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CRIMINAL LIABILITY FOR (SELF)-LIBERATION OF A PERSON LEGALLY DEPRIVED OF LIBERTY UNDER GERMAN, SWISS, AUSTRIAN AND THE PRINCIPALITY OF LIECHTENSTEIN'S LAW

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Abstract

The subject of the article are the regulations concerning the escape of a person legally deprived of liberty, that are in force in countries with a Germanic legal tradition. The analysis of German, Swiss, Austrian and the Principality of Liechtenstein's law is conducted against a background of Polish solutions. The aim of the study is to present similarities and differences between the solutions adopted in particular German-speaking countries, as well as between these solutions and the regulations contained in the Polish Penal Code.

Keywords: offence of liberation (and self-liberation) of a person deprived of liberty, offence of facilitating escape of a person deprived of liberty, offence of instigating to escape

INTRODUCTION

The subject matter of the article are the regulations concerning, in general, escape of a person legally deprived of liberty, that are binding in the countries with a German legal tradition. The analysis of German, Swiss, Austrian and the Principality of Liechtenstein's law is conducted against a background of Polish solutions. The aim

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of the study is to present similarities and differences between the solutions adopted in particular German-speaking countries, as well as between these solutions and the regulations contained in the Polish Penal Code.[1] I am interested in criminal liability, thus, the possibilities of imposing criminal penalties. The issue of disciplinary liability is beyond the scope of this article.

Before I present the analysis of foreign laws, I will outline the above-mentioned background and indicate the provisions that regulate this area in Poland.[2] In accordance with Article 242 § 1 PC, a person who self-liberates when deprived of liberty as a result of a court sentence or an legal order issued by another state authority is subject to a penalty. It is the so-called offence of self-liberation. It consists in the fact that a person legally deprived of the freedom of movement, e.g. a convict in prison or a person remanded in custody in order to serve the penalty of deprivation of liberty or held in pre-trial detention, acts to regain liberty, simply speaking, escapes. A perpetrator who self-liberates by conspiring with other people, uses violence or threatens to do so, or damages the place of confinement is subject to a stiffer penalty (Article 242 § 4 PC). Pursuant to Article 242 § 1a PC, the same penalty as for the offence under § 1 shall be imposed on anyone who, being deprived of liberty as a result of a court sentence or an legal order issued by another state authority and being unsupervised outside a prison or pre-trial custody in connection with performing work, wilfully leaves the designated place of work or wilfully remains outside that place.[3] On the other hand, Article 242 §§ 2 and 3 PC specifies an offence of failure to return to the place of isolation. A person who is temporarily released from prison or pre-trial custody without supervision, or a psychiatric hospital with basic security measures, having used the break in serving the penalty of deprivation of liberty, fails to return to the place of detention within three days after the deadline set is subject to a penalty. While the offence of self-liberation was laid down in the two former Polish Penal Codes in a similar way as it is at present, the offence under Article 242 §§ 1a, 2 and 3 was introduced to the Polish legal order in the current Penal Code.[4] On the other hand, Article 243 PC lays down a penalty for a person who liberates or facilitates the escape of somebody who is deprived of liberty as a result of a court sentence or an legal order issued by another state authority. The above-indicated provisions are placed in Chapter XXX PC titled "Offences against the administration of justice".

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1 Act of 6 June 1997 – Penal Code, consolidated text, Journal of Laws of 2022, item 1138, as amended; hereinafter "PC".

2 Due to the space limits of the article, it is not possible to discuss these issues more thoroughly here. For more literature on the topic see Poniatowski, P., *Przestępstwa uwolnienia osoby prawnie pobawionej wolności (art. 242 i 243 k.k.)*, Warszawa, 2019, passim.

3 On this new type of offence, see Poniatowski, P., 'Samowolne oddalenie się z miejsca pracy przez skazanego zatrudnionego poza terenem zakładu karnego w systemie bez konwojenta (uwagi na tle uchwały SN z 8.04.2021 r., I KZP 9/20)', *Państwo i Prawo*, 2022, No. 12, pp. 85–87.

4 It was connected with more and more common permissions granted to prisoners to leave a correctional facility (e.g. in order to work or in connection with being granted leave).

CRIMINAL LIABILITY FOR (SELF)-LIBERATION OF A PERSON DEPRIVED OF LIBERTY IN GERMAN LAW

The provisions concerning the conduct under consideration are placed in Chapter 6 of the Penal Code of 18 May 1871[5] titled "Resistance to state authority" (*Widerstand gegen die Staatsgewalt*).

In accordance with § 120 StGB (*Gefangenenbefreiung*), whoever liberates a prisoner or aids and abets the escape of a prisoner is subject to imprisonment for up to three years or a fine (subsection 1). If a perpetrator, being a public officer or a person under special obligation of public service, is obliged to prevent escape of a prisoner, he is subject to a penalty of imprisonment for up to five years or a fine (§ 120 subsection 2 StGB). Public officers are: (a) civil servants and judges, (b) other persons performing official functions, (c) persons who have been assigned public tasks in a public authority or another institution, or have been authorised to provide public administration services regardless of the organisational form within which the obligations are fulfilled (§ 11 subsection 1(2) StGB). Under § 120 subsection 3 StGB, attempt to commit this offence is subject to punishment.[6]

A prisoner (*Gefangene*) is a person who – as a result of policing or penal powers of the state to deprive a citizen of liberty – has been deprived of liberty in a legal way (i.e. in a formally proper although not necessarily substantively just way) and in the public interest, and in consequence thereof is under the authority of a competent authority, e.g. a person serving an imprisonment sentence, awaiting trial in custody, awaiting extradition, arrested to be coerced or in connection with public disorder.[7] It concerns instances of deprivation of liberty not only in criminal but also civil cases, e.g. arrest of a witness who groundlessly refuses to testify in a civil case – § 390 Zivilprozessordnung (ZPO),[8] arrest of a debtor – §§ 888 and 890 ZPO.[9] On the other hand, a person who has been deprived of liberty by a private individual in the course of citizen's arrest is not a prisoner (§ 127 subsection 1 Strafprozeßordnung – StPO[10]).[11] It should be pointed out that in accordance with § 120 subsection 4 StGB, a prisoner within the meaning of subsections 1 and 2 is also a person who, based on the authority's order, is deprived of liberty in

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[5] Strafgesetzbuch (source: https://www.gesetze-im-internet.de/stgb/index.html; accessed on 30.01.2023); hereinafter "StGB".

[6] Offences in Germany are divided into crimes (*Verbrechen*) and misdemeanours (*Vergehen*) (§ 12 StGB). A crime attempt is always subject to punishment, while misdemeanour attempt – including offences under § 120 – only when this is stipulated in a special provision (§ 23 subsection 1 StGB).

[7] Kühl, K., Heger, M., *Strafgesetzbuch. Kommentar*, C.H. Beck, 2014, p. 696. Also see Maier, G., *Aktuelles Strafrecht für Ausbildung, Prüfung und Praxis*, Vol. I, Karlsfeld, 1999, pp. 20–21; Eser, A., in: Eser, A. et al., *Schönke/Schröder Strafgesetzbuch Kommentar*, C.H. Beck, 2014, p. 1457; Hilgendorf, E., in: Arzt, G. et al., *Strafrecht. Besonderer Teil. Lehrbuch*, Bielefeld, 2015, p. 1239.

[8] German Civil Procedure Code (source: https://www.gesetze-im-internet.de/zpo; accessed on 30.01.2023).

[9] Kühl, K., Heger, M., *Strafgesetzbuch…*, op. cit., p. 696.

[10] German Penal Procedure Code (source: https://www.gesetze-im-internet.de/stpo; accessed on 30.01.2023).

[11] Kühl, K., Heger, M., *Strafgesetzbuch…*, op. cit., p. 697.

a suitable institution. It concerns, for example, accommodation of the accused in a psychiatric hospital for the purpose of observation in accordance with § 81 StPO, or a person subject to a preventive measure in the form of placement in a psychiatric hospital (*Unterbringung in einem psychiatrischen Krankenhaus* – § 63 StGB) or a closed detoxification centre (*Unterbringung in einer Entziehungsanstalt* – § 64 StGB).[12]

The above-mentioned § 120 StGB stipulates liability of an instigator and aider and abettor because self-liberation is not (with the exception of a case determined in § 121 subsection 1(2) StGB, which will be discussed later) penalised[13]; and in accordance with general principles of liability, the persons are criminally liable when they deliberately instigate another person (instigator) or aid and abet (aider and abettor) the commission of a forbidden act (§§ 26 and 27 StGB).[14] A perpetrator of an offence under § 120 StGB may be any person, also a fellow-prisoner of a person liberated or instigated to escape or aided in the escape.[15]

In the German doctrine, attention is drawn to the fact that the state of 'being a prisoner' (*Gefangenenstatus*) lasts until release from prison, ordering a break in sentence service or liberation resulting from escape.[16] The state is not interrupted by non-custodial forms of serving a sentence in an open correctional institution (*offener Vollzug*), working outside prison without supervision (*Freigang*), being on short leave without supervision (*Ausgang*) or permits to leave prison temporarily (*Urlaub*).[17] In the context of the features of offences (liberating, aiding and abetting the escape of a prisoner), the issue of the use of the above-mentioned relaxed forms of isolation is problematic (there is a lack of an equivalent of Article 242 §§ 1a, 2 and 3 PC in StGB). It is emphasised that liberation consists in the removal, even momentary, of the official authority over a prisoner, which requires the existence of actual or social relationship in the form of a prisoner's submission to the authority (*Herrschaftsverhältnis*).[18] Therefore, liberation must involve overcoming security measures, e.g. opening locked areas or eliminating direct supervision. If there are no such security measures because a prisoner is allowed to leave prison, it is not

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[12] See Fischer, T., *Strafgesetzbuch mit Nebengesetzen*, München, 2015, p. 940; Maier, G., *Aktuelles Strafrecht…*, op. cit., p. 21.

[13] Attention is drawn in German literature to the lack of penalisation of self-liberation (*Selbstbefreiung*) – see, inter alia, Fischer, T., *Strafgesetzbuch…*, op. cit., p. 941; Eser, A., in: *Schönke/Schröder Strafgesetzbuch…*, op. cit., p. 1459.

[14] See Barton, S., in: Leipold, K., Tsambikakis, M., Zöller, M.A. (eds), *AnwaltKommentar StGB*, Heidelberg – München – Landsberg – Frechen – Hamburg, 2015, p. 1048; Wolter, J., in: Wolter, J. (ed.), *Systematischer Kommentar zum Strafgesetzbuch*, Vol. II, *§§ 46–122 StGB*, Köln, 2012, nb. 9 to § 120. A forbidden act (*rechtswidrige Tat*) is only such conduct that matches the features determined in the penal act (§ 11 subsection 1(5) StGB).

[15] Fischer, T., *Strafgesetzbuch…*, op. cit., p. 940.

[16] Ibidem, p. 940.

[17] Ibidem, p. 940 and § 10 subsection 1, § 11 and § 13 of the German Penalty Execution Code (Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung; https://www.gesetze-im-internet.de/stvollzg; accessed on 30.01.2023). The statute also stipulates supervised forms of a prisoner's stay outside prison: external employment under supervision – *Außenbeschäftigung* (§ 11 subsection 1(1)), short-time leave under supervision – *Ausführung* (§ 11 subsection 1(2)), escorting a prisoner when necessary – *Ausführung aus besonderen Gründen* (§ 12).

[18] Barton, S., in: *AnwaltKommentar StGB*, op. cit., pp. 1047–1048.

possible to speak about liberation.[19] The issue is even more complicated if we take into account that a prisoner may legally stay outside prison without supervision or under supervision. According to one (strict) opinion, the state of being under the official authority is maintained only when a prisoner uses relaxed forms of isolation under the supervision of responsible people. According to another opinion, the state also occurs when a prisoner is not under supervision. An in-between opinion requires that a prisoner is under official authority, i.e. at least is under supervision referred to in § 11 of the German Penalty Execution Code, which does not have to physically restrict a prisoner but creates a psychological barrier to a prisoner's escape.[20] It is emphasised in literature that instigating a prisoner who, using relaxed forms of isolation, is under no supervision to stop coming back to prison remains unpunished because in such a situation there is a lack of a prisoner's subordination to the authority, which was mentioned above. Thus, in such a case, liability under § 258 subsection 2 StGB can be considered (the provision stipulates a penalty for a person who purposefully or consciously completely or partially prevents the execution of a penalty or another measure imposed on a person).[21]

§ 121 StGB specifies the offence of 'prison mutiny' (*Gefangenenmeuterei*). Prisoners who group together (a group, gathering – *Zusammenrottung* – must consist of at least two prisoners[22]) and jointly: (1) force others to particular conduct (§ 240)[23] or physically attack officers in the institution where they are, another public official (e.g. a judge or a prosecutor, or a police officer[24]) or another person who has been assigned supervision tasks, care or investigation (e.g. a hospital employee obliged to guard a prisoner hospitalised, an entrepreneur for whom a prisoner works or an expert physician or an expert witness[25]); (2) escape rapidly; or (3) rapidly aid and abet the escape of one of them or another prisoner, are subject to a penalty of imprisonment for a period from three months to five years (§ 121 subsection 1 StGB).[26] Rapid action should be interpreted as breaking out of confinement, i.e. escape connected with breaking physical security measures that separate prisoners from liberty, e.g. damaging locks, cutting fences etc.[27] Under § 121 subsection 3 StGB, in particularly serious cases, prison mutiny should be subject to a penalty of imprisonment for six months up to ten years. A particularly serious case usually occurs when a perpetrator or another participant

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19 Barton, S., in: AnwaltKommentar StGB, op. cit., p. 1048.

20 See Wolter, J., in: *Systematischer Kommentar…*, op. cit., nb. 5 to § 120.

21 Barton, S., in: *AnwaltKommentar StGB*, p. 1048.

22 Kühl, K., Heger, M., *Strafgesetzbuch…*, p. 699; Eser, A., in: *Schönke/Schröder Strafgesetzbuch…*, op. cit., p. 1461; Wolter, J., in: *Systematischer Kommentar…*, op. cit., nb. 5 to § 121.

23 § 240 StGB stipulates a penalty for a person who unlawfully, by means of force or threat of severe harm, forces another person to action, omission or suffering.

24 Maier, G., *Aktuelles Strafrecht…*, op. cit., p. 27.

25 Ibidem, p. 28.

26 Attempt of this offence is subject to punishment (§ 121 subsection 2 StGB).

27 See Maier, G., *Aktuelles Strafrecht…*, op. cit., p. 28; Eser, A., in: *Schönke/Schröder Strafgesetzbuch…*, op. cit., p. 1462. The use of a copied key by prisoners will not be classified as "rapid" – Fischer, T., *Strafgesetzbuch…*, op. cit., p. 942; Wolter, J., in: *Systematischer Kommentar…*, op. cit., nb. 11 to § 121. It may also concern the use of violence against other persons than those referred to in § 121 subsection 1(1) StGB (including against fellow-prisoners) – Fischer, T., *Strafgesetzbuch…*, op. cit., p. 942.

of a crime: (1) carries firearms; (2) carries another weapon or a dangerous object in order to use it when committing an offence; or (3) poses a threat of losing life or being seriously injured to another person by his/her brutality.[28] It should be pointed out that in accordance with § 121 subsection 4 StGB, a prisoner within the meaning of subsections 1–3 is also a person placed in a prevention custody centre.[29]

All this means that German law penalises self-liberation only in case of rapid escape of prisoners during prison mutiny.

LIABILITY FOR (SELF)-LIBERATION OF A PERSON DEPRIVED OF LIBERTY IN SWISS LAW

As far as Swiss regulations are concerned, the provisions given consideration here can be found under Title 17 Book 2 (Special Part) of the Criminal Code of 21 December 1937[30] – "Crimes and misdemeanours against the administration of law" (*Verbrechen und Vergehen gegen die Rechtspflege*).

In accordance with Article 310(1) sStGB (*Befreiung von Gefangenen*), a person who by means of threat or deceit liberates another arrested person, a prisoner or another person deprived of liberty based on an official order, or aids and abets their escape is subject to imprisonment for up to three years or a fine. In its judgment of 3 July 1970, the Swiss Federal Supreme Court stated that the offences specified in Article 310(1) sStGB, i.e. liberation, and aiding and abetting the escape must involve the use of violence, threat or deceit.[31] The Court also emphasised that aiding and abetting the escape that occurred without the use of violence, threat or deceit should bear liability under Article 305 sStGB (the offence of criminal support). Moreover, according to the Court, assistance given to a prisoner after their liberation is not subject to Article 310 sStGB, because it should concern the escape (*zur Flucht*), and this ends the moment a prisoner overcomes all barriers used to ensure their isolation.[32] With regard to deceitful acts, it should be indicated that in the case resolved by the Supreme Court,

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[28] Serious injury (*Schwere Körperverletzung*) is defined in § 226 StGB in a similar way as in Article 156 § 1 of the Polish PC.

[29] Prevention custody (*Sicherungsverwahrung*) is a type of preventive measure (Title 6 Chapter 3 StGB – *Maßregeln der Besserung und Sicherung* – Measures of correction and protection) used beside a penalty for a perpetrator of an offence who was sentenced in the conditions determined in § 66 StGB. The condition for adjudication of the measure is based on comprehensive assessment of the perpetrator and his offences, and recognition that due to his inclination to commit serious offences, in particular those that cause serious psychical and physical harm to the aggrieved, he poses threat to the public (§ 66 subsection 1(4) StGB). The measure may be also ruled in situations referred to in §§ 66a and 66b StGB.

[30] Schweizerisches Strafgesetzbuch/Code pénal Suisse/Codice penale svizzero/Cudesch penal svizzer. Further comments will refer to the German version of the Code (source: https://www.fedlex.admin.ch/eli/cc/54/757_781_799/de; accessed on 30.01.2023); hereinafter "sStGB".

[31] Case No. BGE 96 IV 72; http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F96-IV-72%3Ade&lang=de&type=show_document#idp313728 (accessed on 30.01.2023).

[32] Thus Delnon, V., Rüdy, B., in: Niggli, M.A. (ed.), *Basler Kommentar. Strafrecht II. Art. 111–392 StGB*, Wiprächtiger, H., Basel, 2013, pp. 2753–2754.

a woman accused of aiding and abetting the escape of a prisoner placed in hospital committed the offence with the use of deceit consisting in cheating a nurse that she was a prisoner's relation.[33] What draws attention is the fact that the causative acts specified in Article 310 sStGB do not include instigating escape.

A person under arrest (*Verhaftete*) is one deprived of liberty without a valid sentence but based on an order issued by a law enforcement or security body; it concerns in particular persons brought to justice or in custody awaiting trial; a person deprived of liberty as a result of a citizen's arrest is not under arrest within the meaning of Article 218 Schweizerische Strafprozessordnung (Swiss Criminal Procedure Act).[34] A prisoner (*Gefangene*) is a person who has been tried and validly sentenced, and is subject to the execution of a penalty or another measure, as well as a person in custody (during a preparatory proceeding – custody awaiting trial or after it awaiting the execution of a penalty of deprivation of liberty – prevention custody).[35] On the other hand, "another person deprived of liberty based on an official order" is a person isolated in connection with a criminal case or a case of a different nature, e.g. a perpetrator of a forbidden act who is subject to preventive isolation measures.[36]

If the perpetrators of liberation or aiding and abetting the escape are participants of a gathering, each of them is subject to imprisonment for up to three years or a fine; if members of a gathering use violence against persons or objects, they are subject to a penalty of imprisonment for up to three years or a fine of at least 30 daily rates[37] (Article 310(2) sStGB). Article 260 sStGB (which penalises participation in a dangerous gathering) defines a gathering (*Zusammenrottung*) as a smaller or bigger number of people ganging together (depending on circumstances) who appear to form a united force.[38] For example, one of the judgments indicated that three prisoners accommodated in one cell do not constitute a gathering.[39]

It should be pointed out that the state of deprivation of liberty must occur in the moment of liberating (or aiding and abetting the escape). The state is not interrupted when an arrested person or a prisoner is brought to a doctor, a court or hospital. However, the state does not occur (thus, the commission of the offence discussed is not possible) when a prisoner is on leave without supervision or works outside a semi-open prison.[40]

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[33] Judgment of 22 November 1960 (case No. BGE 86 IV 217; http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F86-IV-217%3Ade&lang=de&type=show_document; accessed on 30.01.2023).

[34] See Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2751.

[35] Ibidem.

[36] Ibidem.

[37] Such a solution means the minimum fine increased tenfold because under Article 34 para. 1 sStGB, if statute does not stipulate otherwise, the smallest number of daily rates is three and the largest one is 180.

[38] See judgment of the Federal Supreme Court of 16 February 1982 (case No. BGE 108 IV 33; http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F108-IV-33%3Ade&lang=de&type=show_document; accessed on 30.01.2023).

[39] Cited after: Trechsel, S., Affolter-Eijsten, H., in: Trechsel, S., Pieth, M. (eds), *Schweizerisches Strafgesetzbuch. Praxiskommentar*, Zürich, 2013, p. 1419.

[40] Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2751.

Like in the case of Germany, self-liberation goes unpunished under sStGB.[41] It is worth mentioning here that in 2015 L. Reimann, member of the National Council (the lower house of the Federal Assembly of Switzerland), filed a proposal concerning the introduction of penalty for self-liberation. The motive behind the proposal was a considerable number of escapes from prison in Switzerland (according to the 2009 statistical data, ca. 2,600 escapes were recorded annually). The introduction of a penalty for prisoner's self-liberation was expected to have a deterrent effect. S. Sommaruga, member of the Federal Council (the Swiss government), opposed the proposal and indicated that the number of escapes cited was overestimated because it included situations when convicts avoided imprisonment, in particular filed to return to prison on time after being temporarily released from isolation. In fact, the escapes that have most unfortunate consequences are those from closed correctional facilities, but they accounted for 18 in 2014, and only 3 in 2015. In addition, a person who self-liberates does not avoid consequences. An escape is often connected with posing a threat to life and health of the prison personnel, the use of threat or damaging property, or a theft. In such cases other criminal code provisions will be applicable. A fugitive also suffers the consequences of the penalty execution code, e.g. loses the eligibility for parole and exposes oneself to disciplinary penalties and the loss of convenient forms of serving the sentence. S. Sommaruga also indicated that the introduction of penalty for self-liberation might be recognised as being in conflict with the principle *nemo se ipsum accusare tenetur* (Article 113 of the Swiss Criminal Procedure Code[42]) in a situation when a person temporarily remanded in custody escapes. It is due to the fact that the accused has the right to refuse to cooperate in a criminal proceeding (Article 113(1) Swiss CPC) and an escape from custody may be treated as a form of exercising this law. Eventually, in 2017, the National Council rejected the proposal (65 votes for and 122 votes against).[43]

Swiss law lays down an offence of 'prison mutiny' (*Meuterei von Gefangenen*). However, it is constructed differently than in German StGB. In accordance with Article 311(1) sStGB, if prisoners or other persons accommodated in a place of isolation based on an official order gather together (*sich zusammenrotten*) with the intention of attacking an officer of the institution in which they stay or another person who has been assigned the task to guard them, or of forcing, with the use of violence or threat, an officer of the institution where they stay or another person assigned to guard them to a particular action or omission, or with intention of escaping rapidly (meaning readiness to use violence[44]), are subject to imprisonment for up to three years or a fine of at least 30 daily rates. In judicature, a gathering of five prisoners is treated as gathering,[45] but

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41 Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2750; Trechsel, S., Affolter-Eijsten, H., in: *Schweizerisches Strafgesetzbuch…*, op. cit., p. 1419.

42 Schweizerische Strafprozessordnung/Code de procédure pénale suisse/ Codice di diritto processuale penale svizzero/Cudesch da procedura penala svizzer (source: https://www.fedlex.admin.ch/eli/cc/2010/267/de; accessed on 30.01.2023).

43 See https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20153753 and https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=40233 (accessed on 30.01.2023).

44 Delnon, V., Rüdy, B., in: *Basler Kommentar…*, op. cit., p. 2760.

45 Ibidem, p. 2759.

similar interpretation of a gathering of two persons is out of the question.[46] Under Article 311(2) sStGB, a perpetrator who uses violence against persons or objects is subject to imprisonment for up to five years or a fine of at least 90 daily rates. It should be noticed that the offence under paragraph 1 is one posing danger. Prisoners' gathering with a particular intention is enough to treat it as the commission of this offence. An attack on an officer, forcing him to a particular action or an escape does not have to occur.

It should be added that Title 18 Book 2 sStGB – "Offences against official and professional duties" (*Strafbare Handlungen gegen die Amts- und Berufspflicht*) – contains Article 319 (*Entweichenlassen von Gefangenen*) in accordance with which, a public officer who aids and abets the escape of an arrested person, a prisoner or another person deprived of liberty based on an official order or lets such a person escape is subject to a penalty of imprisonment for up to three years or a fine. A public officer (*Beamte*) is a civil servant, or public administration or justice administration employee, as well as a person who holds an office temporarily or has been temporarily employed in public administration or justice administration, or performs official functions temporarily (Article 110(3) sStGB).

CRIMINAL LIABILITY FOR (SELF)-LIBERATION OF A PERSON LEGALLY DEPRIVED OF LIBERTY IN THE LAW OF AUSTRIA AND THE PRINCIPALITY OF LIECHTENSTEIN

In the Austrian Penal Code,[47] the offence under discussion is specified in § 300, which is placed in Chapter 21 of the Special Part – "Offences against the administration of justice" (*Strafbare Handlungen gegen die Rechtspflege*). In accordance with the provision, whoever frees a prisoner who has been deprived of liberty based on a judgment or order issued by a court or an administrative authority, or instigates such a person to escape or aids and abets the escape of this person is subject to a penalty of imprisonment for up to two years (§ 300(1)) provided that he is not subject to a penalty for an offence under § 196 or 299.[48] However, a prisoner who instigates another person to liberate him or aid and abet his escape is not subject to a penalty under para. 1 (§ 300(2)). An attempt to commit this offence is subject to punishment in accordance with general rules (§ 15 subsection 1 öStGB). It should be highlighted that in its judgment of 19 May 2008 (case No. 2007/18/0016), the Supreme Administrative Court of Austria indicated, in the context of § 300 öStGB, that an offence against the administration of justice is especially harmful to public

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46 Trechsel, S., Affolter-Eijsten, H., in: *Schweizerisches Strafgesetzbuch…*, op. cit., p. 1420.

47 Strafgesetzbuch of 23 January 1974 (source: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002296; accessed on 30.01.2023); hereinafter "öStGB".

48 The solution is an example of statutory subsidiarity. In case of concurrence of § 300 with § 196 or § 299, the latter provisions have priority over others. Paragraph 196 öStGB stipulates a penalty for a person who liberates a minor from a correctional measure ruled by the authority, instigates them to self-liberate from the measure or aids and abets the liberation, and § 299 öStGB specifies the offence of criminal support.

interests because, if it is successful, it results in frustrating the execution of the most severe crime prevention measures that can be used by the state and, thus, eventually weakens the preventive effects of the sanctions used by the state.[49]

As shown, the criminal law in Austria does not penalise self-liberation. What is more, öStGB does not stipulate penalties for escape in conjunction with prison mutiny. As a result, like in the German Penal Code, it was necessary to introduce a separate penalty for the so-called instigating perpetrator (*Bestimmungstäter*) and the so-called contributing perpetrator (*Beitragstäter*),[50] because their conduct is punishable if it concerns forbidden acts carrying a penalty (*strafbare Handlung*; see § 12 öStGB).

It should be added that in accordance with § 313 öStGB, in case a public officer commits an offence intentionally by making use of the opportunities given by the service he is involved in, the maximum penalty of imprisonment or a fine to be ruled may be raised by 50%. Although the provision is placed in Chapter 22 of the Special Part of the Austrian Penal Code – "Offences consisting in the violation of professional duties, corruption and similar offences" (*Strafbare Verletzungen der Amtspflicht, Korruption und verwandte strafbare Handlungen*), it seems that it might be applicable in situations when a public officer obliged to guard a prisoner liberates him or aids and abetts his escape.

The Penal Code of the Principality of Liechtenstein contains identical provisions (§ 300 – *Befreiung von Gefangenen*, placed in Chapter 21 of the Special Part – "Offences against the administration of justice" and § 313).[51]

CONCLUSIONS

The above analysis allows for formulating the following conclusions:

(1) Unlike the Polish Penal Code, foreign penal acts in question in general do not stipulate an offence of self-liberation. The only exception is § 121 of the German StGB, which determines an offence of prison mutiny (*Gefangenenmeuterei*). However, it is an exception that is entirely different from not only Article 242 § 1 but also Article 242 § 4 of the Polish PC. The lack of criminal penalty for self-liberation of a person deprived of liberty is deeply rooted in the German legal tradition.[52] For ages, attention has been drawn in the German doctrine to the fact that there are humanitarian factors that do not allow for punishment of natural human desire to regain liberty.[53] It is also emphasised that when considering penalty for

[49] See https://www.ris.bka.gv.at/JudikaturEntscheidung.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2007180016_20080519X00 (accessed on 30.01.2023).

[50] We cannot speak about an instigator and an aider and abettor here because the Austrian Penal Code is based on the concept of uniform perpetration (*Einheitstätersystem*). See Kardas, P., *Teoretyczne podstawy odpowiedzialności karnej za przestępne współdziałanie*, Kraków, 2001, p. 110 et seq.

[51] Strafgesetzbuch of 24 June 1987 (source: https://www.gesetze.li/konso/1988.37; accessed on 30.01.2023).

[52] E.g. the 18th and 19th century Austrian and Prussian law binding in the partitioned Polish territories did not stipulate criminal liability for escape from prison (except the escape in conjunction with prison mutiny known in the Prussian law) (see Poniatowski, P., *Przestępstwa…*, pp. 30–32).

[53] See Mayer, M., *Die Befreiung von Gefangenen*, Leipzig, 1906, p. 12, and also Helm, M., *Das Delikt der Gefangenenbefreiung*, Berlin, 2010, pp. 238–248 and the literature referred to therein.

self-liberation, it is necessary to take into account the effectiveness of a criminal ban and a motivational function of criminal law related to it.[54] From this perspective, penalising conduct from which an average sensitive and resistant person cannot be dissuaded because of their survival instinct is not believed to be functional.[55] It is also possible that a ban will be ineffective due to the length of penalty that a prisoner must serve. A few more years (as punishment for escape) imposed on a person imprisoned for many years do not make a great difference.[56] Doubts concerning penalising self-liberation were also raised in Poland at the time of drafting a penal code in the Second Republic of Poland and also later in relation to the 1969 Penal Code.[57] However, there are no signs indicating that Poland is going to follow the above-mentioned foreign solutions. In my opinion, it is right. Even if we agree that the provision penalising self-liberation is not effective, i.e. it cannot prevent escapes due to the natural human striving for liberty (although an assumption that a ban on escape has not stopped anybody to attempt it should be proved, which in my opinion is not possible), penalising self-liberation should fulfil a certain symbolic function. In fact, it does not concern a disturbance of the proper functioning of the administration of justice in a particular case but the general public interest of public order, which consists in the protection of the state's authority and execution of its obligations.[58] From the point of view of criminal law, not the provisions of disciplinary nature, letting self-liberation of prisoners go unpunished might evoke a feeling in society that the state's bans do not have to be complied with and, as a result, might contribute to slow descending into anarchy in social life. In addition, convicts sentenced to an isolation penalty have a difficulty with fulfilling a duty to return to prison after a temporary release without supervision or a break in executing the penalty of deprivation of liberty. If penalisation of self-liberation were to be abolished, it would be logical to abandon penalisation of conduct specified in Article 242 §§ 1a, 2 and 3 PC. Both cases concern a desire to be at large. It should be pointed out that over the last several years over 100,000 permissions to leave the place of isolation (the so-called systemic or random passes etc.) have been granted and a few thousand prisoners have been leaving prison to work outside.[59] Abolishing the penalisation of self-liberation (and, as a logical result, also the failure to return to the place of isolation) the Polish state would eliminate an essential, as it seems, factor motivating prisoners to fulfil the obligation to submit to the penalty imposed on them. In this light, the arguments for the lack of penalty cited during the discussion in Switzerland are not convincing.[60] However, things look differently in Switzerland. Abandoning

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[54] See Helm, M., *Das Delikt…*, op. cit., p. 242 and the literature referred to therein.

[55] Ibidem. It is worth indicating that the survival instinct of a person deprived of liberty may incite them to different conduct, i.e. to remaining in the place of isolation as long as possible, e.g. due to financial, family, accommodation or health related problems.

[56] Ibidem.

[57] See Poniatowski, P., *Przestępstwa…*, op. cit., pp. 366–367.

[58] For more, see ibidem, pp. 367–369.

[59] See ibidem, pp. 256 and 259.

[60] The argument concerning the possible infringement of the principle *nemo se ipsum accusare tenetur* seems to be in particular inaccurate if the accused escaping from custody awaiting trial

penalisation of some type of conduct (which would possibly take place based on the Polish law) is, from the social point of view, different from desisting from penalisation of an act that has already been unpunished. In the former case, the conviction of the public that the given conduct is not blameworthy would be much stronger.

(2) Article 242 § 4 PC stipulates aggravated type of the offence of self-liberation. The circumstances that increase blameworthiness of an act (acting in conspiracy with other persons, using violence or threatening that it will be used, and damaging the places of confinement) were to some extent also incorporated into a description of an offence under § 121 of the German StGB, but their nature is different. The provision speaks about 'grouping together' and 'rapid' escape in the context of prison mutiny, however these are not the features of aggravated self-liberation, because as such it is not punished. These are features of a basic type of an offence of a special nature.

(3) The foreign legal acts analysed have no equivalent to the offences under Article 242 §§ 1a, 2 and 3 PC. It should be admitted that it shows a consistent attitude: there is no penalty for self-liberation, so there should be no penalty for failure to return to a place of isolation after a temporary release from it. In both situations, a perpetrator naturally strives to be at large.

(4) Polish law does not recognise an offence described in Article 311 of the Swiss Penal Code (*Meuterei von Gefangenen*). It is worth mentioning, however, that there was a similar type of a forbidden act in Article 150 § 3 of the 1932 Penal Code.[61] Under that provision, whoever is involved in conspiracy with other convicts in order to liberate from confinement following a set plan and in anticipation of the use of violence, threat or damage of the place of confinement is subject to a penalty. These were *sui generis* preparatory activities the penalisation of which was rightly, as it seems, abandoned (this type of conduct probably poses too abstract threat to the functioning of the administration of justice and the security of people and property to deserve punishment).

(5) In all the above-presented legislations, there is, like in Article 243 of the Polish PC, an offence consisting in liberating a person deprived of liberty and aiding and abetting the escape of them. In Germany, Austria and the Principality of Liechtenstein, there is a penalty for instigating to escape (in Poland this type of conduct is subject to punishment under general rules – Article 18 § 2 PC). In Switzerland, liberating as well as aiding and abetting the escape must involve violence, threat and deceit to be subject to a penalty under Article 310(1) sStGB. Aggravated types of this offence are specified in the German and Swiss codes. In the Polish code no circumstances qualifying this type are determined. It is

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were punished. This way one might also justify other active conduct connected with the implementation of the principle, e.g. false allegations. Apart from that, such an attitude to the matter presupposes that custody awaiting trial is investigative in nature while its function in Switzerland (as well as in Poland) is totally different (see Article 221 of the Swiss Criminal Procedure Code).

[61] Regulation of the President of the Republic of Poland of 11 July 1932 – Penal Code, Journal of Laws of 1932, No. 60, item 571.

a right solution. The circumstances increasing social harmfulness of liberating a person deprived of liberty or aiding and abetting their escape in a particular case should influence the severity of a penalty imposed by a judge at his/her discretion. In practice, the occurrence of these circumstances will often result in the infringement of some other provisions, thus, there will be their concurrence under Article 243 PC, which may influence the penalty imposed if it is cumulative in nature. It is worth mentioning that in Austrian law and the law of the Principality of Liechtenstein, a prisoner who instigates another person to liberate him or aid and abet his escape goes unpunished. Thus, it is evident that a prisoner who escapes or intends to escape from a place of confinement can do this with total impunity. In Poland, such a regulation would not be possible as Penal Code stipulates a penalty for self-liberation.

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