

# IMMUNITY FROM PROSECUTION FOR EXCEEDING THE LIMITS TO THE RIGHT OF SELF-DEFENCE

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## 1. INTRODUCTION

The Act of 8 December 2017 amending the Act: Criminal Code<sup>1</sup> introduced a clause on immunity from prosecution in case of imperfect self-defence in the event of violation of possessory rights in real property. In accordance with added Article 25 §2a, whoever exceeds the limits to the right of self-defence in order to repulse an assault consisting in a break-in to a flat, premises, a house or the adjoining fenced area, or repulses an assault preceded by a break-in to those places is immune from prosecution, unless the defendant flagrantly exceeds the limits of the right of self-defence. Such a proposal was made in literature, where it was suggested that the right of self-defence and a castle law should be regulated in separation from the right to defend all other interests.<sup>2</sup>

This is the second instance of immunity from prosecution for exceeding the limits to the right of self-defence. In the past, Article 1(2) of the Act of 5 November 2009 amending the Act: Criminal Code, the Act: Criminal Procedure Code, the Act: Penalty Execution Code, the Act: Fiscal Penal Code and some other acts<sup>3</sup> substituted the immunity from prosecution for the abandonment of imposing punishment in the event of exceeding the limits to the right of self-defence resulting from fear or emotions justified by the circumstances of an assault (Article 25 §3 CC).<sup>4</sup>

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<sup>1</sup> Journal of Laws [Dz.U.] of 2018, item 20; hereinafter: CC.

<sup>2</sup> T. Tabaszewski, *Eksces intensywny obrony koniecznej w orzecznictwie*, Prok. i Pr. No. 12, 2010, p. 75.

<sup>3</sup> Journal of Laws [Dz.U.] No. 206, item 1589.

<sup>4</sup> K. Cesarz, *Przekroczenie granic obrony koniecznej w wyniku strachu lub wzburzenia niesprawdliwionych okolicznościami zamachu (art. 25 §3 k.k.) w świetle orzecznictwa Sądu Najwyższego*,

## 2. *RATIO LEGIS* OF IMMUNITY FROM PROSECUTION

The change, as it is emphasised in the justification for the Bill amending the Act: Criminal Code, is substantiated by:

- “the evaluation of the former practice of law application, which indicates too frequent occurrence of cases of unjustified evasion of the provision of Article 25 §§1 to 3 CC in the course of assessment of conduct of a person who, in order to defend oneself against an unlawful assault, violated or endangered an assailant’s legal interests. The basic legal limitation of the response to an assault is the requirement of ‘the way of defence proportionate to the danger caused by the assault’<sup>5</sup>”
- “negative social perception connected (...) with instances of applying this law. The right of self-defence is recognised in our culture as one of the most important rights and most of its statutory limitations are considered to be in conflict with intuitively defined sense of justice (...). As a result, a dangerous belief is established in public opinion that the rights of an assailant have priority over the rights of the aggrieved (...) and that it does not pay to counteract unlawful conduct, which results in damage to citizens’ trust in the state, its bodies and the legal order”<sup>6</sup>”
- encouragement of “citizens to prevent classical acts of assailants’ aggression without the fear that one could be subject to criminal liability (...); a preventive aspect reflected in the expression of a precise and unambiguous message addressed to a potential assailant that every citizen has the right to efficiently defend oneself”<sup>7</sup>”
- “protection of citizens against arbitrary activities of law enforcement and justice administration bodies in the course of interpreting unclear and insufficiently defined expressions concerning fear and emotions, which are to be justified by the circumstances of an assault”<sup>8</sup>”

The arguments are convincing. The solution protects a defendant against hasty prosecution, which could take place as a result of recognition of exceeding the limits to the right of self-defence. In such a situation, a court could apply extraordinary mitigation of punishment or even renounce it (Article 25 §2 CC).

The fact that the limits to the right of self-defence were quite broadly determined in the judicature does not change this, which is confirmed, inter alia, by the following statements:

- “An attacked person does not have a duty to retreat or hide from an assailant in a shut enclosure or suffer from an assault limiting one’s liberty, but has the right to fight against that assault with the use of all available means that are necessary to make an assailant abandon the continuation of an assault”<sup>9</sup>”

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[in:] J. Majewski (ed.), *Okoliczności wyłączające bezprawność czynu. Materiały IV Bielańskiego Kolokwium Karnistycznego*, Toruń 2008, pp. 51–60; P. Gensikowski, *Nowelizacja art. 25 §3 k.k.*, Prok. i Pr. No. 9, 2009, pp. 125–136.

<sup>5</sup> Justification for the government Bill amending the Act: Criminal Code (the Sejm paper 1871), <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1871> [accessed on 20/01/2018], p. 1.

<sup>6</sup> *Ibid.*, p. 2.

<sup>7</sup> *Ibid.*, pp. 2–3.

<sup>8</sup> *Ibid.*, p. 3.

<sup>9</sup> Judgement of the Appellate Court in Poznań of 14 March 2000, II AKa 98/2000, Wok. 2001, No. 7–8, pp. 92–95; the Supreme Court judgement of 18 October 1935, I K 618/35, OSN(K)

- "The right of self-defence (Article 25 §1 CC) does not only cover repulsing an assault in its course but also at the stage of an objective occurrence of its direct threat as well as in case of its unavoidability, unless an immediate defensive action is taken".<sup>10</sup>
- "The method of self-defence against a direct unlawful assault alone, even if it consists in hitting an assailant with a dangerous tool many times, does not lose the features of being proportionate to the danger of that assault and does not mean that a defendant has gone beyond the limits of the right of self-defence, provided it is the only method of defence the defendant can use to make the assailant abandon the continuation of the assault".<sup>11</sup>
- The comment made by the Supreme Court presents the same approach: "For social reasons, an act classified as exceeding the limits to the right of self-defence should not be treated as an extremely socially dangerous one. Such acts are usually random and do not have an increased level of fault".<sup>12</sup>

However, it must be remembered that those bodies also expressed an opinion on that issue in cases where a defendant was prosecuted. Moreover, there were opinions presented in the case law that defined the limits of the right of self-defence in a narrow way, e.g. it was wrongly assumed that "In the event of defending against an assailant strangling a defendant with two hands, the accused did not manage to release from the grip, caught a knife lying beside and stabbed the assailant's neck and back twice. It can be assumed that he acted in compliance with the right of self-defence, although he went beyond its limits. He stabbed the assailant blindly and not predicting a deadly effect, however, he did not intend to kill the assailant but wanted to cause a serious bodily injury".<sup>13</sup>

One should not forget that a defendant is usually in a situation which does not allow taking fully thought-out decisions based on cool consideration of all circumstances of an event; just the opposite, a decision must usually be taken quickly and the choice of means of defence is limited.<sup>14</sup> It is rightly pointed out in the case law that the method of defence is usually determined by the time and place where an attack occurs and its intensity and violence, which limit a defendant's possibility of cool reasoning concerning

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1936, No. 4, item 145; judgement of the Appellate Court in Kraków of 22 June 2006, II AKA 87/06, KZS 2006, No. 10, item 13.

<sup>10</sup> The Supreme Court ruling of 1 February 2006, V KK 238/05, OSNKW 2006, No. 3, item 29 with glosses of approval by T. Bojarski, OSP No. 10, 2006, pp. 540-542 and M. Derlatka, Pal. No. 1-2, 2007, pp. 298-301; the Supreme Court judgement of 12 June 2012, II KK 128/12, Prok. i Pr. No. 12 - supplement 2012, item 2; the Supreme Court judgement of 6 November 2014, IV KK 157/14, Prok. i Pr. No. 3 - supplement 2015, item 2.

<sup>11</sup> Judgement of the Appellate Court in Katowice of 15 October 1998, II AKA 53/98, Przegląd Orz. PA w Katowicach 1998, No. 4, item 14; judgement of the Appellate Court in Łódź of 7 May 1999, II AKA 26/99, Biul. PA w Łodzi 1999, No. 9, p. 3; judgement of the Appellate Court in Lublin of 28 September 1999, II AKA 101/99, Prok. i Pr. No. 3 - supplement 2000, item 22.

<sup>12</sup> The Supreme Court judgement of 8 October 1973, I KR 145/73, LEX No. 2177070.

<sup>13</sup> Judgement of the Appellate Court in Kraków of 16 September 1993, II AKr 122/93, LEX No. 28016.

<sup>14</sup> Judgement of the Appellate Court in Gdańsk of 31 March 1999, II AKA 2/99, KZS 2000, No. 3, item 42.

the choice of defence method”,<sup>15</sup> and a man who faces a direct unlawful assault is unable to maintain reasonable conduct in order to defend himself or a third person and not to cause unnecessary and excessive harm to an assailant.<sup>16</sup> It is often an instinctive action, without thinking it over; a sudden defensive response occurs in a situation of threat, when a defendant realises an assault and wilfully undertakes defence.<sup>17</sup>

On the one hand, the regulation encourages citizens to take defensive action against perpetrators who usually trespass on someone’s property with intent to commit a serious crime, e.g. burglary and theft or robbery. On the other hand, it is a warning, which tells perpetrators that the property owner can attack them at the very early stage of their unlawful conduct. One cannot approve of a situation where a law-abiding citizen cannot efficiently defend himself against assaults on him or his property with the use of available means and, in this really stressful situation, must consider whether the method of self-defence chosen is or is not proportionate to the actual threat. It is an assailant who, undertaking unlawful activities, should take into account that he can suffer damage as a result of them. An assailant may and should expect efficient defence of the object he attacks, thus he wilfully and consciously exposes himself to the risk of consequences of defensive activities.<sup>18</sup> It is rightly emphasised in the judicature that “The right of self-defence is a fundamental right. Conviction of a person exercising this right does not only constitute its negation but, undoubtedly, is one of the most flagrant violations of substantive criminal law. It cannot be an illusory right and it would be one if it had no guarantee of efficiency”.<sup>19</sup>

The solution lets a prosecutor discontinue an investigation or inquiry in accordance with Article 17 §1(4) Criminal Procedure Code (hereinafter: CPC), because statute stipulates that a perpetrator is not subject to punishment. However, a defendant is not completely absolved because his conduct is unlawful, but only non-punishable. It is right because, to tell the truth, a person acts with the purpose of self-defence but goes beyond its limits either because of the use of an inappropriate means or because of its too early or too late use. Discontinuation of proceedings is absolutely favourable for a defendant; it saves him from stressful experiences connected with criminal proceedings and financial expenses involved. In the former legal state, such a person could only expect an extraordinary mitigation of punishment or renouncement of a penalty at the most (Article 25 §2 CC). Anyway, he had to stand trial. In this context, one cannot approve of the statement that the solution is curious because it is addressed to prosecutors and not to the society and judges, and in addition it glorifies one illegal act as a response to another illegal act.<sup>20</sup>

<sup>15</sup> Judgement of the Appellate Court in Warsaw of 3 April 1997, II AKa 81/97, LEX No. 29666.

<sup>16</sup> Judgement of the Appellate Court in Katowice of 30 December 1997, II AKa 247/97, LEX No. 1541151.

<sup>17</sup> Judgement of the Appellate Court in Kraków of 5 October 2006, II AKa 140/06, LEX No. 227391.

<sup>18</sup> T. Tabaszewski, *Eksces intensywny...*, p. 86.

<sup>19</sup> Judgement of the Appellate Court in Rzeszów of 19 January 1995, II AKr 3/95, OSA 1995, No. 2, item 9.

<sup>20</sup> J. Warylewski, *Czy zmiany w przepisach Kodeksu karnego z 1997 r. dotyczących obrony koniecznej są nam potrzebne?*, [in:] W. Cieślak, M. Romańczuk-Gracka (ed.), *Między stabilnością a zmiennością prawa karnego. Dylematy ustawodawcy*, Olsztyn 2017, pp. 97 and 98.

### 3. CONDITIONS OF IMMUNITY FROM PROSECUTION

The clause on immunity from prosecution laid down in Article 25 §2a CC is applicable when a defendant:

- has exceeded the limits to the right of self-defence;
- has repulsed an assault consisting in a break-in to a flat, premises, a house or the adjoining fenced area; or
- has repulsed an assault preceded by a break-in to those places (positive requirements).

The clause on immunity from prosecution is not applicable in case the limits to the right of self-defence have been flagrantly exceeded (a negative requirement).

Immunity from prosecution depends on the place of an assault, which is a flat, premises, a house or the adjoining fenced area. It is an objective criterion.

#### 3.1. EXCEEDING THE LIMITS TO THE RIGHT OF SELF-DEFENCE

Article 25 §2 CC regulating the issue of exceeding the limits to the right of self-defence does not determine its form, and in the case law and literature, it is commonly assumed that it concerns:

- intensive excess taking place in case of the use of a method of defence that is disproportionate to the danger of an assault, which was clearly exposed in Article 25 §2 CC; it takes place when the force of defence exceeds the need to repulse an assault. It is assumed that it is admissible to use any available means of an efficient repulse of an assault<sup>21</sup> or a defendant is required to choose the softest of the efficient means.<sup>22</sup> None of those standpoints can be approved of because one cannot find grounds for them in Article 25 §2 CC. Taking into consideration that an excess takes place in case of the application of a method of defence that is disproportionate to the danger of an assault and a defensive action is undertaken in an extraordinary situation for a defendant, it must be assumed that it can neither be any method nor the softest one; it must be such that makes it possible to repulse an assault.
- extensive excess consisting in the violation of the time correlation between an assault and defence, i.e. non-contemporariness of defence in relation to an assault, in which the defence may be used before a direct assault (premature defence, *defensio antecedens*) or initiated after an assault (delayed defence, *defensio subsequens*).

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<sup>21</sup> The Supreme Court judgement of 4 November 1938, 2K 2596/37, Zb. O. 1939, No. 6, item 148; the Supreme Court judgement of 3 July 1969, I V KR 118/89, OSPiKA 1970, No. 1, item 10; the Supreme Court judgement of 19 April 1982, II KR 67/82, Gazeta Prawnicza No. 4, 1983, p. 8; A. Gubiński, *Wyłączenie bezprawności. O okolicznościach uchylających społeczną szkodliwość czynu*, Warsaw 1961, pp. 21–22 and 24.

<sup>22</sup> The Supreme Court judgement of 21 May 1975, II KR 372/74, OSNPG 1975, No. 10, item 94; the Supreme Court judgement of 19 March 1982, III KR 31/82, OSNPG 1982, No. 1, item 142; the Supreme Court judgement of 14 June 1984, I KR 123/84, OSNPG 1985, No. 4, item 142; the Supreme Court judgement of 14 June 1984, I KR 124/84, OSNPG 1985, item 51; A. Marek, *Obrona konieczna w prawie karnym. Teoria i orzecznictwo*, Warsaw 2008, p. 130.

Article 25 §2a CC lays down the issue of exceeding the limits to the right of self-defence in general terms without stipulating the criteria for a perpetrator's conduct within and beyond the limits to the right of self-defence. It is established in the light of a particular case. It is rightly pointed out in the case law that: "There are no general and theoretical criteria for defining means and methods of defence proportionate to the danger of an assault. Its appropriate assessment always depends on a thorough analysis of a given incident, and the dynamic of an assault in particular, because it determines the degree of danger".<sup>23</sup> The analysis of the intensity of an assault, including such elements as the intensity of violence, means of attack used, and an assailant's features, is of key importance, because they determine the type and method of application of means aimed at repulsing an assault; they have a decisive impact on the recognition of these actions as ones within the limits of necessity.<sup>24</sup> It is rightly proposed to assess excessive use of a means (a method) of defence also against the objective criteria and not in full dependence on a subjective defendant's assessment,<sup>25</sup> and take into consideration the objective aspect and the reality of an assault, and not to assess it from the perspective of consequences of self-defence for an assailant.<sup>26</sup>

Criminal liability for exceeding the limits to the right of self-defence results from a requirement that it should be caused by the fault, i.e. a perpetrator must be aware of it and at least agree to use an excessive means of defence to repulse a direct and unlawful assault on whatever interest of an individual or that his action is disproportionate to an assault.<sup>27</sup>

Article 25 §2a CC lays down the issue of exceeding the limits to the right of self-defence in general terms without determining what kind of excess it concerns. There is a lack of whatever indication of that, thus, pursuant to the rule of interpretation *lege non distigunte nec nostrum est distinguere*, there are no grounds for limiting the application of the clause of immunity from prosecution to one of the above-mentioned types of excess.

In the context of Article 25 §2a CC, a question is raised whether a defendant repulsing an assault should be a person authorised to use a flat, premises, a house or the adjoining fenced area. Looking at this issue from the perspective of conditions for the right of self-defence, one can answer that it can be anyone because one can defend not only one's own interest but also the interest of another entity. A person authorised to use premises as well as another person who undertakes to protect

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<sup>23</sup> Judgement of the Appellate Court in Warsaw of 8 August 2002, II AKa 255/02, OSA 2003, No. 4, item 30.

<sup>24</sup> The Supreme Court judgement of 17 September 1997, III KKN 316/96, LEX No. 32340; judgement of the Appellate Court in Warsaw of 24 November 2017, II AKa 291/17, LEX No. 2412809.

<sup>25</sup> Judgement of the Appellate Court in Katowice of 30 December 1997, II AKa 247/97, LEX No. 1541151.

<sup>26</sup> Judgement of the Appellate Court in Poznań of 14 January 1992, II AKr 2/92, OSA 1992, No. 4, item 26; the Supreme Court ruling of 7 October 2014, V KK 116/14, LEX No. 1532784; judgement of the Appellate Court in Lublin of 19 October 1999, II AKa 151/99, Prok. i Pr. No. 3 – supplement 2000, item 23; judgement of the Appellate Court in Kraków of 29 September 2005, II AKa 169/05, Prok. i Pr. No. 5 – supplement 2006, item 32.

<sup>27</sup> The Supreme Court judgement of 23 July 1980, V KRN 168/80, LEX No. 17294.

the sphere of an authorised person's privacy may take action consisting in the use of physical force against a perpetrator of a crime of violation of possessory rights in real property.<sup>28</sup> On the other hand, the motives for the introduction of the clause on immunity from prosecution for exceeding the limits to the right of self-defence suggest that it should be applied to people who defend their possessory rights in real property. Possessory rights in real property, as the doctrine emphasises, are the rights to use a house, a flat, premises, an enclosure or a fenced area in an undisturbed way, i.e. to do in those places what you want within the general legal order in an undisturbed way and to decide what third persons, when and on what conditions may be in those places.<sup>29</sup> Therefore, if everyone is entitled to the right of self-defence, it is hard to assume that Article 25 §2a CC is applicable only to persons having legal entitlements to the objects determined in the provision.

### 3.2. TYPE OF ASSAULT

The positive requirements for immunity from prosecution presented above directly suggest that not every type of defensive action is subject to it. What is covered by immunity is a defensive action repulsing an assault that constitutes a break-in or precedes a break-in to places listed in Article 25 §2a CC.

Such conduct is the feature of a crime laid down in Article 193 §1 CC, where, *inter alia*, breaking into someone's house, flat, premises, room or fenced area is penalised. It has the same meaning as in Article 25 §2a CC because, in accordance with the ban on homonymous interpretation, the same words cannot be assigned different meanings.<sup>30</sup> It is rightly pointed out in the doctrine that the concept and the terms: a house, a flat and premises should have the same content as in Article 193 §1 CC.<sup>31</sup>

The word "break-in" means "an act of entering a place by force, with the use of violence" and the word "to break in" means "to enter by force, with the use of violence, against someone's will, to capture, to conquer something".<sup>32</sup> A break-in in the meaning of Article 25 §2a CC is any form of entry into someone else's locked flat, or another place protected by possessory rights in real property, against a clear will of an authorised person.<sup>33</sup> The means used by a perpetrator to break in are

<sup>28</sup> M. Królikowski, A. Sakowicz, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna. Komentarz do art. 1–31*, Vol. I, Warsaw 2017, p. 634.

<sup>29</sup> M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny. Komentarz*, Warsaw, 2016, pp. 1192–1193.

<sup>30</sup> L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2014, p. 148.

<sup>31</sup> J. Warylewski, *Czy zmiany...*, p. 99.

<sup>32</sup> H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 45, Poznań 2004, pp. 92 and 189.

<sup>33</sup> The Supreme Court ruling of 14 August 2001, V KKN 338/98, LEX No. 52067; the Supreme Court judgement of 17 March 1936, III K 2218/35, OSN(K) 1936, No. 10, item 370; the Supreme Court ruling of 14 August 2001, V KKN 338/98 LEX No. 52067; judgement of the Appellate Court in Katowice of 26 April 2007, II AKa 37/07, KZS 2007, No. 11, item 69; M. Siewierski, *Kodeks karny. Komentarz*, Warsaw 1958, p. 351; W. Świda, [in:] I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, Warsaw 1973, p. 500; R.A. Stefański, *Prawnokarna ochrona miru domowego*, [in:] M. Mozgawa (ed.), *Prawnokarne aspekty wolności. Materiały z konferencji Arłamów 16–18 maja*

irrelevant.<sup>34</sup> It is not required that a perpetrator should use violence or illegal threat. It is sufficient that he enters in a way that does not indicate a user's consent. It is indicated in literature that it may occur in the form of a breach in a wall or the ceiling of the neighbours' dwelling.<sup>35</sup> However, in general, defensive conduct occurs in case a perpetrator breaks into a flat in order to steal property. The Supreme Court rightly notices that this applies to every type of a perpetrator's conduct consisting in getting into a place without a clear consent of its host.<sup>36</sup> It may take the form of entry by deception, secretly, through an open window, through a half-open door, after unlocking the door with the use of a duplicated key as well as entry onto someone else's fenced area by car or a helicopter.<sup>37</sup> The justification for the Criminal Code of 1932 indicates that: "The use of a word 'break-in' in CC is to emphasise both violence and special unlawfulness of action infringing the will of a person who has the right to dispose of the space in question. (...) Neither does CC list features of a break-in to the places enumerated in statute, the use of whatever violence against a facility or physical force, or threat against a person".<sup>38</sup>

It is irrelevant for what purpose a perpetrator breaks into a facility; it may just be the breach of possessory rights in real property, battery, burglary and theft, robbery or murder. There are no normative grounds for differentiating the situation of a defender based on a perpetrator's intent, i.e. whether his aim was a breach of possessory rights in real property, property or persons staying there. It was rightly emphasised in the course of legislative work that: "The situation, moment, protection of private life, protection of family life, protection of possessory rights in real property, and ensuring security connected with staying in a house or a flat require that these types of criteria should not be subject to assessment".<sup>39</sup>

In the judicature, it is assumed that:

- "A 'break-in' should be understood as entry to those places against the will of an authorised person rather than a breach of a physical obstacle".<sup>40</sup>

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2005 r., Zakamycze 2006, p. 173; M. Mozgawa, *Kilka uwag na temat przestępstwa naruszenia miru domowego (art. 193 k.k.)*, [in:] Z. Ćwiakalski, J. Postulski (ed.), *Demokratyczne państwo prawne. Księga jubileuszowa dedykowana Profesorowi Andrzejowi Zollowi*, Przemysł-Rzeszów 2012, p. 167; S. Hypś, [in:] A. Grzeszkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2018, p. 993; M. Królikowski, A. Sakowicz, [in:] M. Królikowski (ed.), *Kodeks karny...*, Vol. I, p. 629; J. Kosonoga, [in:] R.A. Stefański (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 1157.

<sup>34</sup> J. Lachowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 880.

<sup>35</sup> *Ibid.*, p. 881.

<sup>36</sup> The Supreme Court ruling of 14 August 2001, V KKN 338/98 LEX No. 52067.

<sup>37</sup> T. Bojarski, [in:] I. Andrejew, L. Kubicki, J. Waszczyński (ed.), *System prawa karnego. O przestępstwach w szczególności*, Vol. IV, part II, Wrocław-Warsaw-Kraków-Gdańsk-Łódź 1989, pp. 61 and 63.

<sup>38</sup> Motywy Komisji Kodyfikacyjnej. Komisja Kodyfikacyjna, Vol. V, issue 4, p. 202.

<sup>39</sup> M. Warchoł's statement at the meeting of the Codification Committee, Komisja Nadzwyczajna do spraw zmian w kodyfikacjach, on 2 November 2017, Biuletyn No. 553/VIII Komisji Nadzwyczajnej do spraw zmian w kodyfikacjach, p. 6.

<sup>40</sup> Judgement of the Appellate Court in Białystok of 17 July 2014, II AKa 140/14, LEX No. 151161; the Supreme Court judgement of 1 October 2007, IV KK 232/07, OSNwSK 2007, No. 1, item 2147.



- “A break-in (...) is entry in conjunction with overcoming an obstacle, however, not a physical one but a breach of the will of an authorised person who is an obstacle for an intruder to overcome. The method of infringing the will of an authorised person may vary but it is of secondary importance, irrelevant from the point of view of occurring crime”.<sup>41</sup>

A break-in is an entry to a facility by a person who is not authorised to enter based on the binding regulations, relations existing between the parties or agreements concluded and giving the right of access to a facility.<sup>42</sup> The conduct of someone who has claims to a flat, premises or another place should be treated in the same way.<sup>43</sup> The conduct of a person who has a title to co-use premises, even where the person has not done this for a long time, cannot be treated as one.<sup>44</sup>

There is no requirement that an authorised person should be present in a given place, e.g. a house or a flat. It is not necessary for the aggrieved to directly pronounce his will at the moment of committing an act; it may also be an implied will, e.g. in the form of a closed door or gate.<sup>45</sup> The Supreme Court rightly states that it concerns “every type of a perpetrator’s conduct consisting in penetrating a place referred to in the provision (someone else’s house, flat or premises) against a clear or implied will of a host”.<sup>46</sup>

The word “break-in” characterises an accomplished act. However, as it is emphasised in the doctrine, it is not necessary for a perpetrator to enter the given place with one’s whole body. It is enough to put a hand through the window to unlock it, open the door, put a leg between the door and the frame in order to prevent closing it.<sup>47</sup> These acts constitute attempts to commit a crime.<sup>48</sup>

Article 25 §2a CC, in its scope, covers such a repulse of an assault that is not a break-in but another type of attack a defendant faces after an assailant has broken into a flat, premises, a house or the adjoining fenced area. Indeed, the provision also stipulates that whoever *verba legis* “is repulsing an assault preceded by a break-in” is subject to immunity from prosecution. Undoubtedly, it applies to a perpetrator’s conduct after a break-in to such places.

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<sup>41</sup> Judgement of the Appellate Court in Katowice of 9 December 2010, II AKa 384/10, LEX No. 785453.

<sup>42</sup> The Supreme Court judgement of 7 May 2013, III KK 388/12, Biul. SN 2013, No. 6, item 1.2.5; the Supreme Court judgement of 3 February 2016, III KK 347/15, Prok. i Pr. No. 5 – supplement 2016, item 5.

<sup>43</sup> L. Peiper, *Komentarz do Kodeksu karnego*, Kraków 1936, p. 515.

<sup>44</sup> The Supreme Court judgement of 21 September 1961, V K 381/61, OSN GP 1961, No. 11–12, item 148.

<sup>45</sup> M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 522; S. Glaser, A. Mogilnicki, *Kodeks karny. Komentarz*, Kraków 1934, p. 826.

<sup>46</sup> The Supreme Court ruling of 14 August 2001, V KKN 338/98, LEX No. 52067.

<sup>47</sup> L. Peiper, *Komentarz...*, p. 514.

<sup>48</sup> M. Mozgawa, [in:] J. Warylewski (ed.), *System Prawa Karnego. Przestępstwa przeciwko dobrom indywidualnym*, Vol. 10, Warsaw 2012, p. 571.

### 3.3. OBJECT OF ASSAULT

The clause on immunity from prosecution is applicable in a situation when an assault targets a flat, premises, a house or a fenced area adjoining them.

From the linguistic point of view, a flat is an enclosure, which usually consists of a room (or rooms), a kitchen, a bathroom, a toilet and a hall, premises where someone stays during the day and at night alone or with a family.<sup>49</sup> It is a room or rooms separated by solid walls, together with other auxiliary enclosures that serve to meet residential needs, e.g. a basement, an attic, a storeroom, a garage placed within the same real estate, a balcony or a terrace. One does not have to stay in there.<sup>50</sup>

It does not matter what the legal status of a flat and the title to live in it are; it can be a flat owned independently or co-owned within a housing association, or a rented or hotel room.

The term “premises” is used in the Criminal Code (Article 39(2e), Article 41a §§1, 2, 3a, 5, Article 193), the Criminal Procedure Code (Article 275a §§1 and 5) and other legal acts, however, in some cases it is preceded by an adjective “residential” (Article 2(1) and (2) of the Act of 15 December 2000 on housing associations,<sup>51</sup> Article 2 (1.4) of the Act of 21 June 2001 on the protection of the rights of lodgers, municipal housing stock and amending the Civil Code,<sup>52</sup> §3(1) of the Regulation of the Minister of the Interior and Administration of 16 August 1999 on technical requirements for the use of residential buildings,<sup>53</sup> Article 2 of the Act of 24 June 1994 on the ownership of premises<sup>54</sup>).

In accordance with Article 2(1) of the Act of 15 December 2000 on housing associations,<sup>55</sup> the term premises means independent residential premises (dwellings) and also premises used for other purposes referred to in the provisions of the Act of 24 June 1994 on the ownership of premises; a studio where an artist regularly works is also treated as a dwelling.

In accordance with Article 2(1.4) of the Act on the protection of the rights of lodgers, the term premises means “premises serving to satisfy residential needs (dwellings) as well as a studio where an artist regularly works; (...) an enclosure used for a short-term stay, especially one in boarding houses, hostels, guest houses, hotels, resort hotels or other buildings used for tourism or recreation is not treated as a dwelling”.

Premises, in accordance with §3(1) of the Regulation on technical requirements for the use of residential buildings, means: “places separated by solid walls, a room or a suite of rooms together with other enclosures earmarked for permanent residence,

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<sup>49</sup> H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 9, Poznań 1996, p. 79.

<sup>50</sup> M. Mozgawa, *Kilka uwag...*, p. 176.

<sup>51</sup> Journal of Laws [Dz.U.] of 2013, item 1222, as amended.

<sup>52</sup> Journal of Laws [Dz.U.] of 2016, item 1610, as amended.

<sup>53</sup> Journal of Laws [Dz.U.] No. 74, item 836, as amended.

<sup>54</sup> Journal of Laws [Dz.U.] of 2015, item 1892, as amended.

<sup>55</sup> Journal of Laws [Dz.U.] of 2013, item 1222, as amended.

or a housing estate in which there is only one dwelling if it has a separate entrance from outside of the building or a staircase”.

According to the definition laid down in Article 2(2) of the Act on the ownership of premises, “an independent dwelling (...) is a place separated by solid walls, a room or a suite of rooms within a building earmarked for permanent residence, which together with other auxiliary enclosures, serves to satisfy people’s residential needs”. According to Article 2(2), premises refer to both residential premises (dwellings) and premises earmarked for other purposes. The definition is also used in relation to independent premises utilised for purposes other than residential (Article 2(1) *in fine*). Premises may contain some components, enclosures that do not literally belong to them directly or are placed within the land outside the building where a given dwelling is separated, especially a basement, an attic, a storeroom, a garage treated as belonging enclosures (Article 2(4)).

None of the definitions may be directly applied to premises referred to in Article 25 §2a CC because they were constructed for the needs of the legal acts in which they were used and their aim is different.<sup>56</sup> Although it is indicated in jurisprudence that a definition covers other legal acts if it is laid down in statute that is recognised as a basic legal act in a given branch,<sup>57</sup> however, none of these acts is such. This means that not every definition laid down in another statute determines the semantic scope of the defined concept laid down in a provision of criminal law. A definition concerning specialist issues laid down in another statute does not have to be binding for the interpretation of concepts used in the Criminal Code, although it may be helpful to interpret the concepts used therein.

Having in mind those indications and the elements of a concept of premises in the above-presented definitions, one may assume that “premises” means a room or a suite of rooms separated by solid walls within a building, together with other auxiliary enclosures serving to meet people’s residential needs, e.g. a basement, an attic, a storeroom, a garage situated within one real estate. Such a meaning is in conformity with the meaning in the colloquial language. In the linguistic interpretation, the word premises means “a flat, an enclosure, a part of a house or building”, but also “a public place, a place where business or cultural activity is carried out, where people spend time with other people in company”.<sup>58</sup>

Limitation of the concept of premises used in Article 25 §2a CC to residential premises (dwellings) with the elimination of business premises cannot be approved of because the definition of premises contains the concept of “a flat”, which would lead to recognition of the term “flat” in the provision as useless. Such interpretation would violate the interpretation directive: *per non est*.<sup>59</sup> Therefore, it should be assumed that the term premises in the meaning of this provision means only business premises. It is rightly assumed in the doctrine that the term premises

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<sup>56</sup> In literature, a definition of a dwelling laid down in the Act on the ownership of premises is adopted (M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks...*, p. 1193).

<sup>57</sup> M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warsaw 2010, p. 331.

<sup>58</sup> H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 19, Poznań 1998, p. 285.

<sup>59</sup> L. Morawski, *Zasady wykładni prawa*, Toruń 2006, p. 106.

should be understood as places earmarked for use other than residential.<sup>60</sup> There are no grounds laid down in Article 25 §2a CC for a statement that business premises are excluded from its scope.<sup>61</sup> The opinion is also in conflict with the *ratio legis* of the provision. No one knows why a defendant repulsing an assault of a burglar to business premises, where there are objects more valuable than in his flat, should be in a less favourable situation. In the doctrine, the concept covers residential premises, i.e. residential-business premises.<sup>62</sup> Indeed, premises may be used to reside in and to do business and, depending on their basic function, they may be flats or business premises. Therefore, there is no need to distinguish separate categories of premises. Such specification of the scope of the term suggests that it concerns both private premises and those belonging to a state, self-government or social institution.

The controversy concerns the types of premises included in the scope of Article 193 §1 CC. In the doctrine governed by the Criminal Code of 1932, there was an opinion that all enclosures belonging to all kinds of state, self-government and private institutions are subject to protection,<sup>63</sup> but the case law presented a totally different standpoint.<sup>64</sup> The Supreme Court, on the basis of the Criminal Code of 1969, assumed that: "The aggrieved under Article 171 §1 CC (at present Article 193) may be a legal person, a state or social institution, even if it did not have legal personality".<sup>65</sup> The Court emphasised that the concept of liberty is connected not only with a man, but such a person may express his will on his own behalf or as a body authorised to act on behalf of entities that are not natural persons. Moreover, natural and legal persons' rights are subject to the same protection in civil law because Article 43 CC stipulates that the provisions on the protection of natural persons' rights are applicable to legal persons respectively. The difference between a natural person and a legal person consists only in the title to express will. The act of expressing will alone is identical and its essence in both cases is the same. This possibility was admitted,<sup>66</sup> or in a limited form, when an act infringes the liberty of a natural person, e.g. of an owner or a user of given premises.<sup>67</sup>

<sup>60</sup> J. Lachowski, [in:] V. Konarska-Wrzošek (ed.), *Kodeks karny...*, p. 879.

<sup>61</sup> M. Warchoł's statement..., p. 14; T. Szafranski's statement at the meeting of Komisja Nadzwyczajna do spraw zmian w kodyfikacjach on 2 November 2017, Biuletyn No. 553/VIII Komisji Nadzwyczajnej do spraw zmian w kodyfikacjach, p. 16.

<sup>62</sup> M. Mozgawa, *Kilka uwag...*, p. 178.

<sup>63</sup> L. Peiper, *Komentarz...*, p. 515.

<sup>64</sup> The Supreme Court judgement of 19 February 1934, 3 K 20/34, OSP 1934, item 394.

<sup>65</sup> Resolution of seven judges of the Supreme Court of 13 March 1990, V KZP 33/89, OSNKW 1990, No. 7–12, item 23 with a gloss by B. Kurzepa, Prob. Praw. 1991, No. 3; the Supreme Court ruling of 17 January 1968, Rw 1391/76, OSNKW 1968, No. 4, item 47 with glosses by A. Marek, WPP 1968, No. 4, pp. 515–518, J. Ziewiński, WPP 1969, No. 7–8, pp. 1297–1301; the Supreme Court judgement of 3 December 1991, V KRN 84/90, OSNKW 1992, No. 3–4, item 27. Thus, also W. Kulesza, *Demonstracja. Blokada. Strajk (Granice wolności zgromadzeń i strajku w polskim prawie karnym na tle prawa niemieckiego)*, Łódź 1991, pp. 146–147.

<sup>66</sup> T. Bojarski, *Karnopravna ochrona nietykalności mieszkania jednostki*, Lublin 1992, p. 93; M. Mozgawa (ed.), *Kodeks...*, p. 525; A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Komentarz do art. 117–277*, Vol. II, Warsaw 2013, p. 639.

<sup>67</sup> I. Andrejew, *Polskie prawo karne w zarysie*, Warsaw 1989, p. 402.

Opponents emphasised that, in the Criminal Code, the crime is treated as an offence against liberty, i.e. a natural person and not facilities serving state or social institutions, and employees cannot be recognised as persons who dispose of those facilities.<sup>68</sup> Due to the fact that Article 193 CC concerns the protection of personal liberty, the provision cannot be applied to premises belonging to state, self-government and social institutions.<sup>69</sup> The standpoint should also refer to Article 25 §2a CC. In the doctrine, it is rightly pointed out that the legislator's unquestionable and clearly expressed intention was to strengthen the protection of privacy and personal liberty.<sup>70</sup>

A single-family house, in accordance with Article 2(3) of the Act on housing associations, is a residential detached house as well as a part of a semi-detached or terraced houses mainly earmarked for the purpose of meeting residential needs. In accordance with the Regulation of the Council of Ministers of 30 December 1999 on the Polish Classification of Types of Construction (Polska Klasyfikacja Obiektów Budowlanych, PKOB),<sup>71</sup> a residential building is a building at least half of which is used for residential purposes. In case less than half of overall useful floor area is used for residential purposes, the building is classified as a non-residential one in accordance with its purpose-oriented design. The residential part of a building includes residential facilities (a kitchen, a living room and bedrooms), auxiliary enclosures, a basement and rooms for common use (e.g. a pram room, a drying room).

In literature, a house is understood as a separate construction with a solid underground part, made of building materials and elements, a construction unit that is a result of construction works and a technical development, regardless of the fact whether it is used for residential purposes or not.<sup>72</sup> It does not matter which part of the floor area is used for residential purposes.

A fenced area refers to a separated, limited part of land demarcated by a complete fence.<sup>73</sup> A fence is to indicate that an owner or user does not want unauthorised persons to enter. A fence may be in the form of a palisade, a wall, a low ha-ha wall, a wooden hoarding, a chain link fence, a boarder, a wire fence, a barbed wire fence, a picket fence, a dyke, a hedge, etc. Bushy trees that hamper entry or

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<sup>68</sup> H. Rajzman, *Przegląd orzecznictwa Sądu Najwyższego w zakresie prawa karnego materialnego (I półrocze 1965 r.)*, NP No. 1, 1969, p. 128; T. Bojarski, *Przestępstwa przeciwko wolności a ochrona dóbr publicznych*, NP No. 6, 1969, p. 903; by this author, *Karnoprawna ochrona...*, pp. 93–94; J. Kudrelek, P. Palka, *Z problematyki przestępstwa naruszenia miru domowego*, PS No. 11–12, 2001, pp. 160–163; A. Marek, *Kodeks karny. Komentarz*, Warsaw 2010, p. 444; A. Sakowicz, *Karnoprawna ochrona prywatności*, Kraków 2006, p. 358; J. Wojciechowska, [in:] B. Kunicka-Michalska, J. Wojciechowska, *Przestępstwa przeciwko wolności, wolności sumienia, wyznania, wolności seksualnej i obyczajności oraz czci i nietykalności cielesnej. Komentarz*, Warsaw 2000, p. 70; J. Kosonoga, [in:] R.A. Stefański (ed.), *Kodeks karny...*, p. 1161.

<sup>69</sup> T. Bojarski, [in:] *System prawa karnego...*, p. 59; R.A. Stefański, *Prawnokarna ochrona...*, p. 172; N. Kłaczyńska, [in:] J. Giezek (ed.), *Kodeks karny. Część szczególna*, Vol. II, Warsaw 2014, p. 490.

<sup>70</sup> J. Warylewski, *Czy zmiany...*, p. 99.

<sup>71</sup> *Journal of Laws [Dz.U.]* No. 112, item 1316.

<sup>72</sup> M. Mozgawa, *Kilka uwag...*, p. 176; by this author, [in:] *System Prawa Karnego...*, p. 576.

<sup>73</sup> J. Lachowski, [in:] V. Konarska-Wrzosek (ed.), *Kodeks...*, p. 880.

make it impossible to observe from outside what is happening inside the area may constitute a fence. The fencing may be permanent or temporary, movable and it does not have to block access. It may be symbolic, however, showing the owner's will not to give access without permission.<sup>74</sup> The area may include a courtyard, a garden, an orchard, etc. The size of the area is not important; it may depend on the size of the real estate.

When a defendant repulses an assault on the area that is not fenced, the requirements of Article 25 §2a CC are not fulfilled. In order to apply it, it is not important who had the right to the area. What matters is the lack of the requirement of a fenced area.<sup>75</sup> Thus, it was wrongly pointed out during the legislative work in the Sejm that the rights of the intruder and the defendant should be weighed.

The condition for the application of Article 25 §2a CC, in case of exceeding the limits to the right of self-defence against a perpetrator who broke into the fenced area, is that it is adjacent to a flat, a house or premises. The word "adjacency" refers to "what is close to something, especially areas, buildings, enclosures that are in the neighbourhood, surround something big or a central object", and the word "to adjoin" means "to boarder, be close to, neighbour".<sup>76</sup> Based on the linguistic meaning of the word, one should assume that it refers to an area adjoining the building with a flat, a house or premises. It is a concept that must be each time assessed and established in the light of particular circumstances. Usually, it is a fenced piece of land that is linked with the use of a flat, a house or premises.

The Article 25 §2a CC, unlike Article 193 §1 CC, does not lay down that these areas should be someone else's places. This does not mean that a protected object that a person breaking into has the right to enter may be an object of a break-in. It is obvious that a person having the right to enter a protected object is not an intruder. The Supreme Court rightly assumed that: "A perpetrator of violation of possessory rights in real property laid down in Article 193 CC may also be the owner of a house, a flat, premises or a fenced area".<sup>77</sup> In such a case, a lodger's right has primacy over the protection of possessory rights in real property as a result of renting.<sup>78</sup> Although an owner is authorised to use things in conformity with social and economic purpose of his rights and to dispose of them (Article 140 CC), when he lets a flat, he deprives himself of the right to use it. A lodger, on the other hand, obtains a possibility of using things (Articles 659 to 668 CC). A break-in

<sup>74</sup> K. Buchała, *Prawo karne materialne*, Warsaw 1989, p. 637; M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks...*, p. 1193.

<sup>75</sup> M. Warchoł's statement..., p. 19.

<sup>76</sup> H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 34, Poznań 2001, pp. 270–271.

<sup>77</sup> The Supreme Court ruling of 3 February 2011, V KK 415/10, Prok. i Pr. No. 7–8 – supplement 2011, item 5 with comments of approval by P. Kozłowska-Kalisz, J. Piórkowska-Flieger, *Przegląd orzecznictwa Sądu Najwyższego z zakresu prawa karnego materialnego za I półrocze 2011 r.*, Pr. w Dział. No. 13, 2013, pp. 186–187; P. Pająk, *Mir domowy czy właścicielski*, CzPKiNP No. 3, 2011, p. 10; M. Pyrcak, *Czy właściciel powinien odpowiadać za przestępstwo naruszenia miru domowego? Uwagi na marginesie artykułu P. Dyluś i K. Wiśniewskiej*, CzPKiNP No. 3, 2011, p. 45; N. Kłaczyńska, [in:] J. Giezek (ed.), *Kodeks...*, p. 491; M. Królikowski, A. Sakowicz, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 631.

<sup>78</sup> M. Filar, M. Berent, [in:] M. Filar (ed.), *Kodeks karny...*, p. 1195.

may also occur in case of entry to facilities that are in the custody of a person without a legal title, with the exception of their owners.<sup>79</sup> Moreover, it is connected with the prevention of unlawful interference into the peace of habitation.<sup>80</sup> Thus, an owner's entry into a rented house, a flat, an enclosure or premises, as well as a rented adjoining area, should be treated as a break-in.

#### 4. FLAGRANT EXCEEDING OF THE LIMITS TO THE RIGHT OF SELF-DEFENCE

The clause on immunity from prosecution for exceeding the limits to the right of self-defence is not applicable when it has been flagrant in nature. The word "flagrant" means: "something negative; too big, clear, obvious, unquestionable, doubtless; striking and impossible to go unnoticed".<sup>81</sup>

Evaluation whether exceeding the limits to the right of self-defence has been flagrant, depending on the stage of the proceedings, is a prosecutor's or a court's competence. These bodies have discretion to decide that there has been flagrant exceeding of the limits to the right of self-defence in each case. Not only the result of a defensive action, but also various circumstances are decisive. Exceeding the limits to the right of self-defence may be intensive as well as extensive excess, and its assessment is the task for a prosecutor and next for a court.

#### 5. CONCLUSIONS

- 1) The clause on immunity from prosecution for exceeding the limits to the right of self-defence by a defendant repulsing a break-in to a flat, premises, a house or the adjoining fenced area or an assault preceded by a break-in to those places (Article 25 §2a CC) gives a defendant a guarantee that he will not be subject to criminal liability in case he uses a disproportionate means, or he uses them too early or too late. It encourages defendants to undertake a defensive action against perpetrators who in general strive directly to commit a serious crime, e.g. burglary and theft or robbery the moment they enter an area, and also a warning to perpetrators that they may be attacked by a person disposing of the area at the early stage of criminal conduct. Undertaking criminal activities, an assailant must take into account that he will encounter a victim's resistance and, as a result, may incur serious loss, and a defendant may efficiently exercise his right without fear that he will be prosecuted.

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<sup>79</sup> T. Bojarski, *Z problematyki karnoprawnej ochrony mieszkania jednostki*, [in:] M. Bojarski, J. Brzezińska, K. Łuczczak (ed.), *Problemy współczesnego prawa karnego i polityki kryminalnej. Księga jubileuszowa Profesor Zofii Sienkiewicz*, Wrocław 2015, pp. 35–36.

<sup>80</sup> Judgement of the Appellate Court in Katowice of 26 April 2007, II AKa 47/07, KZS 2007 No. 11, item 41.

<sup>81</sup> H. Zgólkowa (ed.), *Praktyczny słownik współczesnej polszczyzny*, Vol. 35, Poznań 2002, p. 265.

- 2) Immunity from prosecution is applicable to a narrow scope of defensive activities, i.e. only to those targeted at an assault consisting in the violation of possessory rights in real property. This concerns defence against break-in to a flat, premises, a house or the adjoining fenced area or an assault preceded by a break-in to those places. It is applicable to facilities that natural persons, and not state, self-government or social institutions, dispose of.
- 3) What guarantees that the instrument will not be misused is in practice the exclusion of immunity from prosecution in case of flagrant exceeding the limits to the right of self-defence. In such situations, exceeding the limits to self-defence must be absolutely obvious, raising no doubts at all.

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## IMMUNITY FROM PROSECUTION FOR EXCEEDING THE LIMITS TO THE RIGHT OF SELF-DEFENCE

### Summary

The article presents the clause on immunity from prosecution for exceeding the limits to the right of self-defence by a defendant repulsing an assault consisting in a break-in to a flat, premises or a fenced area adjoining them or an assault preceded by a break-in to those places (Article 25 §2a CC), which was introduced by the amendment of 8 December 2017 to the Criminal Code. Immunity from prosecution is applicable to defensive activities against an assault consisting in the violation of possessory rights in real property: a break-in to a flat, premises, a house or an adjoining fenced area or an assault preceded by a break-in to those areas. It is applicable to the facilities that natural persons dispose of and not to state, self-government

and social institutions' ones. The clause is not applicable in the event of flagrant exceeding the limits to the right of self-defence, which is a guarantee that it will not be misused in practice. The author expresses approval of the solution.

Keywords: clause on immunity from prosecution, possessory rights in real property, right of self-defence, exceeding the limits to the right of self-defence

## NIEKARALNOŚĆ PRZEKROCZENIA GRANIC OBRONY KONIECZNEJ

### Streszczenie

Przedmiotem artykułu jest wprowadzona nowelą z dnia 8 grudnia 2017 r. klauzula niekaralności przekroczenia granic obrony koniecznej przez odpierającego zamach polegający na wdarciu się do mieszkania, lokalu, domu albo na przylegający do nich ogrodzony teren lub zamach poprzedzony wdarciem się do tych miejsc (art. 25 §2a k.k.). Niekaralność dotyczy działań obronnych, skierowanych przeciwko zamachowi polegającemu na naruszeniu miru domowego: wdarciu się do mieszkania, lokalu, domu albo na przylegający do nich ogrodzony teren lub zamachowi poprzedzonemu wdarciem się do tych miejsc. Dotyczy tego rodzaju obiektów pozostających we władaniu osób prywatnych, a nie instytucji państwowych samorządowych lub społecznych. Klauzula ta nie ma zastosowania w wypadku, gdy przekroczenie granic obrony koniecznej było rażące, co daje gwarancję jej nienadużywania w praktyce. Autor ocenia to rozwiązanie pozytywnie.

Słowa kluczowe: klauzula niekaralności, mir domowy, obrona konieczna, przekroczenie granic obrony koniecznej

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