but to indicate regulations that will constitute grounds for sentencing. In other words, the provision determines the regulation (all concurring provisions) as a point of reference in the assessment of one act.

What confirms the fact that the provision of Article 11 §2 CC does not constitute grounds for creating a new type of a prohibited act is its style. Indeed, the regulation expresses a rule that in case of real concurrence of statutory provisions, a court must sentence a perpetrator for the commission of one offence in accordance with all concurring provisions. All the concurring provisions become grounds for sentencing. In such a case, no new type developed ad hoc is attributed to a perpetrator as a result of circumstances in which he/she has acted. This kind of statement cannot be interpreted as sentencing for a new prohibited act classified in concurring provisions. In fact, provisions classifying various prohibited acts concur. The legislator only instructs to perform the assessment of an act committed from the perspective of all concurring provisions.

One also cannot agree with the thesis quoted above that the concurrence of provisions results in the development of a new type of a prohibited act, which carries a penalty laid down in the most severe provision. This opinion is in conflict with the function of Article 11 §3 CC, which does not determine a penalty for a new type but provides an interpretational directive addressed only to a court and indicating which of the concurring provisions should constitute grounds for the imposition of a penalty. The literal content of Article 11 §3 CC is for such interpretation because it does not mean that a penalty laid down in the most severe provision is a statutory one for the new type, that an offence with such a construction carries a penalty laid down in the most severe provision, but only that it constitutes grounds for the imposition of a penalty.

In fact, the function of the provision of Article 11 §2 CC is to fully express the criminal content of an act, its entire unlawfulness, in the course of its legal

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[27] P. Kardas, *Zbieg przepisów ustawy…*, pp. 233–234.
[28] *Ibid.*

classification. It might be an argument against elimination of a provision concerning an offence for which the limitation period has lapsed from the grounds for sentencing. However, it is not a rule without exceptions. It should be assumed that in case of an act committed by a perpetrator under the age of 17 but over the age of 15, classified cumulatively in accordance with one the provisions referred to in Article 10 §2 CC and a provision from outside of this catalogue, the rule resulting from Article 10 §1 CC requires that the latest provision should be eliminated from the grounds for sentencing.[29] In case of concurrence of provisions concerning prosecution *ex officio* and that based on a motion, the legal classification of such an act taking into account the provision concerning prosecution based on a motion depends on whether such a motion has been filed.[30] A lack of a motion means it must be ignored in the grounds for sentencing. Finally, in case of concurrence of a provision concerning an offence prosecuted *ex officio* with that based on private charges, considering both provisions within one legal classification is admissible only when a prosecutor decides to prosecute the entire offence *ex officio* in order to protect social interests (Article 60 §1 CPC).[31] If a prosecutor does not make such a decision, the legal classification should not take into account the provision concerning an offence prosecuted based on a private charge. There is still another exception to the principle of expressing the entire unlawfulness in the cumulative legal classification. It is a situation in which a perpetrator commits what is called aggravated attempt but voluntarily prevents the consequence belonging to the features of a substantive offence initially intended. It can be exemplified by a case in which a perpetrator shoots a victim in order to kill but realises what happens, calls emergency services and saves the victim's life, although does not prevent a serious damage to the victim's health in the form of loss of his/her lung. In such a case, in order to express the whole criminal content of the act, it would be necessary to consider Article 148 §1 CC in conjunction with Articles 13 §1 and 156 §1(2) CC in conjunction with Article 11 §2 CC. The features of the indicated offences are matched in this case. However, due to the content of Article 15 §1 CC, which bans prosecution for an attempt to kill, the provisions of Article 13 §1 CC in conjunction with Article 148 §1 CC must be ignored because this conduct is not subject to punishment.

The presented situations indicate exceptions to the rule concerning demonstration of the entire unlawfulness in the legal classification of an act. Those exceptions are necessary because of the need to respect the principles of criminal liability, modes of prosecution, and first of all, the will of the aggrieved concerning prosecution of some of them. If those exceptions to the rule concerning demonstration of the entire unlawfulness in the legal classification of an act are admissible in order to

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[29] Compare the judgment of the Appellate Court in Wrocław of 15 October 2015, II AKa 245/15, Legalis No. 1360975; the judgment of the Appellate Court in Katowice of 20 November 2014, II AKa 313/14, LEX No. 1665550.

[30] See A. Zoll, [in:] A. Zoll, W. Wróbel (eds), *Kodeks karny. Część ogólna*, Vol. 1: *Komentarz do art. 1–52*, Warsaw 2016, p. 204; also compare the Supreme Court judgment of 14 June 2002, II KKN 267/01, Legalis No. 59429; the Supreme Court judgment of 15 October 2003, IV KK 299/03, Legalis No. 98122.

[31] M. Czekaj, *Ingerencja prokuratura w sprawach o przestępstwa prywatnoskargowe*, Prokuratura i Prawo No. 7–8, 1999, p. 46.

maintain a coherent existence of various instruments within the criminal law, then, for harmonious co-existence of the cumulative legal classification and the statute of limitations, it is necessary to ignore the classification of a provision determining a type of an act for which the limitation period has lapsed. And it does not mean that one act is divided into several ones because only one act is still subject to assessment. In such a case, the assumption that a division of one act takes place constitutes confusion of the ontic foundation of an assessment (act) with the point of reference for that assessment, i.e. concurring provisions. The act remains the same, only its legal assessment is modified.

Exceptions to the rule of expressing the entire unlawfulness in the legal classification of an act and, in particular, the necessity of taking into account also circumstances annulling punishment, which occur in criminal law, only confirm that a provision concerning an offence for which the limitation period has lapsed must be eliminated from the legal classification of the act. It is hard to resist an impression that reference made to such a provision in the grounds for sentencing is in conflict with the principle resulting from Article 101 CC, which stipulates that a perpetrator cannot be prosecuted for a given conduct in case the term indicated thereof has lapsed. The maintenance of such a regulation in the legal classification, in fact, also means prosecution of a perpetrator for implementation of the features of an act for which the limitation period has lapsed. If one considers the fact that barring punishment by the statute of limitations is a circumstance that excludes the punishment for an offence, then, like in the case of a provision in Article 15 §1 CC, it becomes necessary to modify the legal classification of the act in the way taking into account the consequences of both instruments. Sentencing a perpetrator also based on the provision concerning an offence for which the limitation period has lapsed violates the guarantee function of criminal law and, first of all, the statute of limitations. Although a perpetrator holds no expectation that the statute of limitations will bar punishment for an act he/she has committed, if the period for that lapses, the scope of criminal liability changes to one that can be executed. The change takes place *ipso jure*, regardless of the aggrieved or law enforcement bodies' will; even regardless of a perpetrator's will.

What also constitutes an argument for ignoring a provision specifying an offence for which punishment is barred by the statute of limitations in the cumulative classification is also a procedural consequence of the instrument and the negative procedural condition in the form of a lack of complaint of an authorised prosecutor in case of an offence prosecuted based on a private charge. There is no doubt that in both cases there is an obstacle to conducting a trial, although they are determined in two different sub-sections in Article 17 §1 CPC. However, it must be emphasised that a lack of private complaint as well as punishment barred by the statute of limitations do not annul unlawfulness of an act committed by a perpetrator but obstruct the proceeding of a trial and thus, a perpetrator's criminal liability. In both cases there are obstacles to impose a penalty. As it has been emphasised above, if provisions specifying offences prosecuted *ex officio* and based on a private charge concur, a lack of a prosecutor's decision in accordance with Article 60 §1 CPC results in the necessity of eliminating the latter from the grounds for sentencing. The lapse

of the limitation period for a fragment of an act classified cumulatively must have the same consequence.

The supporters of the opinion that the provision for which the limitation period has lapsed should not be eliminated from the cumulative classification argue that the whole offence is subject to the statute of limitations (in accordance with Article 101 §1 CC) and not just its legal classification, and in such a case an act is subject to entire and not fragmentary assessment, which could decide that the term of punishment limitation is determined by a provision laying down the most severe penalty and constituting, in accordance with Article 11 §3 CC, grounds for the imposition of a penalty. It is hard to resist an impression that in such a case the legal assessment of an act from the point of view of punishment barred by the statute of limitations is fragmentary because it is limited to a provision laying down the most severe penalty. Within the scope of the statute of limitations, in this case, we also refer to a fragment of an act and not an offence as a whole, i.e. only to the provision determining the most severe penalty. Referring the statute of limitations to the whole offence classified cumulatively requires that the legal classification should be modified depending on the lapse of the limitation period in relation to fragments described in the provisions laying down more lenient penalties.

Finally, it is worth noting one more issue. Article 8 §1 of the Fiscal Penal Code (henceforth FPC) determines the ideal concurrence, inter alia, of a fiscal offence and a common crime. It results in the prosecution of a perpetrator for two offences, although he/she committed only one act because each of the provisions is applicable, i.e. a provision of common criminal law and a provision of fiscal penal law. In such a situation, we actually deal with one act but the legislator makes us accept a fictitious occurrence of two prohibited acts. One cannot rule out that in such a case the limitation period will be different for a common crime and for a fiscal offence. Regardless of one act in the ontic sense, it is not possible to apply one limitation period because the Criminal Code regulates it independently (Article 101 CC) of the Fiscal Penal Code (Article 44 §1 FPC). It can be exemplified by a situation in which a perpetrator does not keep books (Article 60 §1 FPC) and this way causes financial loss (Article 303 §2 CC). It is emphasised in the doctrine of fiscal penal law that in such a situation, there is the ideal concurrence of a fiscal offence with a common crime.[32] A fiscal offence carries a penalty of 240 daily rates, which means that its punishment is barred after five years (Article 44 §1(1) FPC). A common crime carries a penalty of imprisonment for three months to five years and its punishment is barred after ten years (Article 101 §1(3) CC). If the shorter period lapses, it becomes obvious that the provision specifying the act being subject to the statute of limitations in that shorter period cannot be applied. In the presented example, there will be no liability for a fiscal offence. A similar situation will take place in case of the ideal concurrence of a fiscal misdemeanour and a common crime as well as a common misdemeanour and a common crime (Article 10 §1 CC). In such situations, the limitation period lapses separately for a misdemeanour and a crime, and the lapse of the shorter one

[32] Thus, e.g. I. Zgoliński, [in:] I. Zgoliński (ed.), *Kodeks karny skarbowy. Komentarz*, Warsaw 2018, p. 408.

results in a lack of possibility of prosecuting a perpetrator for an act that is subject to the shorter limitation period. Thus, the legislator knows situations in which two limitation periods are applied in relation to actually the same act. The similarity between the cumulative concurrence and the ideal concurrence consists in their ontic foundation, which is an act. The difference results only from the adoption of a particular normative solution, which requires multiplication of assessment without multiplication of prohibited acts, or multiplication of assessment equivalent to multiplication of prohibited acts. In case of the ideal concurrence, sentencing for two separate offences (misdemeanours) constitutes a certain fiction accepted by the legislator and resulting from the separation of common criminal law and fiscal penal law, and law on misdemeanours. Therefore, it seems that we would risk accusation of violating the systemic coherence if, in case of the ideal concurrence of prohibited acts, we assumed a necessity of taking into account the lapse of the limitation period for one of them and, in case of the cumulative legal classification, also based on one committed act, we did not. It should be assumed that because of the fact that the real basis for both instruments is the same (one act), it is necessary to avoid application of a provision specifying an offence for which the limitation period has lapsed. Exclusion of the application of such a provision will take place in the form of discontinuation of proceedings concerning one of the acts in case of the ideal concurrence, and in the form of modification in case of the cumulative classification.

The considerations presented so far show that the Polish legal system knows situations in which, regardless of one act classified cumulatively under at least two statutory provisions, some of them are eliminated for various reasons. The elimination of liability for the implementation of the features of a prohibited act in such a case is forced by the need to adopt a systemic approach and maintain the coherence of different legal constructions. The conditions are fulfilled by a solution in accordance with which, in case of the lapse of the limitation period for an offence specified cumulatively in a provision concurring with other regulations, it is necessary to ignore the former one.

Obviously, one must be aware of the fact that such a solution, although in the dogmatic sense it matches the cumulative legal classification (Article 11 §2 CC) with barring punishment by the statute of limitations (Article 101 CC), in practice may cause problems concerning the description of an act attributed to a perpetrator. If, as a result of elimination of one of the concurring provisions due to the lapse of the limitation period for one of the offences specified in it, it is not possible to describe a means a perpetrator used to commit an act, it may be difficult to describe the entire act. It can be exemplified by concurrence of the provisions of Articles 273 and 286 §1 CC, where a perpetrator using a falsified document deceives the aggrieved and this way makes them dispose of their property disadvantageously. Elimination of the provision of Article 273 CC from the legal classification as a result of the lapse of the limitation period means that it will not be possible to indicate in the act description that a perpetrator has used a falsified document, and consequently, that it will not be possible to emphasise in what way the perpetrator has deceived the aggrieved. One cannot describe an act of deception in a general way; it is necessary to give a detailed account of the way in which the perpetrator has done it. In the

presented situation, there is a problem with the description of an act the perpetrator is charged with and then attributed to him/her.

The presented example indicates that the solution to the problem proposed in the present article aimed at bringing together the cumulative legal classification and barring punishment by the statute of limitations may make the practice of application of concurring provisions more difficult. However, the above-mentioned practical problems can be avoided by adopting a solution pursuant to which the length of the limitation period is laid down in the most severe provision. The issue signalled in the title is only a proof that it is not always possible to bring together dogmatic solutions and needs in the field of law application.

BIBLIOGRAPHY

Bojarski T., *Typizacja przestępstw i zasada nullum crimen sine lege (wybrane zagadnienia)*, Annales UMCS, Sectio G, Vol. 24, 1977.

Czekaj M., *Ingerencja prokuratura w sprawach o przestępstwa prywatnoskargowe*, Prokuratura i Prawo No. 7–8, 1999.

Daszkiewicz W., *Glosa do wyroku SN z 10 kwietnia 1977 r., sygn. RW 116/77*, Nowe Prawo No. 6, 1978.

Dębski R., *Zasada nullum crimen sine lege i postulat wyłączności ustawy*, Acta Universitatis Lodziensis, Folia Iuridica No. 50, 1992.

Długosz J., *Ustawowa wyłączność i określoność w prawie karnym*, Warsaw 2016.

Gałązka M., [in:] A. Grześkowiak, K. Wiak (eds), *Kodeks karny. Komentarz*, Warsaw 2018.

Kardas P., *Zbieg przepisów ustawy w prawie karnym. Analiza teoretyczna*, Warsaw 2011.

Kulik M., *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warsaw 2014.

Majewski J. (ed.), *Zbieg przepisów oraz zbieg przestępstw w polskim prawie karnym. Materiały II Bielańskiego Kolokwium Karnistycznego*, Toruń 2006.

Spotowski A., *Pomijalny (pozorny) zbieg przepisów ustawy i przestępstw*, Warsaw 1976.

Wąsek A., *Kodeks karny. Komentarz*, Vol. 1, Gdańsk 1999.

Wolter W., *Kumulatywny zbieg przepisów ustawy*, Warsaw 1960.

Wróbel W., Zoll A., *Polskie prawo karne. Część ogólna*, Kraków 2010.

Zgoliński I., [in:] I. Zgoliński (ed.), *Kodeks karny skarbowy. Komentarz*, Warsaw 2018.

Zoll A., *Zbieg przepisów ustawy w polskim prawie karnym*, Annales UMCS, Sectio G, Ius Vol. 60, No. 2, 2013.

Zoll A., [in:] A. Zoll, W. Wróbel (eds), *Kodeks karny. Część ogólna*, Vol. 1: *Komentarz do art. 1–52*, Warsaw 2016.

Legal regulations

Act of 6 June 1997 – Criminal Code, Journal of Laws [Dz.U.] of 1997, No. 88, item 553, as amended.

Act of 6 June 1997 – Criminal Procedure Code, Journal of Laws [Dz.U.] of 1997, No. 89, item 555, as amended.

Act of 10 September 1999: Fiscal Penal Code, Journal of Laws [Dz.U.] No. 83, item 930, as amended.

Case law

Judgment of the Appellate Court in Wrocław of 19 June 2001, II AKa 218/01, OSA 2001, No. 10, item 63.
Supreme Court judgment of 14 June 2002, II KKN 267/01, Legalis No. 59429.
Supreme Court judgment of 15 October 2003, IV KK 299/03, Legalis No. 98122.
Supreme Court judgment of 14 January 2010, V KK 235/09, OSNKW 2010, No. 6, item 50.
Judgment of the Appellate Court in Białystok of 31 January 2013, II AKa 254/12, Legalis No. 715070.
Judgment of the Appellate Court in Katowice of 24 May 2013, II AKa 563/12, KZS 2013, No. 10, item 63.
Judgment of the Appellate Court in Katowice of 2 August 2013, II AKa 480/12, KZS 2013, No. 4, item 15.
Supreme Court ruling of 30 October 2014, I KZP 19/14, OSNKW 2015, No. 1, item 1.
Judgment of the Appellate Court in Katowice of 20 November 2014, II AKa 313/14, LEX No. 1665550.
Judgment of the Appellate Court in Wrocław of 19 February 2015, II AKa 13/15, Legalis No. 1213468.
Judgment of the Appellate Court in Wrocław of 6 May 2015, II AKa 88/15, OSAWr 2015, No. 3, item 328
Supreme Court ruling of 28 May 2015, II KK 131/15, KZS 2015, No. 9, item 9.
Judgment of the Appellate Court in Wrocław of 15 October 2015, II AKa 245/15, Legalis No. 1360975.
Supreme Court judgment of 29 October 2015, SDI 42/15, Legalis No. 1364797
Judgment of the Appellate Court in Wrocław of 25 February 2016, II AKa 331/15, Legalis No. 1443569.
Supreme Court ruling of 22 March 2016, V KK 345/15, Legalis No. 1430515.
Judgment of the Appellate Court in Katowice of 2 June 2016, II AKa 141/16, OSAKat 2016, No. 3, item 4.
Supreme Court ruling of 19 October 2016, IV KK 333/16, Legalis No. 1537680.
Supreme Court judgment of 23 November 2016, III KK 225/16, OSNKW 2017, No. 4, item 18.
Judgment of the Appellate Court in Wrocław of 22 December 2016, II AKa 337/16, Legalis No. 1576341.
Judgment of the Appellate Court in Katowice of 22 June 2017, II AKa 150/17, Legalis No. 1658164.
Supreme Court ruling of 29 June 2017, IV KK 203/17, Legalis No. 1682039.
Supreme Court resolution of 20 September 2018, I KZP 7/18, www.sn.pl.

CUMULATIVE LEGAL CLASSIFICATION AND THE STATUTE OF LIMITATIONS IN CRIMINAL LAW

Summary

The issue of the relation between the cumulative legal classification and barring punishment by the statute of limitations in criminal law is seldom a subject of broader considerations in literature. It concerns a situation in which provisions laying down different sanctions concur, and for one of the offences specified in them the limitation period has lapsed. This raises a question whether the provision specifying that act should be referred to in the grounds for sentencing or whether it should be eliminated. Two extreme opinions on the issue were deve-

loped in the practice of law enforcement, which inspired the First President of the Supreme Court to file a motion to the Supreme Court to adopt a resolution that shall make case law uniform. The Supreme Court adopted a resolution concerning the case I KZP 7/18 on 20 September 2018. The article aims to solve the problem in a different way from the one the Supreme Court proposed in its resolution.

Keywords: law, criminal law, cumulative legal classification, barring punishment by the statute of limitations

KUMULATYWNA KWALIFIKACJA PRAWNA A PRZEDAWNIENIE KARALNOŚCI W PRAWIE KARNYM

Streszczenie

Zagadnienie relacji pomiędzy kumulatywną kwalifikacją prawną a przedawnieniem karalności w prawie karnym jest rzadko przedmiotem szerszych rozważań w literaturze. Chodzi o sytuację, w której zbiegają się ze sobą przepisy operujące różnymi sankcjami, a w stosunku do przestępstwa opisanego w jednym z nich upłynął już termin przedawnienia karalności. Rodzi się pytanie, czy przepis typizujący ten czyn należy powoływać w podstawie skazania, czy też trzeba go pominąć. W praktyce wymiaru sprawiedliwości wykształciły się dwa skrajne stanowiska w tym zakresie, co skłoniło Pierwszego Prezesa Sądu Najwyższego do złożenia wniosku do SN o podjęcie uchwały w tym przedmiocie, która ujednolici orzecznictwo. Uchwała zapadła przed SN w dniu 20 września 2018 r. w sprawie I KZP 7/18. Celem niniejszego opracowania jest próba rozwiązania zasygnalizowanego problemu w sposób odmienny od tego, który zaproponował SN w swojej uchwale.

Słowa kluczowe: prawo, prawo karne, kumulatywna kwalifikacja prawna, przedawnienie karalności

LA CALIFICACIÓN CUMULATIVA Y LA PRESCRIPCIÓN DE DELITO EN EL DERECHO PENAL

Resumen

La relación entre calificación cumulativa y la prescripción de delito en el derecho penal no es frecuentemente un objeto de analisis más amplia en la doctrina. Se trata de caso en el cual hay un concurso de normas que prevén sanciones diferentes y un delito descrito por estas normas ya ha prescrito. Por lo tanto, cabe considerar si se puede mencionar dicho precepto en los fundamentos de la condena, o hay que prescindir de él. En la práctica, existen dos posturas opuestas en este ámbito, lo que motivó al Presidente del Tribunal Supremo a presentar solicitud al Tribunal Supremo de adoptar un acuerdo al respeto que consolide la jurisprudencia. El acuerdo fue dictado por el Tribunal Supremo el 20 de septiembre de 2018 en la causa I KP/18. El presente artículo intenta solucionar este problema de forma distinta a la que propone el Tribunal Supremo en su acuerdo.

Palabras claves: derecho, derecho penal, calificación cumulativa, prescripción de delito

НАКОПИТЕЛЬНАЯ ПРАВОВАЯ КЛАССИФИКАЦИЯ И ИСТЕЧЕНИЕ СРОКА ДАВНОСТИ СУДИМОСТИ В УГОЛОВНОМ ПРАВЕ

Резюме

Проблематика, касающаяся отношений между накопительной правовой классификацией и истечением срока давности судимости в уголовном праве не столь часто служит предметом более широкого обсуждения в предметной литературе. Речь идёт о ситуации, в которой правовые положения, касающиеся различных санкций, соприкасаются между собой, а в случае преступления, содержащемся в одном из них, срок давности судимости уже истёк. Возникает вопрос: следует ли классифицировать положение, определяющее это действие, на основании приговора, или его следует пропустить? В практике правосудия разработаны две крайние позиции в этой области, что побудило Первого Председателя ВС представить заявление в Верховный суд о принятии Постановления по этому вопросу, которое унифицировало бы судебную практику. Постановление было принято Верховным судом 20 сентября 2018 года по делу I KZP 7/18. Целью настоящего исследования является попытка решения представленной проблематики, отличного от предложенного в Постановлении Верховного суда.

Ключевые слова: право, уголовное право, накопительная правовая классификация, истечение срока давности судимости

KUMULATIVE RECHTSFINDUNG UND STRAFBARKEITSVERJÄHRUNG IM STRAFRECHT

Zusammenfassung

Die Beziehungsangelegenheit zwischen kumulativer Rechtsfindung und der Strafbarkeitsverjährung im Strafrecht ist selten Gegenstand breiterer Erwägungen in der Literatur. Es handelt sich hier um eine Lage, in welcher Vorschriften verschiedene Sanktionen anwendend, zusammen münden, und angesichts eines Verbrechens mit einer solchen Vorschrift beschrieben worden zu sein, dessen Strafbarkeitsverjährungstermin bereits abgelaufen ist. So entsteht die Frage, ob die Vorschrift, welche dieses Delikt typisiert, in der Rechtsgrundlage für die Verurteilung berufen werden soll, oder diese Vorschrift gemieden werden soll. In der Gerichtsbarkeitspraxis sind zwei krasse Standpunkte in diesem Umfang entstanden, was den Ersten Vorsitzenden des Obersten Gerichtes (OG) dazu geneigt hat, einen Antrag zum OG einzureichen, um einen diesbezüglichen Beschluss zu fassen, welcher die Rechtsprechung zu vereinheitlichen vermag. Der Beschluss fiel vor dem OG am 20. September 2018 mit Aktenzeichen I KZP 7/18. Das Ziel dieser Bearbeitung ist ein Lösungsversuch des angedeuteten Problems auf einem anderen Wege, als das OG es in seinem Beschluss vorgeschlagen hat.

Schlüsselwörter: Recht, Strafrecht, kumulative Rechtsfindung, Strafbarkeitsverjährung

CLASSIFICATION JURIDIQUE CUMULATIVE ET PRESCRIPTION EN DROIT PÉNAL

Résumé

La question de la relation entre la qualification juridique cumulative et le délai de prescription en droit pénal fait rarement l'objet de considérations plus larges dans la littérature. Il s'agit d'une situation dans laquelle les dispositions relatives à diverses sanctions coïncident et où, pour l'infraction décrite par l'une d'elles, le délai de prescription de la responsabilité pénale a expiré. La question qui se pose est de savoir si la disposition qui caractérise cet acte doit être invoquée dans le fondement de la condamnation ou si elle doit être omise. Dans la pratique de la justice, deux positions extrêmes dans ce domaine se sont développées, ce qui a amené le Premier Président de la Cour suprême à soumettre à la Cour suprême une demande d'adoption d'une résolution à ce sujet, qui unifierait la jurisprudence. La résolution a été adoptée devant la Cour suprême le 20 septembre 2018 dans l'affaire n° I KZP 7/18. Le but de cette étude est d'essayer de résoudre le problème signalé d'une manière différente de celle proposée par la Cour suprême dans sa résolution.

Mots-clés: droit, droit pénal, classification juridique cumulative, prescription pénale

RELAZIONE TRA LA QUALIFICAZIONE GIURIDICA CUMULATIVA E LA PRESCRIZIONE IN DIRITTO PENALE

Sintesi

La questione della relazione tra la qualificazione giuridica cumulativa e i termini di prescrizione è raramente oggetto di ampie considerazioni in letteratura. Si tratta di una situazione in cui convergono norme con sanzioni diverse, e nei confronti del reato descritto in una di esse il termine di prescrizione è già decorso. Sorge la domanda se la disposizione che caratterizza questo atto debba essere invocata nella base della condanna o se debba essere omessa. Nella prassi della magistratura si sono sviluppate due posizioni estreme al riguardo, il che ha spinto il primo Presidente della Corte suprema a presentare una mozione alla Corte suprema per adottare una deliberazione in materia, che unificherà la giurisprudenza. La delibera è stata adottata dinanzi alla Corte suprema il 20 settembre 2018, in causa I KZP 7/18. L'obiettivo di questo studio è tentare di risolvere il problema segnalato in modo diverso da quello proposto dalla Corte suprema nella deliberazione.

Parole chiave: diritto, diritto penale, qualificazione giuridica cumulativa, prescrizione

Cytuj jako:

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