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HALVING OF AN ARBITRARY DEPARTURE (ARTICLE 338 OF THE PENAL CODE AND ARTICLE 682, PARAGRAPH 2, POINT 2 OF THE DEFENCE ACT)

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Abstract

The article analyses the type of behaviour of arbitrary separation in terms of its division between criminal law and misdemeanour law. This behaviour has been considered bitype since the entry into force of the Act of 11 March 2022 on Homeland Defence (i.e. since 23 April 2022), but not to its full substantive scope. Halving only applies to the arbitrary leaving of a designated place of residence and does not cover criminal behaviour consisting in the arbitrary leaving of an entity – which should be criticised. In this article, in order to provide a comprehensive approach to the analysed issues, the historical outline of the penalisation of the crime of arbitrary separation is presented, and *de lege ferenda* tasks are set, the implementation of which will result in, among others: removing the loophole in the law in the form of total impunity for one-off, arbitrary separation of a soldier from their unit, lasting no more than 48 hours, which has been present in the military criminal law system continuously since 1 January 2010, i.e. since the entry into force of the amendment changing, among others, the wording of the provision of Article 338 of the Penal Code.

Key words: arbitrary separation, bisection, bitype, arbitrary leaving the designated place of stay, soldier, criminal law, misdemeanour law, military crime, military misdemeanour

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INTRODUCTION

The scope of military criminal law (*de lege lata* decreed as the third part of the Criminal Code)[1] permits the assumption that it is not only a specific constituent element co-creating an integrated system of criminal law norms, but in terms of safeguarding the interests of the Armed Forces (hereafter 'AF'), it also represents a complex field for legal science. While over the last 100 years military criminal law has been technically regulated differently (i.e. as autonomous legal acts,[2] as well as constituent parts of the general criminal codes),[3] in each case two main sets of norms could be discerned in these provisions. The first contained so-called general provisions, while the second consisted of provisions criminalising specific types of military offences. Therefore, uninterruptedly over the years and notwithstanding the unification into a single legal act of military and general criminal law (lasting from the entry into force of the 1969 Criminal Code – i.e. since 1 January 1970, up to the present day), the military criminal provisions are still perceived as: '(…) a kind of criminal [military – note AZ] code in miniature'.[4]

As a preliminary note, it is also important to mention that until the entry into force of the Act of 11 March 2022 on Homeland Defence[5] (i.e. until 23 April 2022), military offences were indivisible acts, i.e. acts that were not divided between criminal and misdemeanour law. This was owing to the general lack of typification of military offences in the Code of Offences[6] or any other piece of legislation. In fact, the acts penalised by the HDA which had already been repealed did not have a military aspect – the 1967 Act on the Universal Obligation to Defend the Republic of Poland.[7] This is because the penal provisions contained therein were *de facto* acts of a universal character which, due to their gravity, primarily constituted a catalogue of offences (Articles 224–240 AUOD and Article 242 AUOD) accompanied – as should be emphasised – by a single offence (Article 241 AUOD).

Thus, until the entry into force of the HDA (i.e. until 23 April 2022), the classification of acts as military offences was carried out solely on the grounds of the procedural jurisdiction of the military garrison court as a court of first instance

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1 Act of 6 June 1997, Criminal Code, i.e. Journal of Laws of 2025, item 383 (hereinafter 'the CC').

2 See Regulation of the President of the Republic of Poland of 22 March 1928 on the Military Criminal Code, Journal of Laws of 1928, No. 36, item 328, as amended (hereinafter 'the 1928 MCC'); Regulation of the President of the Republic of Poland of 21 October 1932, Military Penal Code, Journal of Laws of 1932, No. 91, item 765 (hereinafter 'the 1932 MCC'); Decree of the Polish Committee of National Liberation of 23 September 1944, Provisions introducing the Polish Army Criminal Code, Journal of Laws of 1944, No. 6, item 28 (hereinafter 'the PACC').

3 See Act of 19 April 1969, Criminal Code, Journal of Laws of 1969, No. 13, item 94, as amended (hereinafter 'the 1969 CC'), and the CC.

4 M. Flemming, 'Przedmowa', in: Flemming M., *Kodeks karny – część wojskowa. Komentarz*, Warszawa, 2000, p. IX.

5 Act of 11 March 2022 on Homeland Defence, Journal of Laws of 2023, item 1615 (hereinafter 'the HDA').

6 Act of 20 May 1971, Code of Offences, Journal of Laws of 2023, item 1234 (hereinafter 'the ACO').

7 Act of 21 November 1967 on Universal Obligation to Defend the Republic of Poland, Journal of Laws of 1967, No. 44, item 220, as amended (hereinafter 'the AUOD').

(Article 10 of the Act of 24 August 2001, Code of Proceedings in Cases of Offences)[8, 9] – which was the appropriate solution.

However, subsequently to that date, apart from the indicated general way of categorising acts as military offences (which *de facto* is still in force), certain qualitative changes occurred at the discussed level. In Section XXV of the HDA, entitled 'Penal provisions and provisions on financial penalties', an illustrative catalogue of military offences was included – something that had not been practised in the criminal law system *sensu largo* prior to that time. This is an unprecedented situation, all the more so as one of them (i.e. the military offence from the provision of Article 682(2)(2) HDA) has also led to the division of a military offence from the provision of Article 338 of the Penal Code consisting in arbitrary separation.[10] This is the first systemic case of the division of a military offence ever being made.

ARBITRARY SEPARATION (ARTICLE 338 OF THE CC) – HISTORICAL PERSPECTIVE

The discussion on the military offence of arbitrary separation (Article 338 of the CC), as well as its division, should be preceded by a concise analysis with regard to the evolution of the criminalisation of this act in the system of military criminal law. This is because this offence holds a historically well-established position, as it is the common denominator of all criminal-military regulations enacted in the last century, starting from the provisions contained in separate and strictly military criminal codes, and ending with the military parts that co-create the general criminal-law code regulations.

In the first military penal regulation (which was enacted ten years after Poland regained its independence), i.e. the 1928 MCC,[11] the subject matter in question was directly referred to by the very title of one of its parts, which reads: 'Wilful separation and desertion'. This offence was committed by an offender who: physically distanced himself from the unit, left his post of duty (Article 48 of the 1928 MCC); exceeded the number of leave days granted (Article 48 of the 1928 MCC); or committed an act 'in the field' by failing to join the nearest unit or the unit from which he had previously detached himself; or by failing to report immediately

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[8] Act of 24 August 2001, Code of Procedure in Petty Offences, Journal of Laws of 2022, item 1124 (hereinafter 'the CPPO').

[9] In principle, for committing a military offence, a soldier bears misdemeanour liability initiated by a request for prosecution submitted by the Commander of the Military Unit (hereinafter 'the MU') in which they serve. In this respect, the Commander of the MU is the sole competent authority (Article 86a § 1 of the CPPO). The second type of responsibility that may be applied to a soldier for committing a military offence is military disciplinary liability, which is also initiated by the Commander of the MU, provided that the Commander waives the right to request for prosecution (Article 86a § 2 of the CPPO, subject to the wording of Article 86a § 3 of the CPPO).

[10] A. Ziółkowska, 'Komentarz do art. 338 k.k.', in: Konarska-Wrzosek V. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2023, p. 1575.

[11] The 1928 Military Criminal Code was in force from 1 August 1928 until 31 December 1932.

to the unit as soon as his captivity ended (Article 49 of the 1928 MCC). In terms of gravity, this offence constituted a military misdemeanour.

A slightly different approach to the issue in question was adopted in the next military penal regulation, i.e. the MCC of 1932.[12] When decreeing the issue in question, the term 'wilful separation' was not used at all, even though the content of individual provisions of the code (in particular those in Chapter VII entitled 'Offences against military duty') clearly implied it. The conduct of a soldier in failing to register immediately after returning from captivity at his unit, which was included in a separate provision (i.e. Article 44 § 1 of the 1932 MCC), was excluded from the substantive scope of the military offence in question. Furthermore, the said offence could admittedly be committed by arbitrarily exceeding the number of leave days granted, but this conduct was no longer explicitly included in the Code as one of the forms of the above-mentioned offence (this was not the case in the 1928 MCC, see Article 48 of the 1928 MCC).[13]

Under the provisions of the 1932 Military Penal Code, a soldier who left his unit or post of duty or remained outside them (Article 43 § 1 of the 1932 MCC) was criminally liable for arbitrary separation. In terms of gravity, this offence was a military misdemeanour, which did not forfeit its character even if the act was committed during wartime (Article 43 § 2 of the 1932 MCC). The exception was if a soldier – pursuant to the wording of Article 43 § 1 of the 1932 MCC – undertook actions: '(…) for the purpose of permanently evading his military duty or if [his – AZ's note] absence from the unit lasted more than six months' – in which case he committed a military crime (Article 46 § 1 of the 1932 MCC).

Also in the last separate military-criminal regulation – i.e. in the CCPA[14] – the legislator, in decreeing the military offence in question, did not expressly use the phrase 'arbitrary separation'. Moreover, this offence was part of the catalogue of the so-called 'Offences against Military Obligation' (Chapter XIX CCPA), and in terms of its gravity it was either a military misdemeanour (in terms of a soldier leaving or remaining outside a unit or post of duty – Article 115 § 1 CCPA); or a military crime (if the wilful desertion occurred during a war – Article 115 § 2 CCPA; or e.g. '(…) with a view to a prolonged or permanent evasion of military duty' – Article 118 § 1 CCPA).

The common denominator of all the above-mentioned military criminal regulations was that the duration of a soldier's absence was neutral to the essence of the military offence in question. However, it was of significance in assessing the punishment (see Articles 51 and 52 of the 1928 MCC; Article 46 § 1 of the 1932 MCC; or Article 118 CCPA), in assessing the gravity of the act (see Article 46 § 1 of the 1932 MCC; Article 115 § 2 CCPA; or Article 118 § 1 CCPA), and in choosing the method

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[12] The 1932 Military Criminal Code was in force from 1 January 1932 until 29 September 1944.

[13] At the time when the 1932 MCC was in force, it was emphasised that: 'Remaining outside a unit or post of duty is a form of negative attitude on the part of a soldier towards their military duty. It may consist, for example, in failing to return on time after a leave of absence (…)'; M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 43 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, Warszawa, 1933, p. 103.

[14] The 1944 Criminal Code of the Polish Army was in force from 30 September 1944 until 31 December 1969 (hereinafter 'the CCPA').

of criminal repression, i.e. judicial or disciplinary penalisation).[15] This was because, in cases of lesser gravity, the offence of 'arbitrary separation' was punishable by disciplinary punishment[16] (see Article 45(1) of the 1928 MCC; Article 32(a) of the 1932 MCC; Article 7 CCPA).[17]

Moreover, a common element was also the permanent nature of this offence, the fact that its elements were already realised by a single behaviour of the offender, as well as the requirement that the offender's action must have been intentional (with direct or possible intent). In fact, the offender had to have been aware of and willing to violate the obligation incumbent upon him *in concreto*, by causing his absence from the place specified by the military obligation.[18]

However, a different approach to the circumstance of the 'duration of absence of a soldier' acting under the conditions of arbitrary separation was taken in the 1969 CC (Article 303). Such an offence was a military misdemeanour included in the 'Offences against the obligation to perform military service' (Chapter XXXVIII of the 1969 CC).

Under the main mode, criminal responsibility was envisaged in the case of a soldier's arbitrary departure from a unit or a designated place of stay, as well as for arbitrary remaining outside them, the absenteeism having to amount to more than two calendar days[19] (Article 303 § 1 of the 1969 CC) and lasting up to a maximum of 14 calendar days (*argumentum a contrario* from Article 303 § 3 of the 1969 CC). The reasoning for reducing the lower threshold for penalising the act to below two calendar days, on the other hand, was the situation in which a soldier had previously been convicted for arbitrary separation (i.e. acting under conditions of recidivism) or had been subjected to disciplinary punishment for such an act within the last six months, in the form of an arrest sentence[20] (Article 303 § 2 of the

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[15] E. Mecnarowski, E. Saski, M. Buszyński, B. Matzner, 'Komentarz do art. 48 k.k.woj. z 1928 r.', in: Mecnarowski E., Saski E., Buszyński M., Matzner B., *Kodeks karny wojskowy*, Warszawa, 1928, p. 98.

[16] M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 43 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, London, 1944, p. 40.

[17] The literature on the subject emphasised that: 'A violation (…) of the established order of military service (…) [was – AZ] not always a military offence. (…) [It could – AZ] only be an offence punishable on disciplinary grounds. Soldiers in active military service (…) [were liable – AZ] for offences only under the disciplinary procedure (…)' – H. Aratyn, A. Zawirski, *Wojskowe prawo karne*, Warszawa, 1960, p. 7.

[18] E. Mecnarowski, E. Saski, M. Buszyński, B. Matzner, 'Komentarz do art. 48 k.k.woj. …', op. cit., pp. 97–98; M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 46 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, Warszawa, 1933, p. 110; M. Buszyński, B. Matzner, K. Muller, 'Komentarz do art. 46 k.k.woj. z 1932 r.', in: Buszyński M., Matzner B., Muller K., *Kodeks karny wojskowy z komentarzem*, London, 1944, p. 43; J. Kaczorowski, J.K. Cisek, R. Vogl, 'Komentarz do art. 115 k.k.W.P.', in: Kaczorowski J., Cisek J.K., Vogl R., *Kodeks karny Wojska Polskiego i ustawy dodatkowe z komentarzem*, Warszawa, 1946, pp. 128 and 130.

[19] On 'absenteeism exceeding 2 calendar days', see judgment of the Supreme Court of 4 May 1970, Rw 306/70, *OSNKW*, 1970, No. 9, item 106; I. Andrejew, 'Komentarz do art. 303 k.k. z 1969', in: Andrejew I., *Kodeks karny. Krótki komentarz*, Warszawa, 1981, p. 250; I. Andrejew, 'Komentarz do art. 303 k.k. z 1969', in: Andrejew I., *Kodeks karny. Krótki komentarz*, Warszawa, 1988, p. 263.

[20] On 'disciplinary penalisation', see the IWSN resolution of 16 May 1972, U 1/72, *OSNKW*, 1972, No. 7–8, item 128; judgment of the Supreme Court of 19 December 1975, Rw 403/75,

1969 CC). If, on the other hand, the soldier's absenteeism on account of arbitrary separation exceeded 14 calendar days (Article 303 § 3 of the 1969 CC),[21] or if, in carrying out the act in question within the temporal dimension indicated, the soldier took his weapon with him (Article 303 § 4 of the 1969 CC), he was liable for the commission of the qualified offence of arbitrary separation.[22]

Moreover, the 1969 CC introduced a certain subjective exclusion, as the provisions criminalising arbitrary separation did not apply to officers, warrant officers, professional, and periodic service soldiers (Article 303 § 6 of the 1969 CC).[23] That was a solution hitherto unknown.

Notwithstanding certain polarisations,[24] the 1969 CC reproduced the solutions developed in the previously existing separate military penal codes with regard to the offence in question. This is because it was still of a permanent nature,[25] its elements were fulfilled by a single behaviour of the offender (subject, however, to its minimum temporal dimension – Article 303 § 1 and 2 of the 1969 CC), and the offender was required to act intentionally (with direct or possible intent).[26]

Based on the above, it should be emphasised that from the time the 1928 MCC came into force (i.e. from the beginning of August 1928) until the time the 1969 CC remained in effect (i.e. until the end of August 1998), the military offence of arbitrary separation was an act that was not divided between criminal law and the law of misdemeanours.

OSNKW, 1976, No. 3, item 51; judgment of the Supreme Court of 27 March 1970, Rw 232/70, *OSNKW*, 1970, No. 7, item 88; resolution of the Supreme Court (7) of 27 March 1974, U 2/74, *OSNKW*, 1974, No. 6, item 122; judgment of the Supreme Court of 4 October 1972, Rw 964/72, *OSNKW*, 1972, No. 12, item 202; judgment of the Supreme Court of 18 November 1971, Rw 1198/71, *OSNKW*, 1972, No. 3, item 56.

[21] On 'absenteeism exceeding 14 calendar days', see judgment of the Supreme Court of 26 February 1970, Rw 134/70, *OSNKW*, 1970, No. 6, item 64; W. Sieracki, 'Glosa do wyroku SN z 26.02.1970, Rw 134/70', *Wojskowy Przegląd Prawniczy*, 1970, No. 3, p. 386 (critical); it should also be noted that arbitrary separation exceeding 14 days was treated by the CCPA as desertion – L. Czubiński, *Polskie wojskowe prawo karne w zarysie*, Warszawa, 1981, p. 114.

[22] See I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa, 1980, p. 460.

[23] See H. Popławski, R. Skarbek, 'Przestępstwa wojskowe', in: Popławski H., Skarbek R., Szczurek Z., *Prawo karne wojskowe i skarbowe*, Gdańsk, 1983, p. 38; K. Buchała, *Prawo karne materialne*, Warszawa, 1980, p. 760.

[24] A certain new solution adopted in the 1969 CC, previously unknown, concerned the application mode of prosecution for offences under Article 303 §§ 1–2 of the 1969 CC. Competence in this respect was vested in the Commander of the MU. An exception was made for the military prosecutor, who could initiate proceedings for these offences *ex officio* if, in their opinion, considerations of military discipline warranted it (Article 576 § 1 of the Act of 19 April 1969, Code of Criminal Procedure, Journal of Laws of 1969, No. 13, item 96, as amended; hereinafter 'the 1969 CCP') – S. Rybarczyk, *Zarys prawa wojskowego. Prawo karne wojskowe*, Vol. IV, Warszawa, 1974, p. 204.

[25] Judgment of the Supreme Court of 3 July 1984, Rw 364/84, *OSNKW*, 1985, No. 3–4, item 24; K. Mioduski, 'Komentarz do art. 303 k.k. z 1969', in: Bafia J., Mioduski K., Siewierski J., *Kodeks karny. Komentarz*, Warszawa, 1971, p. 675; I. Andrejew, 'Komentarz do art. 303 k.k. …', op. cit., 1988, p. 263.

[26] On 'wilful misconduct' see T. Leśko, S. Rybarczyk, *Prawo wojskowe PRL*, Vol. II, Warszawa, 1987, p. 166; J. Muszyński, 'Część czwarta. Wojskowe prawo karne materialne', in: Łustacz L. (ed.), *Podstawowe wiadomości o prawie wojskowym*, Warszawa, 1969, p. 219.

ARBITRARY SEPARATION (ARTICLE 338 CC) – THE *DE LEGE LATA* PERSPECTIVE

The analysis of the provision of Article 338 CC which penalises arbitrary separation *de lege lata* allows the inference that the legislator, when decreeing its content, used two different ways of approaching the code matter. The first one (applied previously in the 1969 CC and partly in the strictly military penal codes) assumes the punishability of each (even single) behaviour of the offender, provided that the temporal dimension of his/her absence due to arbitrary separation reached at least the minimum indicated in the content of the provision (see Article 338 § 2 and 3 CC). The second approach, on the other hand, subjects the existence of military-criminal responsibility for arbitrary separation to the condition of repetition (but not juridical recidivism) of the offender's conduct (Article 338 § 1 CC) – which had not been employed hitherto.

The literature (with a view to the severity of the sanctions) distinguishes the following types of arbitrary separation:[27]

– short-term arbitrary separation – occurs when at least two arbitrary absences of a soldier, each lasting no longer than 48 hours, have been committed within a period not exceeding three months; this offence is punishable by restriction of liberty (Article 338 § 1 CC);
– medium-term arbitrary separation – occurs when a single arbitrary absence of a soldier lasts for more than 48 hours but does not exceed seven days; this offence is punishable by restriction of liberty, up to one year's military detention, or up to one year's imprisonment (Article 338 § 2 CC);
– long-term arbitrary separation – occurs when a single arbitrary absence of a soldier lasts more than seven days; this offence is punishable by military detention (up to two years) or imprisonment for up to three years (Article 338 § 3 CC).

The Code's treatment of the timeframe currently determining the lower temporal limit for the existence of military criminal liability for arbitrary separation is not original, but is the result of the amendment of this provision made under Article 92(2) of the Act of 9 October 2009 on Military Discipline.[28]

Until the entry into force of the AMD (i.e. until 1 January 2010), the elements of the offence in question were fulfilled by every (even the smallest) arbitrary departure of a soldier from his unit or designated place of stay, or by remaining outside them.[29] On the other hand, depending on the duration of the absence, it was either

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[27] W. Marcinkowski, 'Komentarz do art. 338 k.k.', in: Marcinkowski W., *Kodeks karny. Część wojskowa. Komentarz*, Warszawa, 2011, p. 197.

[28] Act of 9 October 2009 on Military Discipline, Journal of Laws of 2009, No. 190, item 1474, as amended (hereinafter 'the AMD').

[29] See S. Hoc, 'Komentarz do art. 338 k.k.', in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2016, p. 1725; A. Kamieński, 'Komentarz do art. 338 k.k.', in: Filar M. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2006, p. 975; R. Góral, 'Komentarz do art. 338 k.k.', in: Góral R., *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warszawa, 2005, p. 543; J. Wojciechowski, 'Komentarz do art. 338 k.k.', in: Wojciechowski J., *Kodeks karny. Praktyczny komentarz z orzecznictwem*, Warszawa, 1997, pp. 571–572.

a misdemeanour of the principal type[30] if the soldier's arbitrary absence lasted more than 14 calendar days (Article 338 § 1 CC in the wording prior to 1 January 2010), or a misdemeanour of the privileged type[31] if the soldier's arbitrary absence lasted less than 14 calendar days (Article 338 § 2 CC in the wording prior to 1 January 2010).[32]

The original shape of the elements of the crime of arbitrary separation (i.e. that in the wording prior to 1 January 2010) was a literal repetition of the solutions previously decreed in the strictly military penal codes – and it was a correct approach. Adoption in the 1997 Criminal Code, in relation to the phenomenon of arbitrary separation, of solutions substantially different from those previously decreed in the 1969 code regulation, was justified, *inter alia*, by the need to eliminate the existing stratification of crimes of this type. As aptly emphasised at the time, that stratification was the result of attaching too much weight: '(…) to the temporal aspect of the soldier's unlawful stay outside the unit/post of duty (…). The result was an excessively casuistic typification, not favourable to the conduct – contrary to appearances – of an effective action against a criminal act'.[33] For this reason, the lower limit of the privileged type of the offence of arbitrary separation (in its original wording) decreed in the CC was completely detached from the criterion of time, while the entire content of the provision defining the scope of the elements of the offence in question was formulated in a highly synthetic manner. It was emphasised that the circumstance in the form of the soldier's awareness of the threat of criminal-military responsibility for every instance (even the shortest) of arbitrary separation was a factor conducive to maintaining an adequate level of military subordination.

Despite the passage of time, the aforementioned position on the need to eliminate the excessive stratification of crimes of this nature, among others, has not grown obsolete. On the contrary. This state of affairs has, unfortunately, been exacerbated by the amendment of the elements constituting the offence of arbitrary separation – or in other words, their new formulation – which has remained in force since 1 January 2010. The introduction of a lower threshold of absence (not exceeding 48 hours on a single occasion) as a condition for criminal-military liability for arbitrary separation was justified at the time by the need to strengthen: '(…) the role of the

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[30] This offence was prosecuted *ex officio* (under the public prosecution mode) and was punishable by military detention or imprisonment of up to three years – Article 338 § 1 CC in the wording prior to 1 January 2010.

[31] This offence was prosecuted at the request of the Commander of the MU (public prosecution mode) and was punishable by restriction of liberty, military detention for up to one year, or imprisonment for up to one year – Article 338 § 2 CC in the wording prior to 1 January 2010.

[32] Liability for the offence of arbitrary separation (in the wording of Article 338 CC prior to 1 January 2010) was similar to liability under Article 303 of 1969 CC, with only a minor mitigation of the sanction. Moreover, Article 338 CC (in the wording prior to 1 January 2010): (1) retained the stricter liability for arbitrary separations exceeding 14 calendar days (§ 1); (2) retained the application mode for prosecution of arbitrary separations amounting to less than 14 calendar days (§ 3), (3) decreed the subjective exclusions (§ 4).

[33] Komisja ds. Reformy Prawa Karnego, 'XXXIX Przestępstwa przeciwko obowiązkowi pełnienia służby wojskowej', in: Komisja ds. Reformy Prawa Karnego, *Projekt Kodeksu Karnego*, November 1990, p. 111.

commander in considering short-term arbitrary separations (…)'.[34] However, from a logical standpoint, it is difficult to agree with this justification; especially since, in practice, the amendment had precisely the opposite effect. Moreover, it triggered a discussion in the doctrine of criminal law regarding the number of varieties of arbitrary separation types decreed in Article 338 CC,[35] as well as a state of complete impunity for behaviour consisting in a single arbitrary absence of a soldier from a unit for less than 48 hours, which has lasted from 1 January 2010 to the present day.

The aforementioned amendment has also led to a systemic inconsistency, existing to this day, which relates to the adopted temporal elements constituting the prohibited act of a short-term arbitrary separation (Article 338 § 1 CC). The lower time limit conditioning criminal-military responsibility under the provision in question is in fact established for at least two arbitrary separations effected within a period of not more than three months, with a single absence on each occasion not exceeding 48 hours. It should be noted that, in accordance with the literal wording of Article 338 § 1 CC, there may be more than two such arbitrary separations of a soldier within a period of not more than three months; or there may be only two such incidents, with each of them lasting continuously for as long as, for example, 48 hours (or, naturally, less).

In this case, the time of the soldier's actual remaining in the conditions of arbitrary separation – amounting in the cited example to 96 hours, but (given the statutory conditions and circumstances of the case) still justifying the legal qualification of the act as a short-term arbitrary separation under Article 338 § 1 CC (i.e. as a misdemeanour of the basic type[36] or of the privileged type,[37] depending on the adopted approach in this regard) – *de facto* constitutes a temporal dimension significantly longer than the lower temporal limit conditioning criminal-military responsibility for the medium-term arbitrary separation under Article 338 § 2 CC, which (also depending on the adopted approach in this regard) is recognised in criminal law doctrine as a misdemeanour of the basic type[38] or of the privileged variant.[39]

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[34] *Uzasadnienie do ustawy o dyscyplinie wojskowej*, p. 20, https://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/1666 [accessed on 31 December 2023].

[35] In the doctrine of criminal law, one may encounter two clearly polarised positions as to how many types of arbitrary separation were decreed in the content of the provision of Article 338 CC following its amendment in 2009. There are proponents of the position that the offence in question has three types: a privileged type (i.e. *short-term arbitrary separation* – Article 338 § 1 CC); a basic type (i.e. *medium-term arbitrary separation* – Article 338 § 2 CC); and a qualified type (i.e. *long-term arbitrary separation* – Article 338 § 3 CC). Thus, W. Marcinkowski, 'Komentarz do art. 338 k.k. …', op. cit., p. 201. Their opponents, on the other hand, are of the opinion that the offence in question comprises of two types: the basic type (i.e. *short-term arbitrary separation* – Article 338 § 1 CC) and 2 forms of the qualified type (i.e. *medium-term and long-term arbitrary separation* – Article 338 § 2 and 3 CC) – thus, A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', in: Stefański R.A. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2015, p. 1868.

[36] See A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', op. cit., p. 1868.

[37] See W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 201.

[38] Ibidem.

[39] See A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', op. cit., p. 1868.

An analogous systemic inconsistency also exists between short-term arbitrary separation under Article 338 § 1 CC and *long-term arbitrary separation* under Article 338 § 3 CC,[40] i.e. an offence subject to much stricter penalisation, when the time of the soldier's effective presence in the conditions of arbitrary separation totals more than seven days, but it is not a one-off and continuous absence (i.e. the absence referred to in Article 338 § 3 CC), but a number of behaviours (e.g. ten arbitrary separations) carried out over a period not exceeding three months, each of them amounting to, for example, 48 hours. Such arbitrary separation will, in fact, last 20 days.

Although this state of affairs is a direct consequence of the change in the content of Article 338 CC (through the addition by way of amendment of, *inter alia*, § 1), the removal of the said systemic inconsistency is also not facilitated by the permanent nature of the crime in question.[41] After all, the legal qualification of the act depends not on the actual (i.e. cumulative) duration of the soldier's arbitrary separation, but on how long each of his or her unlawful absences was on a single occasion.

Apart from the permanent nature of this crime, another circumstance that has not changed over the years is the fact that, as a rule, its elements are realised by a single behaviour of the offender (with the reservation that it must last for at least the minimum period of time indicated in the wording of the provision, i.e. 48 hours – Article 338 § 2 CC, or more than seven days – Article 388 § 3 CC), while the perpetrator of arbitrary separation is at the same time still required to act intentionally (with direct or possible intent).[42]

ARBITRARY ABANDONMENT OF A DESIGNATED PLACE OF STAY (ARTICLE 682(2)(2) HDA) – A *DE LEGE LATA* APPROACH

By virtue of the provisions of the HDA (in force since 23 April 2022), the criminal law system *sensu largo* has, *inter alia*, provided examples of the typification of military offences, with one of them also bisecting – but to a limited extent – the military code offence under Article 338 CC, i.e. arbitrary separation.

A literal interpretation of Article 338 CC results in the conclusion that this offence refers to three different places/situations: (1) leaving one's unit; (2) leaving the designated place of stay; (3) remaining outside them; with the common denominator of these being the 'arbitrary' element of the offender's action. On the other hand, the substantive scope of the military offence under Article 682(2)(2) HDA criminalises only the unjustified and arbitrary leaving of a designated post while on duty.

However, arbitrary departure from a designated place of stay is not the same as arbitrary departure from one's unit.

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[40] See W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 201; A. Ziółkowska, 'Komentarz do art. 338 k.k.', op. cit., p. 1576; R. Janiszowki-Downarowicz, 'Komentarz do art. 338 k.k.', op. cit., p. 1868.

[41] W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 214; S.M. Przyjemski, 'Komentarz do art. 338 k.k.', in: Górniok O., Hoc S., Przyjemski S.M., *Kodeks karny. Komentarz*, Vol. III, Gdańsk, 1999, p. 491.

[42] W. Marcinkowski, 'Komentarz do art. 338 k.k.', op. cit., p. 215.

The soldier's so-called 'own unit' (to which the wording of Article 338 CC refers directly) should be considered to be the MU in which the soldier performs active military service, i.e. for example: the area of a company, brigade, regiment, battalion, school, institution,[43] or training centre.

On the other hand, a soldier's 'designated place of stay' may be either a place designated within the territory of his unit (while being a place other than that where he usually stays) or a place designated outside the territory of his unit (e.g., another training ground, warehouse, exercise area,[44] building,[45] garrison, tactical strip, or the route of a service vehicle) – with the proviso that arbitrary departure from the designated place of residence occurs only in the second of the cases indicated by way of example, as the first in fact qualifies as arbitrary departure from the unit.

The designation of the place of stay may occur by means of, for example: a temporary pass, a permanent pass,[46] a superior's referral of a soldier for psychiatric observation,[47] the granting of leave, the granting of exemption from official duties (including sick leave),[48] or an order to leave. For this reason, the 'designated place of stay' of a soldier (to which *expressis verbis* reference is made both in Article 338 CC and in Article 682(2)(2) HDA) is any place indicated to a soldier by their superior, which is situated outside the soldier's home MU, in which the soldier has a task for a definite or permanent period of time (alone or with other soldiers) in order to: (1) perform service / perform official activities; (2) be on readiness to perform or perform service / perform official activities; or (3) be at the disposal of his superior.

In this context, it is difficult to assume that the military offence under Article 682(2)(2) HDA represents a halving of the military offence under Article 338 CC, since the gap in the law existing since 1 January 2010, with regard to the lack of criminalisation of behaviour consisting in a one-off and arbitrary separation of a soldier from a unit for no longer than 48 hours, continues to be present in the criminal law system. This state of affairs results from the change in the content of the elements of Article 338 CC (as already mentioned), as well as the fact that the scope of the elements of the military offence under Article 682(2)(2) HDA is significantly narrower than the scope of the elements of the military offence under Article 338 CC.

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43 See S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1723.

44 R. Góral, 'Komentarz do art. 338 k.k.', op. cit., p. 542.

45 S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1724.

46 See 'The arbitrary departure of a soldier from a garrison in the area in which he or she was obliged to remain on the basis of a permanent pass constitutes an arbitrary departure from the designated place of stay' – judgment of the Supreme Court IW of 31 May 1995, WR 62/95, *OSNKW*, 1996, No. 1–2, item 4.

47 See '(…) the arbitrary departure of a soldier from a psychiatric hospital to which he or she has been referred by a superior for observation constitutes arbitrary departure from the designated place of stay (…)' – judgment of the Supreme Court IW of 18 December 1984, RW 683/84, *OSNKW*, 1985, item 42; Z. Ćwiąkalski, A. Zoll, 'Przegląd orzecznictwa Sądu Najwyższego z zakresu prawa karnego materialnego za I półrocze 1985 r.', *Nowe Prawo*, 1986, No. 7–8, p. 115.

48 Cf. 'The stay of a soldier outside the unit or designated place of stay outside the unit after the expiry of the period until which he or she was entitled to be outside them (…), i.e. the failure to return to duty on time, also constitutes the realisation of the offence of arbitrary separation – in this case in the form of omission' – S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1724, cited after: A. Kamieński, 'Komentarz do art. 338 k.k.', in: Górniok O. (ed.), *Kodeks karny. Komentarz*, Warszawa, 2006, p. 974.

When addressing the military offence under Article 682(2)(2) HDA, it is also worthwhile to make a synthesised reference to its temporal dimension – more specifically, to the lack of indication of the temporal boundary dividing the discussed act, in terms of subject matter, between a military misdemeanour and a military crime. Therefore, in order to make the relevant distinction, it is necessary to use an interpretation *a contrario* with respect to Article 338 § 1 or 2 CC (as these wordings refer to the same temporal dimension) and assume that any (even if only a one-off) unjustified and arbitrary departure of a soldier from the designated place of stay lasting not longer than 48 hours at a time should be qualified as a military misdemeanour under Article 682(2)(2) HDA.

CONCLUSION, OR ARBITRARY SEPARATION / ARBITRARY DEPARTURE FROM A DESIGNATED PLACE OF STAY – A *DE LEGE FERENDA* PERSPECTIVE

The analysis in the area of the military offence of arbitrary separation (Article 338 CC) and its partial halving, i.e. the military misdemeanour of arbitrary abandonment of a designated place of stay (Article 682(2)(2) HDA), shows the extent of *de lege ferenda* tasks still to be carried out in the area in question.

Two proposals for revision should be considered with a view to eliminating overly casuistic typification, ensuring systemic consistency, providing conditions for effective action against crime and, above all, closing the loophole in the law in the form of complete impunity for one-off arbitrary separations of up to 48 hours by a soldier from the unit.

The first assumes a return to the original form of typification of the crime of arbitrary separation, i.e. to the one existing before 1 January 2010, along with a complete resignation from the subjective exclusion previously included in Article 338 § 4 CC in the wording from before 1 January 2010. This is because it unjustifiably differentiated the legal situation of *de facto* the same subjects (i.e. soldiers in active military service) for committing the same act (i.e. arbitrary separation), clearly privileging the soldiers indicated in the content of this provision, who were not subject to criminal liability for arbitrary separation.[49]

Legal sanctioning of the proposed amendment would inevitably determine the pointlessness of the continued existence of the discussed type of military misdemeanour. On the other hand, the removal of the (currently existing) halving would eliminate unnecessary stratification of this type of objectionable behaviour. Indeed, the original wording of the elements of the offence of arbitrary separation criminalised every (even one-off) behaviour of this type by the offender, and for the substance of the military offence in question, the duration of the soldier's absence was irrelevant. Thus, the return to the wording of Article 338 CC (from

[49] Similarly also: W. Marcinkowski, 'Zmiany w prawie karnym oraz w prawie wykroczeń wynikające z nowej ustawy o dyscyplinie wojskowej', *Wojskowy Przegląd Prawniczy*, 2009, No. 4, p. 50.

before 1 January 2010) would result in a *de facto* return to the historically sanctioned (in separate criminal-military regulations) manner of describing and criminalising the offence of arbitrary separation.

The second *de lege ferenda* proposal, on the other hand, is to retain arbitrary separation as an act divided between criminal law and misdemeanour law, but with some changes to the content of both Article 338 CC and Article 682(2)(2) HDA.

With respect to Article 338 CC, a *de lege ferenda* task should be the removal of § 1. There is no justification for making this offence (whether treated as a privileged or basic type, depending on the approach adopted) dependant on the repetition of the offender's behaviour, while the essence of the other, much more serious, types of this offence under Article 338 § 2 or Article 338 § 3 CC is already exhausted by a one-off act of the offender, which must last for more than 48 hours (Article 338 § 2 CC) or more than 7 days (Article 338 § 3 CC).

In turn, the content of Article 682(2)(2) HDA should be broadened to ensure that the substantive scope of the military misdemeanour set out therein is fully aligned with the substantive scope of the military offence under Article 338 CC. Thus, criminalisation under Article 682(2)(2) HDA would also need to cover arbitrary departure from one's unit, as well as unauthorised stay outside one's unit or designated place of stay. Only such an approach will guarantee a comprehensive and coherent systemic solution within the scope of the penalisation of a soldier's arbitrary conduct consisting in leaving the unit, designated place of stay, or remaining outside them.

Furthermore, consideration should be given to adding a provision to Article 682(2)(2) HDA explicitly defining the maximum time period for such an act. Currently, it is only on the basis of an *a contrario* interpretation (already mentioned) that it may be concluded that a military offence is any (even single) unjustified and arbitrary separation of the perpetrator for a period 'not exceeding 48 hours'.

Moreover, irrespective of the adopted concept of amendments, one should also consider the need to include in the content of the provision of Article 338 CC the postulate raised in the doctrine of criminal law that arbitrary separation of a soldier should be introduced as a qualified type of this military offence when committed: '(…) outside the country, as well as during the performance (…) of tasks with the use of military weapons or during combat operations'.[50] This is a valid proposal, if only due to progressive globalisation and the ever-increasing internationalisation of the activities of the Polish Armed Forces, as evidenced, for example, in stabilisation, peacekeeping, and humanitarian missions or overseas deployments of military contingents.

[50] S. Hoc, 'Komentarz do art. 338 k.k.', op. cit., p. 1726 cited after A. Kamieński, 'Komentarz do art. 338 k.k.', in: Górniok O. (ed.), op. cit., pp. 975–976.

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